Oucho v Opiyo (Environment and Land Appeal 24 of 2021)
[2022] KEELC 3919 (KLR) (13 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3919 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 24 OF 2021

M SILA, J

JULY 13, 2022

BETWEEN

JOHN ABURA OUCHO ..... APPELLANT

AND

PATRICK OMONDI OPIYO ..... RESPONDENT

RULING

(Application to adduce additional evidence on appeal; section 78 (1) (d) of the *Civil Procedure Act*; principles to be applied before accepting new evidence on appeal; appellant having filed suit claiming to have purchased land from the respondent and seeking an injunction to restrain the respondent from the land; respondent's case being that he borrowed some money from the appellant and the appellant kept the land ownership documents as security; respondent filing counterclaim for return of the documents; appellant withdrawing his suit and not attending court for hearing of the counterclaim; court passing judgment in favour of the respondent; appellant filing an appeal and after it has been heard, but before judgment, filing the present application; the purported new evidence being evidence to the effect that the respondent had sold the suit land; no indication of when this purported new evidence came to the hands of the appellant; in assessment of court, the new evidence could not have influenced the judgment; even assuming that the respondent had sold the land, that does not affect the right of the respondent to claim the land ownership documents; application dismissed)

1. The application before me is that dated April 27, 2022 filed by the appellant. The substantive order sought is in prayer (iii) of the application and the applicant seeks that he be granted " leave to adduce new and compelling evidence that was not in his possession at the time of hearing." The application is opposed.

2. To put matters into context, this is an appeal arising out of the judgment of the magistrate's court in Mombasa CMCC no 2921 of 2009 which judgment was delivered on March 26, 2021. The appellant was plaintiff in the said suit with the respondent as defendant. In the plaint, the appellant pleaded that

he purchased from the respondent the right to occupy a plot at Mrima, which plot was described as unsurveyed and unregistered, though properly defined. He averred that he paid kshs 300,000/= for the plot. He pleaded that the defendant apparently lost part of the money paid and resorted to harassing him and interfere with his possession of the plot. In the suit, the appellant sought an order of injunction to restrain the respondent from the land. The respondent filed defence where he pleaded to be the owner of the disputed plot. He asserted that he never sold his rights to the applicant. He pleaded that on August 1, 2009 the appellant lent him kshs 40,000/=, on condition that the respondent would deposit his documents of ownership to the suit land as security, and that the documents would be returned upon the loan being settled. He pleaded that he subsequently repaid the loan in the same month of August 2009 but the appellant failed to return to him his documents. In September 2009, he fell into arrears of rent and he again approached the appellant for some money. He pleaded that the appellant drew a sale agreement purporting that he had sold his plot which the respondent refused to sign. He therefore denied having signed any sale agreements and he claimed the same to be forgeries. A dispute then arose and the appellant told him that he will not hand over to him the ownership documents for the land. Apart from the defence, he also filed a counterclaim wherein he asked for an order against the appellant for return of his documents.

3. The matter first proceeded for hearing before Hon Gesora, on December 3, 2010 when the appellant testified in support of his suit. The matter was thereafter adjourned several times before the defence case commenced. On February 3, 2016, the matter went before Hon Nyakweba, as Hon Gesora had been transferred. It was mentioned in court that a third party has emerged also claiming to have purchased the same land and there was need to join him to the suit. Hon Nyakweba ordered that the case starts de novo. A notice of withdrawal of suit dated May 6, 2019 was later filed and the order of withdrawal of suit was recorded on May 8, 2019. The suit then fell into the hands of Hon Kyambia. There was filed an application dated June 13, 2019 by the respondent seeking orders of an injunction and leave to amend the counterclaim. The court observed that the appellant had withdrawn his suit and what was left for determination was only the counterclaim. On whether injunction should issue, the court determined that status quo be maintained but declined to grant leave to amend the counterclaim.

4. The case proceeded for hearing of the counterclaim before Hon Kyambia on September 9, 2020, in absence of counsel for the appellant, despite the date having been taken by consent. The respondent testified and stated *inter alia* that the appellant took his documents which he wanted returned. He called one witness, Paul Okumu, who testified that the appellant lent the respondent kshs 40,000/= which was repaid but the appellant declined to surrender back the land documents. There followed an application to set aside the *ex parte* proceedings but this was dismissed in a ruling delivered on December 15, 2020. Parties were invited to file submissions and judgment was delivered on March 26, 2021. The judgment was in favour of the respondent. *Inter alia*, the court observed that the appellant had withdrawn his suit and only the counterclaim was pending. The court found the evidence of the respondent uncontroverted and ordered the appellant to return the original documents for the land to the respondent. The trial court also made an award of kshs 500,000/= as damages to the respondent. This appeal was consequently filed.

