Kubai & 6 others v Mucheke (Environment and Land Appeal 22 of 2019) [2023] KEELC 17966 (KLR) (7 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17966 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 22 OF 2019

CK YANO, J

JUNE 7, 2023

BETWEEN

CHRISTOPHER MURITHI KUBAI ..... 1ST APPELLANT

JOSHUA MWITI KARAI ..... 2ND APPELLANT

PETER KIUNGA M'MWENDA ..... 3RD APPELLANT

JULIUS ITHANYA ..... 4TH APPELLANT

BEATRICE KAUMO ..... 5TH APPELLANT

WILLIAM M'MBURA NABEA ..... 6TH APPELLANT

HENRY NJAE MUNORU ..... 7TH APPELLANT

AND

KARANI MUCHEKE ..... RESPONDENT

RULING

1. The application for consideration is the notice of motion dated September 27, 2022 seeking the following orders-;

    1. Spent

    2. Spent

    3. That the honourable court be pleased to admit and consider the full extent on the evidence of the acreage of all the suit lands in question and thereafter do consider the fact that the respondent through the faulty finding of the trial court has amassed land that is twice in size of what he claims to have been his father's land, the basis of the suit.

4. That the Honourable court be pleased to make any further and/or better orders as shall be necessary to ensure justice is delivered to the parties herein.

5. That costs of this application be provided for.

2. The application is brought under Article 159 (1) (2) of the *Constitution*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and all other enabling provisions of the law and is based on the following grounds-;

i. In his suit the respondent claim was that he was suing for recovery of 4.16 acres of land, yet the trial court gave him judgment for a total of 8.104 acres.

ii. That the trial magistrate failed to record the evidence on the sizes of each suit land and the total of the amalgamated sizes of the 9 parcels.

iii. That the omission of this arithmetical total is prejudicial to the appellant's case.

3. The application is supported by the affidavit of Kirimi Mbogo advocate for the appellants/applicants sworn on September 27, 2022 in which it is deposed *inter alia*, that he personally conducted the case in the subordinate court on behalf of the applicants and that when he embarked on preparing the submissions herein as ordered by the court, he was surprised to note that there are no proceedings recorded over the sizes of the appellants 9 parcels of land as was testified by Pw 2. That thereafter, the deponent made several applications to the District Land Registrar at Maua who provided him with certified copies of the registers, and/or search certificates showing the acreages for the respective parcels of land. That since the land sizes was a very crucial component of the entire case, the deponent is at a loss as to why the honourable court failed to record the figures. That the trial court gave judgment in favour of the respondent totaling 8.104 acres which is about twice the size of land he claimed his father's estate had lost. The deponent has listed nine land parcel numbers and their acreages and annexed copies of records for parcel No. 2696, 7583 and 7580 and copies of search certificates for parcel No. 5477, 7332, 3299, 4471,1775 and 857.

4. The respondent opposed the application and filed a replying affidavit sworn by himself on November 17, 2022 in which he deposed *inter alia*, that the application is not based on any known provisions of the *Civil Procedure Rules* and that the orders sought are misconceived and untenable and amounts to grounds of appeal in disguise as the applicants attack the lower court findings in the application and the memorandum of appeal. That the applicants are only introducing new evidence which ought to have been produced in the trial court with possibilities of prejudice to the respondent the resultant effect of injustice. The respondent denied that part of the evidence adduced by the parties in the trial court is missing and that at no time was the issue of missing evidence raised at the trial court. That the applicant's want to conduct another trial in this court behind the back of the parties, adding that the appeal be only limited to the record of the lower court. That the annextures in the application were all obtained after the determination of the case.

5. The application was canvassed by way of written submissions. In their submissions dated February 1, 2023, counsel for the applicants submitted that the application is supported by Article 159 (2) (d) of the *Constitution* as well as section 78 (1) (d) of the *Civil Procedure Act*. That Article 159 (2) (d) requires that in dispensation of justice, courts should not be unnecessarily encumbered by technicalities while Section 78 (1) (d) affords the appellate court discretion to take additional evidence or to require the same to be taken. Counsel for the applicants relied on the Supreme Court case of *Mohammed Abdi Mohamud vs Ahmed Abdullahi Mohammed & others* [2018] which set out the principles governing allowing of additional evidence and *Sharon Mwende Ndolo vs Rahab Nyangima John & another* [2022] eKLR.

6. The applicants counsel submitted that the replying affidavit has not raised any issues that would convince the court to deny the applicants' application.

