



Chege v Attorney General & 8 others (Civil Appeal (Application) 27 of 2019) [2024] KECA 1529 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1529 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 27 OF 2019
PM GACHOKA, RL KORIR & MA WARSAME, JJA
OCTOBER 25, 2024**

BETWEEN

PHARIS NDUNG’U CHEGE APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

GOVERNOR, NAKURU COUNTY 3RD RESPONDENT

NJUGUNA KAMAU 4TH RESPONDENT

JOHN KIHAGI 5TH RESPONDENT

MUTAI MICHAEL 6TH RESPONDENT

ISAAC MUNGAI KAMAU 7TH RESPONDENT

IBRAHIM KARANJA 8TH RESPONDENT

SAMUEL NDUNG’U KIMANI 9TH RESPONDENT

(An application for leave to adduce additional evidence from the judgment and decree of the Environment and Land Court of Kenya at Nakuru (Ohungo, J.) delivered on 12th October 2018 in Constitutional Petition No. 20 of 2014)

RULING

1. By Notice of Motion dated 29th April 2022, the applicant seeks leave of this Court to adduce additional evidence in this appeal. The appeal arises from the judgment and decree of Ohungo, J. in Nakuru ELC Constitutional Petition No. 20 of 2014 delivered on 12th October 2018. The applicant has invoked the



provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, order 51, rule 1 of the Civil Procedure Rules and Rule 31 of the Court of Appeal Rules 2022.

2. The application is grounded on the facts espoused in the body of the application and the supporting affidavit deposed by the applicant. According to the applicant, he was in negotiation talks with the 3rd respondent but the same yielded no fruits. It was during those negotiations that two letters, dated 16th September 2019 and 8th October 2020, came to the attention of the applicant. From those letters, the applicant's deduction was that it conclusively established that the portion of land measuring 4.9 acres was included in the parcel of land measuring 26.9 acres for the construction of a stadium.
3. The applicant is intent on adducing those documents as additional evidence whose particulars are as follows: a letter dated 16th September 2019 from Delamere Estates Limited to the County Government of Nakuru and a letter dated 8th October 2020 from the County Attorney, Government of Nakuru County to the firm of Kagucia & Company Advocates.
4. The applicant urged this Court to allow the application on the following grounds: the evidence was not available at the trial court notwithstanding the exercise of due diligence, search and investigation; the evidence is directly relevant to this appeal; the evidence will holistically determine the appeal; the evidence will assist this Court to arrive at a fair and just determination of the issues before it; it is in the interests of justice and equity that the application is allowed; and the respondents will suffer no prejudice if the orders sought are granted.
5. The application was neither opposed nor responded to by any of the respondents. Be that as it may, the application was heard virtually on 2nd October 2024. In the absence of the respondents or their instructing counsel, learned counsel for the applicant, Miss. Njoki, relied on the applicant's written submissions and list and bundle of authorities both dated 18th June 2024. She abridged the facts giving rise to this appeal to submit that the application had met the threshold set out in our jurisdiction. She thus urged this Court to allow the application as prayed.
6. We have considered the application, the affidavit in support and the submissions thereto. The applicant seeks leave of this Court to adduce additional evidence. The law governing admission of additional evidence is to be found in Rule 31 of the Court of Appeal Rules 2022. The power of this Court to allow adduction of new evidence is discretionary. Its constituent elements were properly ruminated by the Court in *Mzee Wanje & 93 others vs. A. K. Saikwa & others* [1982-88] 1KAR 462 that held:

“The principles upon which an appellate Court in Kenya in civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd vs. Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

- a. it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- b. the evidence must be such that, if given, it would probably have an important influence on the rest of the case, though it need not be decisive;
- c. the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”



7. This Court, differently constituted in Civil Appeal (Application) No. 276 of 2020; Hon. Basil Criticos vs. The Honorable Attorney General & 7 others, formulated the following considerations when considering the application as follows:

“Whether the evidence could not have been obtained with reasonable diligence for use at the trial; whether the additional evidence, if allowed, will have an important influence on the result of the case; and that the evidence is credible though it need not be incontrovertible.”

8. It is instructive to note that the application of that Rule is not intended to succor an indolent litigant who has slept on his or her rights. Upon the discovery of additional evidence, a party must move with speed and should not invoke this Rule at the eleventh hour.

9. We note that this application was filed on 29th April 2022. The applicant is thus duty bound to explain the delay in filing the application since the documents the applicant intends to adduce stem from the years 2019 and 2020. In the supporting affidavit annexed to the application, we note the two letters are attached as exhibits as follows: letter dated 16th September 2019 forwarded to the applicant’s advocates by Kamonji Kiburi advocates on 17th September 2019; and letter by the County Government of Nakuru written directly to the applicant’s Advocates on 8th October 2020. This application was filed almost two years later and there no explanation for the delay. Furthermore, the applicant does not even state when the negotiations were concluded.

10. Be that as it may, the applicant has not established with precision, the influence the evidence will have on the determination of the dispute. Consequently, our inescapable finding is that the applicant has not met the threshold for the grant of those orders.

11. In any event, we must restate that this Court’s jurisdiction is only derived from the *Appellate Jurisdiction Act* and the Rules thereunder. This Court is not bound by the *Civil Procedure Act* or the rules established therein. It was therefore improper for the applicant to invoke the provisions in that Act as set out in the application.

12. The upshot of our above analysis is that the application lacks merit. It is dismissed but with no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF OCTOBER 2024.

M. WARSAME

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