5. The appeal came before me for directions and I directed that it be heard by way of written submissions and both counsel for the appellant and counsel for the respondent filed their submissions. The matter came up for hearing on February 9, 2022, when counsel informed court that they would fully rely on their written submissions and I reserved judgment for March 30, 2022. Before that day, an application seeking more or less similar orders as this one, was filed on March 28, 2022 and owing to the said application, the judgment was arrested. That application was withdrawn and this application filed on April 27, 2022. I have already mentioned that the appellant seeks an order to adduce additional evidence. In his supporting affidavit, the applicant wants to adduce new evidence to the effect that the

suit land was sold to a third party, one Athman Omar Korsen, on June 21, 2010. The appellant states that he got this information from one Stephen Ochieng Otieno. He has attached an affidavit of the said Stephen Ochieng Otieno where Mr Otieno has deposed that he acted as agent of the respondent, and that on June 21, 2010, he sold the land to one Athman Omar Korshen at kshs 530,000/=. It is deposed that kshs 440,000/= was paid and the balance of kshs 90,000/= was paid on June 22, 2012. He attached a copy of the sale agreement dated June 21, 2010.

6. The respondent has sworn a replying affidavit to oppose the motion. *Inter alia*, he has deposed that he has never sold the land to the alleged Athman Omar Korshen and is a stranger to the affidavit sworn by Mr Otieno. He has deposed further that the applicant already withdrew his suit, and only the counterclaim proceeded, which the applicant failed to defend.

7. Both Mr Magolo Paul, learned counsel for the appellant and M Mwarandu filed submissions in respect of the application which I have taken into consideration. In his submissions, Mr Magolo *inter alia* submitted that the new evidence is to the effect that the suit premises was sold by the respondent to Mr Korsen way back on June 21, 2010 . He submitted that Mr Otieno is ready to testify on the same. He submitted that the appellant stands to suffer substantial loss and damage, and that the application has been brought timeously and without inordinate delay. He referred me to section 78 of the *Civil Procedure Act* and the case of *EO vs COO* (2020) eKLR to support his application. He submitted that the respondent no longer had a legal interest in the property since he sold it. He added that the evidence could not have been obtained by the appellant before and during the hearing, even after reasonable diligence, and that it was only recently that the third party together with Mr Ochieng approached the appellant with this information.

8. For the respondent, Mr Mwarandu, learned counsel, submitted that the application is ambiguous and that there is no new evidence. He submitted that the respondent never sold the property to Mr Korsen and is a total stranger to the affidavit of Mr Ochieng. He submitted that the appellant withdrew his suit and failed to defend the counterclaim. He submitted that having withdrawn his suit he cannot now bring new evidence in the appellate court as he had no case before the lower court.

9. I have considered all the above and I hold the following view.

10. The application is said to be brought pursuant to the provisions of section 3, 3A, and 63 (e) of the *Civil Procedure Act*, and order 51 rule 1 of the *Civil Procedure Rules*. Sections 3 and 3A are general provisions that provide for the court's inherent powers to make orders that are necessary for the ends of justice in absence of any specific provision to the contrary. Section 63 (e) gives the court powers to make such interlocutory orders that may appear to the court to be just and convenient. Order 51 Rule 1 prescribes the manner in which applications should be brought which is by way of a motion. None of these provisions specifically address the question of adducing evidence during an appeal. The specific provision that gives power to the court to admit evidence on appeal is actually section 78 (1) (d) of the *Civil Procedure Act*. Section 78 spells out the powers of the appellate court and is drawn as follows :-

> 78. Powers of appellate court
>
> (1) Subject to such conditions 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.

11. Section 78 (1) (d) above does not prescribe the principles upon which the court ought to exercise its powers to take additional evidence on appeal. However, courts have borrowed from the practice and principles applied by the Court of Appeal in the interpretation of Rule 29 (1) (b) of the *Court of Appeal Rules*, which rule also gives the Court of Appeal power to admit additional evidence on appeal. The said rule is drawn as follows :-

"29.