7. In the respondent's submission dated February 15, 2023, counsel for the respondent submitted that the application is fatally defective as it is not brought under the express provisions of either Section 78 of the *Civil Procedure Act* and Order 42 rule 27 of the *Civil Procedure Rules* which is the applicable law regarding the admission of additional evidence by an appellate court.

8. The respondent's counsel also relied on the Supreme Court case of *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohammed 2 others* (*supra*) and submitted that the reasons given by the applicants for admission of additional evidence do not satisfy the guidelines set out by the Supreme Court in the above case and the applicable law.

9. The respondent also relied on the case of *Wanje vs A.K Saikwa* [1984] eKLR in which the court of appeal held *inter alia*, that the rule does not authorize the admission of additional evidence for purposes of removing lacunae and filling gaps in evidence. It is the respondent's submission that the applicants have not tendered any evidence to demonstrate that the trial magistrate did not record any evidence adduced by the parties. That the applicants have also not proved that they were unable to obtain the evidence sought to be adduced during the trial of the suit. The respondent urged the court to dismiss the application with costs.

Analysis and Determination

10. I have considered the application, the affidavit in support and against and the submissions filed. The issue for determination is whether additional evidence should be allowed in this appeal as sought by the applicants. In the case of *Fibre Link Limited vs Star Television Production Limited* [2015] eKLR (CA 172 of 2012) the court held as follows-;

> " The applicable law as regards the admission of additional evidence by an appellate court is Section 78 of the *Civil Procedure Act* which provides that-;
>
> (1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power-;
>
> (a) to determine a case finally,
>
> (b) to remand a case,
>
> (c) to frame issues and refer them for trial.
>
> (d) To take additional evidence or to require the evidence to be taken;
>
> (e) To order a new trial.
>
> (2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein".
>
> The procedural rules that are handmaidens to Section 78 of the *Civil Procedure* above provide under Order 42 Rule 27 of the *Civil Procedure Rules* that-;
>
> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred, but if-;

(a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) The court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission."

11. The said court further held that generally-;

> " Appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in *TArmohammed & Another vs Lakhani & Co.* (1958) EA 567 where the Court of Appeal in adopting the judgment of Lord Denning in *Ladd vs Marshall* (1954)1 WLR, 1489 the court of Appeal for Eastern Africa stated that:
>
> "Except in cases where the application for additional evidence is based on fraud or surprise, to justify reception of fresh evidence or a new trial, three conditions must be fulfilled, first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the cases, though it need not be decisive, thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

12. The Supreme Court in the case of *Mohammed Abdi Mohamud vs Ahmed Abdullahi Mohammed & others* (*supra*) relied on by both the applicants and the respondent herein set out the principles guiding the admission of additional evidence before appellate courts in Kenya as follows-;

> " (a) The additional evidence must be directly relevant to the matter before the court and is in the interest of justice.
>
> (b) It must be such that, if given it would influence or impact upon the result of the verdict, although it need not be decisive,
>
> (c) It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the part seeking to adduce the additional evidence,
>
> (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit,
>
> (e) The evidence must be credible in the sense that it is capable of belief,
>
> (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively,

(g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process.

(h) Where the additional evidence discloses a strong *prima facie case* of willful deception of the court.

(i) The court must be satisfied that the additional evidence is not utilized for purposes of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

13. The Supreme Court stressed that even with the application of the above stated principles, the court will only allow additional evidence on a case by case basis and even then sparingly with abundant caution.

14. I have considered the above stated authorities and the material on record. Looking at the grounds in support of the application, it is clear that the applicants are faulting the trial court for arriving at the decision it made. This is also one of grounds of appeal herein and in particular ground 9 of appeal. It is also my finding that the evidence the applicants are seeking to adduce was available and could have been obtained at the time of the hearing of the case. I am not persuaded that there are exceptional circumstances to warrant this court to allow the admission of the additional evidence at the appeal stage. In my view, the application by the applicants is an attempt to fill in gaps in the case and to strengthen the appeal. As stated hereinabove, the rule does not authorize the admission of additional evidence for purposes of removing lacunae and filling gaps in evidence. This is clearly what the applicants herein are trying to do. Allowing the application will be enabling the applicants to make out a fresh case in this appeal. Moreover, the applicants have not shown that they made an application before the trial court for review on account that there was an error on the face of the record.

15. In the result, I find that the notice of motion dated September 27, 2022 lacks merit and I accordingly dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE 2023

C.K YANO

JUDGE

In the presence of

Mwirigi B. holding brief for Mbogo for Appellant– present

Aaron Gitonga Advocate for Respondent - present

Court Assistant – V. Kiragu