



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC APPEAL 1 OF 2019

THE COUNTY COUNCIL OF MERU

THE CHAIRMAN BOARD OF GOVERNORS.....1ST APPELLANT

MAARA SECONDARY SCHOOL

THE DIOCESE OF MERU REGISTERED.....2ND APPELLANT

TRUSTEE KANYAKINE PARISH.....3RD APPELLANT

VERSUS

PCEA THRO THE REGISTERED TRUSTEE..... RESPONDENT

RULING

1. The application before me is brought under the provisions of section 1A, 1B and order 42 rules 27, 28 and 29 order 51 rule (I) and article 159 (I) (d) of the Kenyan constitution. The applicants/appellants are seeking the following orders:

- (i) That this honourable court be pleased to certify this application as urgent and the same be heard exparte on the first instance.
- (ii) That this honourable court be pleased to grant leave to the applicants/appellants to adduce additional evidence in this appeal.
- (iii) That honourable court be pleased to grant leave and issue orders for the visit to the scene in respect of the suit lands and the report of the scene visit be admitted as part of evidence to this appeal.
- (iv) That this honourable court please to allow the applicants/appellants to testify and adduce additional evidence in the appeal herein.
- (v) That this honourable court be pleased to make such further orders as may deem fit for interest of justice herein.
- (vi) That the cost of this application be in the cause.

2. Applicant contends that the additional evidence shall not prejudice any party.

3. The application is also supported by the two affidavits of one Kimathi J.Mugambi dated 7/10/19 and 30/10/19. The applicants desire that there be a revisit of the scene and a refer thereof be compiled in the interest of justice and fairness.

4. It has been submitted that the applicants are rightly before the court as the application ought to be filed before the appeal is heard.

5. The application is opposed by the respondent via the affidavit of one Rev. Richard Gichuki Muriithi fixed on 25.10.19. The respondent contends that in the course of the trial, the trial magistrate one Bildad Ochieng did visit the scene and noted the various features on the ground but that feature no longer exist. The appellant had apparently requested the 2nd trial magistrate to have the scene visited but the prayer was declined. Respondent contends that the appellants ought to have appeared against the said ruling.

6. In support of their arguments, the respondent have transferred the following authorities;

(i) Kenya Anti – corruption commission vs Willesden Investment Limited and 7 others (Nairobi civil appeal (application) No. 325 of 2013).

(ii) The Hon. Attorney General vs Torino Enterprises Limited (Nairobi civil appeal (Application) no. 84 of 2012.

(iii) Safe Cargo Limited vs Embakasi Properties Limited and 2 others (Nairobi civil appeal (Application) no 276 of 2008.

(iv) Ladd vs Marshall. The weekly Law Reports 1954 volume I.

7. I have considered all the arguments raised herein. I find that this court does have the discretion to allow take additional evidence as far as sufficient reasons have been proffered and that the process will not occasion prejudice to the parties. The authorities cited by the respondent actually support this reasoning.

8. In the present cases what the appellants desire is to have the scene visit. It was submitted by counsel for the appellants that though there was a scene visit, the same was omitted on part of the record.

9. A perusal of the record indicates that there was a scene visit conducted by the Hon. B. Ochieng on 18.2.2011. The same magistrate proceeded to take the evidence of PW1 as well as partial evidence of PW2 on 18.3.2011 and again proceeded with evidence of PW2 on 12.8.2011 and on 17.2.17 and 23.3.17.

10. Subsequently thereafter, the file was handled by several magistrates including one P.O Onyango who had directed matter to start denovo and for there to be a scene visit which never happened.

11. Eventually directions were given for case to proceed from where matter had stopped on 1.8.2018 before Hon. Ndungu who then proceeded to hear defence case. The subsequent judgment was written on the basis of the evidence tendered before Hon. B. Ochieng (in respect of plaintiff's case) and Hon. Ndungu (in respect of defence case). I therefore find that the scene visit records conducted by Hon. B. Ochieng are part of the record. The only drawback is that the trial court did not make any reference to those proceedings (of the scene visit) in the body judgment and hence this is an issue which can aptly be raised in the submissions.

12. I have also taken into account the fact that in their list of documents, the appellants availed many photographs of the scene which are also part of the record.

13. I am of the view that allowing the application may complicate and convolute the dispute further. The court will proceed with this matter on the basis that the scene was visited by Hon. B. Ochieng whose notes were not considered by Hon. Ndungu.

14. In the circumstances, the application is dismissed but each party is to bear their own costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH FEBRUARY, 2020.

IN THE PRESENCE OF: -

C/A: Kananu

Kiogora A and Materi for appellant- present

Kimaita holding brief for BG for Respondent – present

Kimathi Mugambi (representative of 2nd applicant) present

Rev Patrick Muriithi (for PCEA) present

HON. LUCY. N. MBUGUA

ELC JUDGE