(1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power-

(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

12. In the case of *Dorothy Nelima Wafula vs Hellen Nekesa Nielsen & Another* (2017) eKLR, the Court of Appeal stated as follows on the above rule :-

> Under rule 29 (1) (b) additional evidence will be introduced on appeal in the discretion of the Court, "for sufficient reason". Though what constitutes 'sufficient reason' is not explained in the rule, through judicial practice the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. All the authorities cited by both sides are unanimous on this. The often-cited cases in this regard include, Mzee Wanje & 93 Others V A K Saikwa (1982-88) 1KAR 462, *Joginder Auto Service Ltd V Mohammed Shaffique Civil Appeal (Application no Nai 210 of 2000*, Karmali Tarmohamed & Ano V I H Lakhani (1958) EA 567, which are to the effect that, before the Court can permit additional evidence to be adduced under rule 29, it must be shown, one, that it could not have been obtained by reasonable diligence before and during the hearing; two, that the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible. It is agreed that these are only general principles and certainly not the only ones.
>
> The Court in Mzee Wanje (*supra*) issued the following caution on the application of the rule;
>
> > "This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by

the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

13. The above dictum exposes three principles, being :-

    i. That the new evidence could not have been obtained by reasonable diligence before and during the hearing.

    ii. That the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and

    iii. That the evidence sought to be adduced is credible, though it need not be incontrovertible.

14. I think I will add to the above, and state that an application for production of additional evidence needs to be made timeously and promptly, as soon as the new evidence is found to be available. Any unreasonable delay in making an application for production of additional evidence must be frowned upon and may impact on the discretion of the court to allow it. The peculiar circumstances of each case need also to be considered.

15. I have carefully gone through the supporting affidavit of the appellant. Nowhere does he state when this purported new evidence came to be within his knowledge. The closest that he comes to revealing when this evidence came to be his knowledge is through the statement that the new evidence " came up just recently after the appeal had been scheduled for judgment." That doesn't tell us much about when the evidence came to be in his possession. It is not therefore possible to tell whether this evidence was available before and during the trial, or whether the application herein was made immediately upon receipt of the new evidence. It was incumbent upon the applicant to be explicit, and inform court when and how this evidence came to be in his hands, so that the court can assess whether it could have been availed during the hearing, and also make an assessment of whether this application has been made without unreasonable delay. By failing to demonstrate when the evidence became available to him this application must fail.

16. I in fact doubt whether the purported new evidence was not in the appellant's knowledge all along. I have earlier in this judgment pointed out that on February 3, 2016, the appellant's counsel informed court that there is a third party who has emerged in the matter, claiming to have purchased the land in dispute, and that the appellant had been summoned to the chief, Likoni. Counsel stated that he required time to join the said third party. If there was any sale of the property to any third party, it appears as if the appellant was aware of the same during the trial of the matter. He himself, through his counsel, made mention of it in the trial court and I am afraid that I do not believe him when he now states that this is new evidence that was not within his knowledge during trial.

17. Could the alleged new evidence have influenced the outcome of the case ? It will be recalled that the appellant withdrew his suit before the magistrate's court. He also failed to attend at the hearing of the respondent's case and opted not to test the evidence of the respondent nor cross-examine him. Within this application, the appellant does not say whether he wants to adduce this evidence in order to press the case that he had in the plaint, or whether he wants to use it to defend the counterclaim that the respondent presented. I think he ought to have been clear for this court to appreciate exactly why he wants to adduce the alleged new evidence. But let us assume that it is evidence that will be defending the counterclaim since the appellant withdrew his suit. The counterclaim was seeking that the land ownership documents be returned. Could this have influenced the outcome of the case ? I doubt it. Even assuming that the land was sold, does it mean that the appellant is entitled to keep the land ownership documents ? On what basis would he still keep them ? I do not see. In fact, it would probably be the more reason that the documents need to be returned so that they can be handed over

to the new purchaser, if ever there is one. The appellant thus fails the second test laid down by the Court of Appeal.

18. I do not, in the circumstances of this case, find it necessary to assess whether or not the evidence is credible. I have no doubt in my mind that this application is wholly unmeritorious and the same is hereby dismissed with costs.

19. Orders accordingly.

DATED AND DELIVERED THIS 13 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA