



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**CIVIL APPEAL NO. 12 OF 2019**

**ESTHER WAMBUI NJOROGE.....APPELLANT**

**VERSUS**

**EUNICE NJAMBU WANGORA.....RESPONDENT**

**RULING**

Esther Wambui Njoroge hereinafter referred to as the appellant herein took out a Notice of Motion dated 22<sup>nd</sup> July 2019 and filed on 23<sup>rd</sup> July, 2019. The application is brought under section 78 (1) (2) and sections 63(e), 1A,1B and 3A of the Civil Procedure Act. The appellant seeks the following orders;

- 1. That this Honourable court be pleased to accept on record the appellant's second supplementary record of appeal filed herein on 11<sup>th</sup>, May 2018.***
- 2. That all the documents produced in the appellant's second supplementary record of appeal filed herein on 11/5/2019 be admitted on record and taken as part of the appellant's additional evidence In this appeal.***
- 3. That in the alternative to prayer 1 and 2 above, leave be granted to the appellant's to adduce additional evidence of the documents produced in the second supplementary record of appeal filed herein on 11<sup>th</sup> May, 2018 and appropriate directions be given by this Honourable court for the taking of such additional evidence.***
- 4. That cost of this application be in the cause.***

The application is premised on the grounds that the main dispute in this appeal between the parties is the extent of the boundaries for plot no. 63, 82 and 280 as well as the lawful allottee and owner of each property. The County Government of Kajiado surveyed, verified, ascertained and re-aligned the proper measurements for the aforesaid plots, erected new beacons and issued new allotment letters to both the appellant and respondent hence the dispute pertaining to the measurements and boundaries of the said plots has been resolved. The new allotment letters dated 20<sup>th</sup> May 2017 bearing the new plot numbers issued to the appellant by the County Government of Kajiado forms part of the evidence produced in the appellant's 2<sup>nd</sup> supplementary record of appeal filed herein. The respondent will not be prejudiced if the orders sought herein are granted.

Esther Wambui Njoroge, the appellant herein swore a supporting affidavit on 22<sup>nd</sup> July, 2019. She deposed that documents contained in the 2<sup>nd</sup> supplementary Record of Appeal filed on 11<sup>th</sup> May, 2018 were not produced as part of the appellant's evidence in the lower court. The appeal emanated from the CMCC No. 11535 of 2003 wherein judgment was delivered on 20<sup>th</sup> January, 2015.. The main dispute is the extent of the boundaries for plot no. 63 allocated to the respondent and plot no. 82 and 280 allocated to her by the County Government of Kajiado as well as the lawful allottee / owner of the property. That subsequent to the judgment delivered by the lower court on 20<sup>th</sup> January 2015 the County Government of Kajiado being the lessor of all the properties in Ongata Rongai surveyed, verified, ascertained and realigned the proper measurements for plot no. 63, 82 and 280 and erected new beacons. The County Government of Kajiado further issued new allotment letters and new numbers for plot numbers 63, 82 and 280 belonging to both the appellant and respondent. The new allotment letters dated 20<sup>th</sup> May 2017 bearing the new plot numbers for plot no. 63, 82 and 280 are part of the evidence produced in her supplementary record of appeal which she seeks leave to be admitted on record as additional evidence in the appeal.

Eunice njambi wangora swore a replying affidavit on 17<sup>th</sup> September, 2019 in opposition to the application. She averred that the evidence being produced in the 2<sup>nd</sup> supplementary record of appeal are documents procured in 2017 after delivery of the judgment by the trial court, which means that the appellant had these documents but chose not to rely on them. The documents sought to be introduced do not in any way seek to establish any proprietary right hence the application is without merit and the same should be dismissed.

## Submissions

### Appellant's Submissions

Mr. Kagwimi Kangethe learned counsel for the applicant, filed his written submissions on 29<sup>th</sup> October, 2019 in support of the present application. He submitted that subsequent developments had occurred after determination of the case filed in the lower court after delivery of the judgment which constitute crucial and relevant evidence that the court should consider as additional evidence in this appeal. He relied on Section 78 (1) (2) of the Civil Procedure Act that empowers this court to act as a court of original jurisdiction meaning it has liberty to admit any new evidence as if it was conducting the trial in the lower court and with only limited restrictions.

