



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 206 OF 2012

ALEX KIHONGE MUKOMA.....APPLICANT

VERSUS

JOSEPH NGUGI MBURU1ST RESPONDENT

CHARLES KIRUNDI MAGU2ND RESPONDENT

PETER MUNGAI KAGOIYA3RD RESPONDENT

RULING

(Application to adduce additional evidence; case heard while the appellant did not yet have title documents; suit dismissed; appellant now having acquired title documents and wishing to rely on them on appeal; the documents could not have been availed at trial even after exercise of due diligence; application allowed)

1. The application before me is that dated 18 May 2016 filed by the appellant. The prayers sought are as follows :-

(i) *Spent (a certification of urgency).*

(ii) *That this honourable court be pleased to grant leave to the appellant to adduce additional evidence before it, or orders that additional evidence to be taken by any other court of competent jurisdiction.*

(iii) *That in the alternative this honourable court be pleased to order a new trial herein.*

(iv) *That costs of this application be in the cause.*

2. The application is based on the following grounds :-

(a) *That the appellant has crucial additional evidence that was not available during trial.*

(b) *That the appellant obtained the document after filing the appeal.*

(c) *That the subordinate court may no longer have jurisdiction to deal with the subject herein.*

(e) That no prejudice will be occasioned to the respondent.

3. The application is supported by the affidavit of the appellant and is opposed by the respondent.
4. Before I delve into the gist of the matter, I think it is prudent that I first give a little background to this suit.
5. The original suit was commenced by the appellant by way of plaint in the Magistrate's Court at Nyahururu, on 27 July 2001. In his plaint, the appellant pleaded that he is the registered proprietor of the Plot Numbers 13 and 137 situated in Kangui township in Nyandarua District. He averred that on or about 1996, the defendants unlawfully and without justifiable cause trespassed into the said plots and constructed illegal structures thus depriving him quiet use and possession of the said plots. In the suit, he asked for an order of eviction of the respondents from the suit properties; a permanent injunction to restrain them from the said parcels of land; general damages for trespass; mesne profits; and costs of the suit.
6. The respondents filed a joint statement of defence. They inter alia denied that the appellant is the registered proprietor of the suit properties as alleged. They also denied having erected illegal structures. They contended that the 1st respondent is the sole allottee of Plot Nos. K23 and K24 Kangui Township; that the 2nd respondent is the sole allottee of the Plot Nos. K19 and K20, while the 3rd respondent is the sole allottee of the Plot Nos. K17 and K20, which plots, it was said have no relationship with the Plot Nos. 136 and 137. They averred that they occupy their plots and denied that they have trespassed into any of the plaintiff's plots.
7. Before the matter proceeded for hearing, an order was issued to have the various plots in issue visited by the District Physical Planner and Surveyor, Nyandarua. The officers visited the site and filed a report dated 13 October 2008. The District Surveyor testified as PW-1. PW-2 was the appellant and he did testify that he owns the two suit properties which measure one acre each. He testified that he purchased the Plot No. 136 from one Njenga Gatimu and was issued with the allotment letter. The other, Plot No. 137, he was allotted directly by the Government. He was shown the plots on the ground and took possession and he paid rates on the same which he produced as exhibits. He stated that in the year 1996, the respondents started encroaching on the land. He did testify that he was still awaiting the issuance of title deeds for the plots. The respondents also testified, and the gist of their evidence was that they were allotted three plots which they claimed to own. They also called a Surveyor of the County Council of Nyandarua as their witness and the District Physical Planner, Nyandarua.
8. In her judgment, the learned trial Magistrate inter alia held that the plaintiff had not proved ownership of the parcels of land that he claimed.
9. I have deliberately not gone too deeply into the evidence of the parties, nor the judgment, for the reason that I am not hearing the appeal, but only an application to adduce additional evidence during the hearing of this appeal.
10. In his supporting affidavit, the appellant has averred that at the time the trial was proceeding before the Magistrate's court, he had not yet obtained title. He obtained his leases for both plots on 25 June 2015 and 14 March 2015 and was later issued with the Certificates of Title. He has averred that the plots in issue have now been surveyed and there now exists a map for Kangai Township. He has stated that these documents were not in his possession because the process of conveyancing was still on going.
11. The respondents opposed the application through the Replying Affidavit of the 1st respondent. He has deposed that the appellant has filed this application so as to patch up and fill omissions of his otherwise weak case. He is of the view that the appellant now wishes to make out a fresh case on appeal which is not acceptable in law. He has stated that the trial court did not refuse to admit any evidence; that this court has not declared that it requires certain documents or oral testimonies to be adduced to enable it pronounce its judgment; that no substantial or sufficient reason has been given as to why the court should exercise its discretion to allow the additional documents; that the appellant ought to have obtained and

