



**Andima v Municipal Council of Mombasa & 4 others (Civil Appeal
(Application) 149 of 2018) [2023] KECA 255 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 255 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 149 OF 2018
GV ODUNGA, JA
MARCH 17, 2023**

BETWEEN

HARON SILVANO ANDIMA APPELLANT

AND

MUNICIPAL COUNCIL OF MOMBASA 1ST RESPONDENT

**THE SENIOR RESIDENT MAGISTRATE'S COURT MOMBASA 2ND
RESPONDENT**

MAKURI ENTERPRISES AUCTIONEERS 3RD RESPONDENT

REGISTRAR OF TITLES, MOMBASA 4TH RESPONDENT

**TWAHA ABDULHAKIM ABDALLA & ZAINAB ABDULHAKIM ABDALLA
(AS ADMINISTRATORS OF THE ESTATE OF ABDULHAKIM
ABDALLA) 5TH RESPONDENT**

*(Appeal from the Judgment of the Environment & Land Court at
Mombasa pronounced by Lady Justice A. Omollo at Mombasa on 15th
January, 2018 in ELC Misc. Civil Application JR No. 114 of 2010)*

RULING

1. By a Motion on Notice dated 9th May, 2022, the 5th Respondent in the appeal and the Applicant herein seeks that tis court be pleased to take additional evidence by way of an affidavit sworn by the 5th Respondent.
2. According to the Applicant, on 1st July 2010, a sale by Public Auction was conducted by the 3rd Respondent pursuant to the instructions by the 1st Respondent in relation to the Appellant's property known as Title Number L.R. No. MSA/MN/1/496. In that auction, the Applicant emerged the



highest bidder and paid 25% of the purchase price at the fall of the hammer. Vide a letter dated 15th September 2010, Ms. Mutufi Gakuo & Kibata Advocates wrote to the 3rd Respondent informing them that the Applicant had paid a sum of Kshs. 12,225,000.00/= being 75% of the purchase price. After deducting the rates due and owing from the Appellant along with legal costs, court fees, disbursements, Ms. Muturi Gakuo & Kibata Advocates enclosed cheques amounting to Kshs. 9,539,500/= drawn in favour of the Judiciary for onward transmission to the court.

3. According to the Applicant, this information is material and vital to this Court's just determination of the matter as the procedure provided for under the Civil Procedure Rules as regards payment into Court had been fulfilled by the purchaser of the suit property. However, the Appellant who had recourse to collect the money paid into Court has not yet initiated recovery procedure of the Civil Procedure Rules. It was averred that possession of the suit property has been with the 5th Respondent since 2010 and the money paid into court has been accessible to the Appellant since then.
4. It was the Applicant's position that no prejudice shall be occasioned to the parties by granting the prayer sought.
5. In opposing the Motion, the Appellant filed the following grounds of opposition:
 1. The Application does not meet the threshold for allowing additional evidence on appeal as established by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullabi Mobamad & 3 others* [2018]1 eKLR.
 2. The additional evidence that the Applicant intends to adduce in this appeal is not directly relevant to the issues in question in this appeal, because:
 - a. The intended additional evidence relates to the purported payment of the purchase price by the Applicant, for the purchase of the suit property by way of public auction. The intended additional evidence includes:
 - i. A copy of a letter dated 15/9/2010 purporting to confirm that the 5th Respondent/Applicant had paid a sum of Kshs. 12,225,000/= being 75% of the purchase price.
 - ii. Copies of cheques amounting to Kshs. 9,539,500/= drawn in favour of the judiciary for onward transmission to the Court.
 - b. The only issue in the judicial review matter before the High Court was the *ultra vires* nature of the actions of the 2nd and 3rd and 4th Respondents, specifically:
 - i. Whether the proceedings, orders and consequential entries of the 2nd Respondent were ultra vires the powers of the Magistrate under the *Civil Procedure Act* and Rules, *Rating Act* and *Magistrate's Court Act*?
 - ii. Whether the purported sale of the property was ultra vires the powers of the 3rd Respondent Auctioneer under the *Auctioneers Act* and Civil Procedure Act?
 - iii. Whether the registration of the purported surrender and the issue of a provisional title deed and subdivision by the 4th Respondent was *ultra vires* the powers of the Registrar under the *Registration of Titles Act*?
 - c. The only issue before this Court in this appeal is whether the learned judge of the superior court erred in law in failing to hold that the actions of the 1st, 2nd, 3rd and 4th Respondents were ultra vires and therefore amenable to judicial review.