He insisted Respondent would not be prejudiced if application was allowed and the documents admitted on record. Further, that the order will not interfere with her property which has been fully demarcated and which she enjoys quiet possession of. He reiterated that the Appellant was not seeking retrial of the case or introduction of new evidence that would undermine the respondent's defence in the appeal. He explained that the respondent is at liberty to respond or challenge validity or effect of the subject documents during the hearing of the appeal. Further, that the respondent has not stated nature of prejudice to be suffered. Documents contained in the second supplementary list of documents of appeal are products of subsequent events or developments which came into possession of the appellant after the trial and delivery of the lower court's judgment.

In conclusion counsel submitted that subsequent developments which have occurred since delivery of the judgment as stated above constitute crucial and relevant evidence which this court should accept as additional evidence in this appeal.

### Respondent's submissions

The Respondent submitted that the appellant chose to appeal against the decision of the trial court on grounds that the learned magistrate did not consider the evidence that they had tendered before court. Further, that evidence sought to be introduced have always been in possession of the appellant and he should have exercised due diligence during trial and produced it. She insisted that the new evidence dates back to 2007 when the matter was still in the trial court. Further, that Appeal should be based on the evidence before the trial court and not new evidence as being sought to be introduced here. She reiterated that the Appellant is guilty of laches; it is too late to come up with new evidence when the trial court had decided the matter on merit. Further, documents being sought for introduction do not confer any proprietary interests.

On admission of the second supplementary record of appeal, she submitted that the appellant filed the second supplementary record of appeal without the consent or knowledge of this honorable court. Further, that Applicant filed this instant application over a month of filing the supplementary record of appeal. She insisted that the applicants appealed the judgment of the trial court on the basis that their evidence had not been considered by the honorable court. Further, that evidence adduced at the trial court was the evidence they chose to rely on during the appeal. She contended that the Applicant sought to introduce new evidence two years after delivery of the judgment. She averred that the annexed documents of land and rent receipts are not used to prove ownership of the land. Further, that the evidence touched on the issues that had been canvassed in the primary suit. She reiterated that the Applicant had not demonstrated to court how the new evidence was pertinent in aiding in deciding the Appeal. She relied on the case of *Fibre Link Limited vs. star television production* which cited with approval the case of *Wanjie & others vs. Sakawa and others (1984) klr 275* which held, “ *this rule is not intended to enable a party who has discovered fresh evidence to import it nor is 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.*”

In conclusion, the respondent submitted that the application should be dismissed and the second supplementary list of documents expunged from court file.

### Analysis and Determination

Upon consideration of Notice of Motion dated 22<sup>nd</sup> July, 2019 including the parties' affidavits as well as submissions the only issue for determination is whether the Court should accept the Supplementary Record of Appeal. Section 78 (1) (2) of the Civil Procedure Act empowers the Court to take additional evidence in the Appeal. The Applicant sought for the supplementary Record of Appeal to be admitted as the Letters of Allotment which formed part of the dispute in the lower court had been changed by the Allotting Authority. Further, that boundaries to the disputed plots had also changed.

In the Court of Appeal decision of **Attorney General V Torino Enterprises Limited (2019) eKLR**, the Court of Appeal while citing in approval the Supreme Court decision of

**Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** highlighted instances where a Court can admit additional evidence in an appeal and stated thus:

“[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows: (a) the additional evidence must be directly relevant to the matter before the court and be 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 party 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 the purpose 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.

**[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”**

Based on the evidence before me and relying on this Court of Appeal decision, I find that the application is merited and will allow the Appellant to file and serve the Supplementary Record of Appeal within 21 days from the date hereof.

Costs will be in the cause.

**Dated and delivered in Kajiado this 4<sup>th</sup> Day of March, 2020**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Parties absent

Court assistant- Mpoye