produced this evidence had he exercised due diligence and ought to have obtained the leases well before the hearing of the suit; that the evidence sought to be adduced is tainted with fraud and illegality. He has pointed out that the appellant has obtained the leases four years after judgment notwithstanding that the trial court declared that he was not the owner of the plots in issue. He has stated that they have challenged the validity of the leases in the suit Nakuru ELC No. 553 of 2016 which case is pending determination.

12. I have considered the matter alongside the submissions of both counsel for the appellant and counsel for the respondents. I have noted that a lot of the submissions of Mr. Kaburu, learned counsel for the respondent, argue that the application should be struck out because the law firm of M/s Gordon Ogolla & Kipkoech, who appear for the appellant, had not obtained leave to come on record after judgment, in place of the previous counsel on record. I agree that the current application was filed before the said law firm had properly come on record. However, this irregularity was later cured and it was agreed by consent that the application herein be deemed to have been properly filed. I therefore see no place for the very elaborate submissions that the law firm of Gordon Ogolla & Kipkoech is not properly on record for the appellant and I will disregard the said submissions. On the substance of the application, Mr. Kaburu argued that the applicant had all the time to produce this alleged new evidence.

13. Applications of this nature are covered by the provisions of Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 42 Rule 27 of the Civil Procedure Rules. Section 78 of the statute 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.

14. Order 42 Rule 27 28 and 29 are drawn as follows :-

27. 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.

28. Mode of taking additional evidence [Order 42, rule 28.]

15. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Limits to be defined and recorded [Order 42, rule 29.]

16. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

17. It will be noted from the above provisions, that the appellate court has power to take additional evidence or to require the evidence to be taken. Order 42 Rule 27, does give the instances that the appellate court can direct the taking of new evidence. Under Rule 27 (a), the appellate court can take new evidence where the court from whose decree the appeal is preferred has refused to admit such evidence. Under Rule 27 (b), additional evidence can be taken where the appellate court requires such evidence to be produced so as to enable it pronounce judgment; or the appellate court may admit the evidence for any other substantial cause.

18. Substantial course is of course not elaborated in the rules, but this has been the subject of various decisions, including the case of *Wanje vs Saikwa (1984) KLR 275*, and the more recent Court of Appeal decisions in the case of *Samuel Kungu Kamau v Republic*, Court of Appeal at Nairobi, Criminal Appeal No. 29 of 2015 and *James Mwangi Nganga vs Kenyatta University Council & Others*, Court of Appeal at Nairobi, Civil Appeal No. 317 of 2000. What emerges from these decisions is that the appellate court will not allow additional evidence unless such evidence was not available to the party seeking to adduce it despite exercise of due diligence, and reasonable diligence would not have made it available. Such evidence must also be of such nature as to be of influence to the result of the case, and needs to be credible.

19. In our case, the evidence sought to be adduced, that is, the Lease and Certificates of Lease for the appellant, were prepared sometimes in the year 2015. It follows that these documents were not available when the case was heard and determined. I do not think that the appellant could have done anything to have these documents prepared before embarking on his case. It is common knowledge that title documents in Kenya can take quite a while to be prepared and I cannot fault any person for suing in respect of land for which he is yet to acquire title. The title documents in my view could not be procured at the time the case was heard despite the exercise of due diligence. The presence of these titles could have influenced the mind of the trial magistrate when making her judgment and are important elements in this case.

20. I am of the view that the appellant has passed the test laid down in Order 42 Rule 27 and I will therefore allow this application. The appellant is at liberty to adduce the Leases, Certificates of Lease and the map sheet of Kangui Township. The appellant will himself adduce in evidence, the Leases and Certificates of Lease that he holds. In respect of the map, the same will be produced by the Surveyor, Nyandarua District.

21. I make no orders as to costs.

22. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Langat holding brief for Mr. Ogola for the applicant.

No appearance on part of M/s D. K Kaburu & Co. Advocates for the respondents.

Court Assistant: Toroitich

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU