



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 7 OF 2019**

**HADIJA HAJI GALMA.....APPELLANT/APPLICANT**

**VERSUS**

**ABDI AHMED KAWIR.....RESPONDENT**

**RULING**

1. **Hadija Haji Galma** (*the appellant/Applicant herein*) filed an application dated 22<sup>nd</sup> July 2019 seeking leave of this court to adduce and admit the following evidence;

- (a) **A certified copy of minutes of the works town planning and marketing committee meeting held on 13/8/1997 where the appellant was allocated the suit plot under minute No. 12/97/71;**
- (b) **A letter dated 16<sup>th</sup> June, 2003 from the Clerk, County Council of Isiolo forwarding the PDP for plot No. Isiolo Municipality Block 3/267 to the District Physical Planning Office;**
- (c) **A certified copy of the PDP No. ISL/117/99/159 for Plot No. Isiolo Municipality Block 3/267;**
- (d) **Letter reference number ISO/LND/13/2/1456 from the acting clerk, Isiolo County Council to the District Physical Planner asking the officer to find a suitable plot for the appellant for allocation;**
- (e) **A copy of the Police Abstract under OB No. 39/20/9/2011 for lost PDP and listed correspondence;**
- (f) **A letter dated 2/7/2008 from the Clerk, County Council of Isiolo to the District Commissioner Isiolo seeking an investigation on alleged trespass onto Plot No. Isiolo Municipality Block 3/267, the suit land.**

2. The application was supported by the grounds on the face of the application and the affidavit of the appellant who averred that the evidence could not be obtained even with due diligence, at the time of the hearing of the case at the Magistrate's Court. That she endeavored to produce a police abstract which irrefutably demonstrates that she could not produce the PDP for the suit plot and the relevant correspondence from the public offices which shows the chain of custody. That she now has in possession certified copies of some of the documents she had lost, some originating from the public offices drawn and received in execution of public duty hence raising a strong prima facie case. The additional evidence will aid the court in determining the identity of the suit land and also challenge the credibility of the allotment letter issued to the person who donated the suit land to the respondent therein through an affidavit.

3. In support of her case, the applicant has relied on the following authorities; **Attorney General v Torino Enterprises Limited [2019] eKLR; Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission and 3 Others (2013) eKLR; Mohamed Abdi Mahamud Abdullahi Mohamad & 3 Others (2018) eKLR.**

4. The Respondent has opposed the application averring that the appellant is intent on reopening the case for purposes of prosecuting the same all over again. He avers that as per the police abstract, dated 20.9.2011, the applicant reported that she had lost the documents, the once she now seeks to adduce as evidence, which confirms that the evidence was within the knowledge of the applicant during the entire process of the trial and she would have obtained the said documents had reasonable diligence been done. The respondent therefore contends that applicant wants to fill the gaps in her evidence, which she failed to do during the trial. He also states that the proposed documents do not affect the validity of the respondent's title.

5. In support of his case, the respondent relied on the following cases; **Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 Others (2018)eKLR; Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others ( 2019) eKLR.**

**Analysis and Determination**

6. On 25/11/2019 the court directed the Respondent to file his response to the application on or before 25/12/2019, the applicant was then to file submissions by 25.1.2020, while the respondent was to file her submissions by 25.2.2020. None of the parties complied with the time-lines given. Nevertheless all the aforementioned documents have since been filed and I have duly considered the same.

7. The application is anchored on **Order 42 Rule 27 of the Civil Procedure Rules**. The same provides as follows;

***“Production of additional evidence in appellate court [Order 42, rule 27.]***

***(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 reason for its admission”.***

8. In **Wanjie & Others V Sakwa & Others (1984) KLR 275**, the Court of Appeal considered the rationale for the restriction of reception of additional evidence- albeit under Rule 29 of the Court of Appeal Rules- what Chesoni JA observed at page 280 is pointedly relevant, that:

***“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 the 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.”***

9. Hancox JA as he then was in the same case above stated that:-

***“...the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.”***

10. The above decision was adopted by Gikonyo J in **Geoffrey Muriungi & another v John Rukunga M’Imonyo [2017] eKLR** where he held as follows;

***“Doubtless, the appellate court has power to call for and admit additional evidence on appeal, but that power should be utilized sparingly only in apt cases where exceptional circumstances exist. This approach is to avoid giving the party who was unsuccessful at the trial a second bite of the cherry to patch up the weak points in his case and or fill up omissions and gaps in the appeal and or make out a fresh case in appeal”.***

11. In the case cited by the respondent, **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**, a case also referred to by the Court of Appeal in **Attorney General v Torino Enterprises Limited [2019] eKLR** the Supreme Court laid guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:

***“[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."***

12. In this case the appellant stated that she could not produce the documents at the trial court since she had lost the same. I have looked at the record in the trial court. I do note that the appellant clearly mentioned to the trial magistrate during her testimony that the documents herein were lost and she could not avail the same during the trial.

13. I have keenly examined the arguments raised by the applicant vis a vis what transpired before the trial court and I find the arguments not plausible. Appellant did not tabulate in a precise manner as to which documents got lost and when they got lost, and further, there is inconsistencies in the acquisition of the fresh evidence. The appellant's D-exhibit 2 is a letter from the council clerk requesting the physical planner to draw for her another "PDP", since she lost hers in Nairobi. That letter is dated 18.3.2005. The PDP which the appellant purports to adduce was signed on 6.5.2003, while the covering letter by one Stephen Mbondo the clerk to the county council bears the date of 16.6.2003. If indeed the appellant had lost her PDP and a fresh one was to be prepared, the logical trend would have been that the new document or the covering letter would bear a date after 18.3.2005. (When request for fresh documents was made).

14. Another notable lacunae is that the police abstract bears the date of 20.9.2011, the month the appellant filed her statement of defence and counter claim, yet she had lost the documents (at least the PDP) more than six years earlier before March 2005. It is also noted that the documents which allegedly got lost are public documents. The applicant has not demonstrated how she exercised due diligence to get the said documents before or during the lifespan of the suit.

15. In the case of **Safe Cargo limited v. Embakasi properties Limited & 2 Others (2019)**, the Court of appeal disallowed the production of a Part Development Plan amongst other documents while stating that ***"a Part Development Plan is a public document that the applicant, with due diligence could have obtained."***

16. In light of the foregoing analysis, I find that the application dated 22.7.2020 is not merited. The same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

### **ORDER**

The date of delivery of this ruling was given on 24.6.2020. In light of the declaration of measures restricting court operations due to the COVID-19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**