Wandaka & 2 others v Elizabeth Wambui Mwangi (Civil Appeal 36 of 2019) [2024] KECA 1315 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1315 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 36 OF 2019

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

SEPTEMBER 27, 2024

BETWEEN

RAPHAEL KINORU WANDAKA ..... 1ST APPLICANT

SAMSON NGUGI MUTURI ..... 2ND APPLICANT

MILKA MUTHONI MURURI ..... 3RD APPLICANT

AND

ELIZABETH WAMBUI MWANGI ..... RESPONDENT

(An appeal arising from the judgment/Decree of the High Court of Kenya at Nakuru (Sila J.) delivered on 7th March 2019 in Nakuru ELC No. 263 of 2013)

RULING

1. This ruling determines the applicant's Notice of Motion dated 7th July 2022 seeking this Court's leave to adduce additional evidence by way of an affidavit sworn by the 1st applicant (Raphael Kinoru Wandaka). The application is premised on Rule 29 (1) of the *Court of Appeal Rules* (now Rule 31 of the 2022 Rules). It is supported by grounds on its body and a supporting affidavit sworn by the 1st applicant on 7th July 2022 and his supplementary affidavit sworn on 21st March 2023. The application is opposed by a replying affidavit sworn on 2nd August 2022 by Elizabeth Wambui Mwangi, the 1st respondent.

2. The background to the application is that the applicants instituted Civil Suit No. 263 of 2013 in the Environment and Land Court (ELC) at Nakuru claiming that one Muturi Munene (deceased) was the owner of ballot No. 36 in Mukinye Farmers' Cooperative Society Limited, a land-buying company. The said Muturi Munene is the 2nd applicant's father and husband to the 3rd applicant. It is pleaded that during his lifetime, he transferred his share and ballot in respect of the said plot to the 2nd and 3rd applicants who subsequently sold it to the 1st applicant. However, when they went to the offices of

the said society to transfer the said plot, they found that the same had already been transferred to one Erastus Kimanga. The same plot was subsequently transferred to Geoffrey Gacathi and afterward to the respondent. It is their position that this was done fraudulently and illegally.

3. Sila J. rendered his judgment on 7th March 2019 dismissing the applicants' suit and issued a declaration that the respondent was the rightful proprietor of the land parcel Gilgil/Karunga Block 5/36 (Mukinye). It is the said verdict that triggered this appeal in which the applicants' now seek adduction of new evidence.

4. The applicants' plea for leave to adduce new evidence is premised on the grounds that:

   (a) during trial, the 1st applicant was not able to procure documents from the Government Co-operative Office, Gilgil but only had access to the records at the offices of Mukinye Farmers' Co-operative Society;

   (b) the documents now in his possession can shed light and settle the issue of ownership of Ballot No. 36 at Mukinye Farmers' Co- operative Society Ltd. which could only process, procure and produce the land parcel Gilgil/Karunga Block 5/36 (Mukinye); and,

   (c) the superior court itself raised doubts with the register of Mukinye Farmers' Co-operative Society Ltd.

5. In opposition to the application, the respondent swore a replying affidavit dated 2ndAugust 2022 deponing that:

   (a) the application is incompetent, an afterthought and a feeble attempt by the appellants to introduce fresh evidence to patch up the weak points in their case;

   (b) the appellants had the opportunity to adduce the purported additional evidence since it has always been available and would have been adduced in court if the applicants had done due diligence;

   (c) the applicants have failed to show that the additional evidence sought to be adduced has a substantial influence on the result considering that the trial court had considered the members' list and records from Mukinya Farmers' Co-operative Society and made a determination based on those official records.

6. In support of the application, the applicants reiterated the contents of the affidavits in support of the application and submitted that the application satisfies the tests laid down by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR.

7. In opposition to the application, the respondent submitted that the evidence sought to be introduced is not new as evidenced by the applicants' admission in their supplementary affidavit that the trial court declined to admit the evidence. Therefore, the applicants ought to have appealed against trial court's decision declining its application to adduce the said evidence, which they did not.

8. It was the respondent's case that the evidence sought to be introduced is not helpful to the applicants' appeal since the suit was also found to be time-barred and the trial court found that the respondent was an innocent purchaser for value who conducted due diligence before purchasing the suit property. In conclusion, the respondent urged this Court to be guided by the guidelines laid for admission of additional evidence before appellate courts in Kenya by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [*Supra*] and dismiss the instant application with costs.

9. We have considered the parties' rival pleadings and submissions and the established legal principles that guide the court in the exercise of its mandate under Rule 29 (1) of this *Courts' rules* (now Rule 31 of the Court of Appeal Rules, 2022).

10. This Court in *Mzee Wanje & 83 others v A. K. Saikwa & other* [1982-88] 1 KLR 462 addressed its mind to the principles to be considered in allowing additional evidence on appeal as follows:

> "The principles upon which an appellate Court in Kenya in civil cases will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning L.J. (as he then was) in the case of *Ladd v Marshall* [1984] 1 WLR1489 at 1491 and those principles are:
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> a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
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> b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.
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> c. The evidence must be such as it presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

11. Even as we apply the above principles in this case, the first threshold to be met by an applicant in an application of this nature is to demonstrate that the evidence sought to be introduced is "new" as claimed by the applicants. Evidence is "new" if -

(a) it was not adduced in the original trial, and

(b) it could not have been adduced in those proceedings despite the exercise of reasonable diligence. Regarding the question whether the evidence is "new," we note from the record that there is clear admission by the 1st applicant in his supplementary affidavit in which he states that the request to adduce additional evidence after the close of the appellants' case before the trial court was rejected by the learned Judge. That was way back in 2019. The said admission and the fact that the applicants sought the trial court's leave to adduce the said evidence leaves no doubt that the evidence was actually available. Therefore, it cannot be termed as "new" evidence.

12. The next question is whether this evidence could not have been obtained despite exercise of due diligence. The applicants had the burden to demonstrate that the additional evidence was not available to them in any form during the trial and it could not have been obtained through the exercise of due diligence. As early as at the time of instituting their suit before the trial court, the appellants clearly set out the basis of their claim which was ballot paper number 36 in Mukinye Farmers' Cooperative Society Limited which they averred was owned by the late Muturi Munene. From this clear averment, it is evident that they knew the existence of this society which had issued the ballot paper. If at all they had any queries prior to filing the suit or before the hearing, they were at liberty to inquire from the Department of Trade, Industrialization, Co-operative & Tourism, sub-county co-operative and seek confirmation of the authenticity of the particulars of the members of the said society. They did not do so even as they were assembling evidence in preparation for the trial.

13. The applicants in their affidavit in support of their application have annexed a letter dated 22nd June 2022 from the Department of Trade, Industrialization, Co-operative & Tourism confirming the authenticity of the particulars of members of Mukinye Farmers' Co-operatives. The judgment appealed against in this case was delivered on 7th March 2019. This information was obtained after the lapse of over 3 years after the delivery of the judgment and over 9 years after the suit was filed. We note

that the applicants have not annexed their letter requesting for the said information at least to clarify when it was sought. They left it to this Court to guess when they requested for the information, if at all, they did.

14. Equally important is the fact that there is nothing to show that the said information was not available prior to filing the suit, or during the trial and could not have been procured despite exercise of due diligence. The Supreme Court of India in *Chander Kanta Bansal v Rajinder Singh Anand* [2008] 5 SCC 117 explained "due diligence" in this manner:

> " 16. The words "due diligence" have not been defined in the Code. According to *Oxford Dictionary* (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per *Black's Law Dictionary* (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to *Words and Phrases by DrainDyspnea* (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs".

15. Similarly, the Supreme Court of India in *J. Samuel and ors. v Gattu Mahesh & Ors* [2012 2 SCC 300 explained what was meant by the words "due diligence" and concluded in the following words:

> " 19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.
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> 20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

16. In the given facts of this case, there is a clear lack of due diligence. Parties are not allowed to fill a lacunae in their case at the appellate stage. An appellate court should not pass an order to patch up the weakness of the evidence of the unsuccessful party before the trial court.

17. It is our finding that the applicants' case does not fall within the ambit of the guidelines set out by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others* (supra). Consequently, we find that the application to adduce new evidence is an attempt to have a second bite at the cherry so to speak and to fill the gaps in their case. Consequently, we decline to exercise our discretion in favour of the applicant for the above stated reasons. Therefore, we find no merit in the applicant's application dated 7th July 2022 and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR .