



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL CASE NO. 110 OF 2011

JAMES NDIRANGU NG'ANG'A..... APPELLANT

VERSUS

KANUBHA MAREBHA VAGHELA.....RESPONDENT

RULING

1. The appellant /applicant has moved the court under Order 42 rules 11,13 and 27 of the Civil Procedure Rules and sections 1A, 1B, 1C and 3A of the Civil Procedure Act seeking the following;

1. That the honourable court be pleased to give directions to facilitate the hearing of the appeal.
2. That this honourable court be pleased to order that the appeal do proceed to hearing
3. That this honorable court be pleased to order that additional evidence be adduced as it deems fit including a site visit.
4. That the costs of this application be provided for.

2. The notice of motion is premised on three grounds on the face of it and on an affidavit sworn by the applicant. In ground (c), the applicant avers that the nature of the dispute is such that may require this court to make site visit. The application is opposed by the respondent who has filed a replying affidavit. In the replying affidavit, the respondent avers the applicant has not adduced any sufficient reason to be allowed to bring in additional evidence. Secondly the record of appeal as filed contains documents which are strange and the amended memorandum of appeal should also be rejected. In paragraph 9, 10 and 11 of the replying affidavit raised other issues which were not pursued by the respondent in their oral submissions.

3. Mr. Gacheru counsel for the applicant opened his submissions in support of the application by citing article 159 of the constitution and section 1A of the civil Procedure Act. In seeking directions, they submit that they have included all the documents while omitted maps that were huge. According to the applicant only one document is strange which they had no objection being expunged. He urged the court to admit the appeal and give directions on mode of hearing. He submitted further that under order 42 rule 27 (b), this court has power to examine a witness. He is asking the court to do site visit and have the 3 officers cross-examined. This submission is made on the basis that the trial magistrate went on site and this court cannot re-evaluate that evidence unless a similar visit is made.

4. Mr. Onchiri submitted that the applicant has admitted there are strange documents in the record of appeal filed and mentioned them to exist in pages 4, 7 - 8, 9 – 11, 16,25- 32. He urged the court to have them expunged. He also submitted some documents were not included in the record filed. In his view,

the two records are not complete and therefore this appeal is not ripe for directions. Mr. Onchiri also opposed the adduction of more evidence as all the witnesses were examined and cross-examined. He submits that if the request to put in additional evidence is allowed it will in their view amount to hearing the case de novo. They cited the cases of

- i). **Douglas vs. Charles Ogeto**
- ii). **Ibrahim Mohamed vs. Halima**
- iii). **Joseph Owino vs. Eunice Suraya**

I was not sure if these authorities were made available to the court because I could not find them in the file. The respondent urged the court to disallow the application with costs.

5. Under Order 42 rule 11, an appellant is required to list the appeal before a judge for directions within 30 days from the date of filing the appeal. In rule 13(3), the judge may give directions concerning the appeal generally and as regards manner of presentation of evidence, exhibits and the typing of any record or part thereof. Subrule 4 lists the documents the judge is required to confirm before allowing the appeal to proceed to hearing and in rule 13(4)(f)(ii) gives the judge discretion to dispense with some of those documents listed. In the present appeal, the trial court's proceedings both written and typed are already made available in the appeal file. Secondly, the appellant has put in place the record of appeal. Mr Onchiri submits that directions should not be given because there are strange documents included in the record. My interpretation of this rule is that once the proceedings and judgment/decrees appealed from have been made available together with the exhibits then the appeal directions can be taken.

6. The process of preparing a record of appeal in my view is a matter of practice rather than a requirement of the law to make it easier for parties and the court during the hearing and determination of the appeals while making references to documents. The inclusion or exclusion of some documents in the record cannot bar it from being fixed for hearing as the entire file is available to the appellate court. Secondly the respondent during the hearing of appeal can always point out which documents ought not to be relied upon in the appeal and give their reasons. In light of this I am satisfied that the appeal before court is capable of being heard and so I do allow prayer 2 of the motion and issue directions that this appeal be heard by one judge in Bungoma on a date convenient to both parties. The parties shall file written submissions which shall be orally highlighted before the trial judge on the date fixed for hearing.

7. Further, order 42 rule 27 provides that;

“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. I read this rule to be anticipating a scenario where the trial court has refused **“to admit evidence which ought to have been admitted”** which does not apply in this circumstance. Rule 27 (b) refers to **“the appeal court requiring any document to be produced on any witness to be examined to enable it to pronounce judgment.”** This appeal is at the stage of taking directions therefore the appellate court is not able to determine whether there will be need to call for additional evidence or not. The submission by the appellant on asking the court to visit the site and have the officers from the land's department and cross-examined in my view is equivalent to review of the proceedings of the trial magistrate. The Rules referred to a scenario of evidence that was not within the

reach of the appellant during the trial of his case and hence the need to bring it up before judgment in the trial court or on appeal. I do find the request for additional evidence as not merited and refuse it.

8. However, this court reminds the parties that it reserves its discretion set out in rule 27(b) quoted above to exercise it if deemed necessary on notice to parties. The result is the application is allowed in part. Costs of the application abide the outcome of the appeal.

DATED, SIGNED AND READ on the 14th day of July 2014.

A. OMOLLO

JUDGE.