



**Stephen (Suing as the administrator and representative of the estate of Oure Omolo Ogalo) v Omuko & 2 others (All sued as representatives of the Estate of Oluoch Ojuko and in their respective personal capacities) (Environment and Land Appeal E006 of 2023) [2024] KEELC 1054 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1054 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E006 OF 2023  
AY KOROSS, J  
FEBRUARY 29, 2024**

**BETWEEN**

**GEORGE OMOLO STEPHEN ..... APPELLANT  
SUING AS THE ADMINISTRATOR AND REPRESENTATIVE OF THE ESTATE  
OF OURE OMOLO OGALO**

**AND**

**MARGARET ANYANGO OMUKO ..... 1<sup>ST</sup> RESPONDENT  
JOYCE AKUMU ODERO ..... 2<sup>ND</sup> RESPONDENT  
TOBIAS TABU ODERO ..... 3<sup>RD</sup> RESPONDENT  
ALL SUED AS REPRESENTATIVES OF THE ESTATE OF OLUOCH OJUKO  
AND IN THEIR RESPECTIVE PERSONAL CAPACITIES**

**RULING**

**Appellant’s case**

1. In the notice of motion that is the subject of this court’s resolution filed by the appellant dated 3/07/2023 in which this court has primarily been moved under Section 78 of the *Civil Procedure Act* and Order 42 Rule 27 of the *Civil Procedure Rules*, the appellant has sought leave to file additional evidence on appeal.
2. The motion is predicated on grounds thereon and it is supported by an affidavit sworn on the same date by the appellant George Omollo Stephen.
3. The grounds thereon are replicated in the supporting affidavit and in summary, the appellant avers the additional evidence which are composed of photographs of structures and crops subsisting on land



parcel no. North Sakwa/Maranda/1436 (suit property) are pertinent, will influence the outcome of the appeal, serve the interests of justice and will bring the suit to finality.

4. The appellant avers that the reason the evidence was not produced before the trial court was because of his inadvertence and hostilities between the parties following a meeting convened by the chief of West Sakwa on 14/11/2019. He contends that the suit was undefended and the respondents did not adduce evidence.
5. In addition, the appellant avers the evidence is credible and demonstrates willful deception by the trial court and the evidence is not intended to fill gaps in the case and that the respondent will not be prejudiced if the orders sought are granted.
6. The motion is unopposed and as directed by the court, it is canvassed by written submissions dated 11/11/2023 which is filed by the firm of M/s Achola Jaoko & Co. Advocates who are on record for the appellant.

#### **Appellant's submissions**

7. In relying on Section 78(1) of the [Civil Procedure Act](#), Order 42 Rule 27 of the [Civil Procedure Rules](#) and the Supreme Court of Kenya's decision of [Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others](#) [2018] eKLR and that of [Attorney General v Torino Enterprises Limited](#) [2019] eKLR, counsel submits the appellant has met the requisite conditions to warrant the grant of the orders sought.

#### **Issue for determination, analysis and determination**

8. This court has considered the motion as well as the appellant's submissions together with the provisions of law cited and authorities relied upon and the singular issue that arises for determination is whether the appellant should be granted leave to adduce additional evidence.
9. As submitted by counsel, the legal basis for the motion is founded in Section 78 of the [Civil Procedure Act](#) and Order 42 Rules 27, 28 and 29 of the [Civil Procedure Rules](#) and it is on the basis of these provisions that this court is empowered to grant the relief sought by the appellant. Section 78 of the [Civil Procedure Act](#) states: -

- “(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.”

10. Whilst the procedural aspect which underpins this Section 78 is found in Order 42 Rules 27, 28 and 29 of the [Civil Procedure Rules](#) which provides: -

“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. 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. 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.”

11. However, it is not in every instance that leave is granted to adduce additional evidence and it is usually granted in exceptional circumstances, with abundant caution and on a case by case basis. In the case of *Mohamed Abdi Mahamud* (*supra*), the Supreme Court of Kenya comprehensively and authoritatively laid out the principles to be considered in determining whether an appellate court should accept the adduction of additional evidence.

12. It must be noted the principles outlined in *Mohamed Abdi Mahamud* (*supra*) are not conjunctive but an applicant in this case the appellant has to substantially meet the criteria thereon. The court laid out the following guiding principles when an appellate court is exercising its discretion in allowing additional evidence: -

“ .... 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.”

13. I have evaluated and considered the documents the appellant intends to adduce as additional evidence in particular the bundle of photographs vis a vis the criteria outlined by the Supreme Court in the case of *Mohamed Abdi Mahamud* (*supra*).
14. The appellant’s case before the trial court was hinged on adverse possession and it is trite law that in such cases, an observation of the land is usually made and undoubtedly, the photographs are directly relevant and will impact the case. In addition, contrary to counsel’s assertion, the suit was defended and the 1<sup>st</sup> respondent adduced evidence.
15. Therefore, one of the key deliberations this court considers is the availability of the intended additional evidence and the appellant has to demonstrate that he would reasonably not have been aware of the evidence and that during trial, it could not have been obtained with reasonable diligence and was not within his knowledge and at the time, could not have been produced.
16. The appellant gave two reasons for failure to adduce this evidence before the trial court one was his mistake and secondly, the hostility that took place subsequent to a meeting convened by the area chief on 14/11/2019.
17. This court has glimpsed the lower court record and as is the nature of adverse possession claims, the issue of the appellant’s occupancy was an issue that was raised throughout the entire trial of the suit



in the lower court and therefore, having failed to adduce this evidence, he was the author of his own misfortune.

18. As to the actions of the chief, the appellant did not tender this document before this court for it to test its veracity. From the record, I have stumbled upon a letter dated 11/11/2019 by Bondo/Rarieda sub county surveyor in which his office had sought to resolve a boundary dispute over the suit property on 14/11/2019 and it is noted under Sections 18 and 19 of the *Land Registration Act*, his office had jurisdiction to so do.
19. If at all this is the exercise the appellant is referring to, then this does not advance his arguments for the reason the outcome of this exercise which is usually by way of a report, has not been adduced before this court to show that the exercise took place and if it so did, if violence was exhibited by any of the parties.
20. Being an alleged occupier of the suit property, indisputably the appellant had knowledge of activities obtaining upon it and he would reasonably and in exercise of due diligence procure the said photographs and consequently, I find and hold that the appellant is not deserving of the orders sought.
21. I further find that the attempt by the appellant to introduce additional evidence on appeal is intended by him as an unsuccessful party, to make a fresh case on appeal, fill up omissions and patch up weak points in the case.
22. For the foregoing reasons, I ultimately find the notice of motion dated 3/07/2023 is unmerited and it is hereby dismissed with the appellant bearing his own costs.
22. Accordingly and taking note the record of appeal has been filed and served, this matter shall be mentioned for directions with a view of determining the main appeal on 10/04/2024.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**29/2/2024**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:-**

N/A for the parties

Court assistant: Ishmael Orwa