3. The intended additional evidence relating to the payment of the purchase price by the Applicant to the 3rd Respondent auctioneer is private issue limited to them.
 4. The intended additional evidence about the Applicant's payment of the purchase price will not influence/ impact the result of the verdict of the Court in this appeal on the exercise of public power by the 14th Respondents.
 5. The additional evidence would not have had any or any important influence on the case if it was available at the time of the trial of the judicial review matter before the High Court which only dealt with the exercise of public power.
 6. The Applicant has failed to demonstrate that he could not have obtained or produced the intended additional evidence with reasonable diligence for use at the trial of the judicial review matter before the High Court.
 7. The Applicant is seeking to use the intended additional evidence to make a fresh case on appeal, remove lacunae, fill gaps in his evidence, and/ or to patch up the weak points of his case in this appeal and is actually an afterthought because:
 - a. This appeal had already been fully heard before Ouko, JA (as he then was), Musinga and Gatembu JJA, save that judgement was not delivered because the Court declared a mistrial on 17/6/2021.
 - b. The Applicant did not apply or see the need to apply to adduce the intended additional evidence during the initial hearing of the appeal before the Court declared a mistrial.
 8. In any event, the Applicant filed the Application on 11/5/2022, after an unexplained inordinate delay of one (1) year since 17/6/2021 when the Court declared a mistrial of this appeal.
 9. Allowing the application will delay the hearing of the main Appeal.
6. The Appellant also filed a replying affidavit in which it was averred that the appeal in this matter arose from the decision of the High Court (Hon. Lady Justice Omollo) dismissing the Appellant's Notice of Motion dated 18/10/2022 for judicial review in which it was sought an order of certiorari to quash the proceedings and judgement of the 2nd Respondent delivered on 12/4/2010 in Msa CMCC No. 3631 of 2009. According to the Appellant, the grounds in support of the order sought in the Notice of Motion were all related to the exercise of public power by the 2nd Respondent in relation to the proceedings in Msa CMCC No. 3631 of 2009 and the 4th Respondent in relation to the 4th Respondent's issuance of a certificate of title to the 5th Respondent/ Applicant in respect of the suit property Plot No. 496/1/MN.
 7. It was averred that the decree of the High Court resulting from the judgement in the judicial review proceedings was an order refusing to grant the public law remedy of certiorari sought by the Appellant in the motion and that the only issue before this Court is whether the said order of the High Court issued on 16/10/2018 refusing to grant the public law remedy of certiorari was merited or was erroneous.
 8. According to the Appellant, the intended additional evidence sought to be adduced by the 5th Respondent/ Applicant will not assist this Court in determining the foresaid issue of exercise of public power by public employees because the intended additional evidence relates to the payment of the consideration for the irregular purchase of the suit property Plot No. 496/1/MN by way of public auction; the said evidence relates to the payment of consideration between the 5th Respondent/



Applicant and the 3rd Respondent auctioneer, who are both private citizens yet the motion for judicial review challenged the exercise of public power by public bodies, that is the 2nd and 4th Respondents herein, and only sought a public law remedy of certiorari.

9. It was averred that as the purchaser, the Applicant had possession of the evidence of payment of the consideration all along since 1/7/2010 when he purchased the suit property Plot No. 496/1/MN by way of public auction.
10. In the Appellant's view, the Applicant has filed this Application as an afterthought because this appeal had already been fully heard before Ouko, J.A (as he then was), Musinga and Gatembu JJ.A and was only pending delivery of judgement when on 17/6/2021, the Court declared a mistrial and directed that the appeal be heard again before a fresh bench, because Ouko, J.A (as he then was) ceased to hold office after his appointment to the Supreme Court. Before the said decision, the Applicant did not apply or see the need to apply to adduce the additional evidence now sought to be adduced.
11. Based on legal advice, it was averred that the Applicant's application does not meet the threshold for allowing additional evidence on appeal and that the Appellant shall suffer prejudice if the Court allows the Applicant to adduce the additional evidence because this appeal has been pending for 4 years since 2018 when the Appellant filed the appeal and allowing the intended additional evidence will delay the expeditious hearing and determination of this Appeal. It was therefore sought that the Motion be dismissed with costs.
12. In support of the Motion, the Applicant relied on the written submissions which were highlighted by his learned counsel, Mr. Mohamed Ali, during the virtual hearing.
13. In the written submissions the Applicant relied on Rule 29(1) of the *Court of Appeal Rules*, 2010 as well as the case of *Archer & another v Archer & 2 others* (Civil Application E058 of 2021) [2022] KECA 9 (KLR) in which it was held that leave to adduce additional evidence is at the discretion of the Court. The Applicant also relied on the case of *Mzee Wanjic and 93 others v A. K. Saikwa and others* (1982-88) 1 KAR 462 on the principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence.
14. It was submitted that the present Appeal arises from the judgment of the Environment & Land Court at Mombasa pronounced by Lady Justice A. Omollo at Mombasa on 15/1/2018 in ELC Misc. Civil Application JR No. 114 of 2010 which was a judicial review matter challenging the process culminating to the decision of the 2nd Respondent in Mombasa CMCC 3631 of 2009. It was disclosed that when the Appeal came up for hearing, the Appellant while highlighting his submissions brought up the issue of payment of the proceeds from the auction made by the 5th Respondent, the Applicant herein and that the Court was interested in knowing whether the Applicant had actually paid the said purchase price.
15. However, while the parties were waiting for the judgment of the Appeal, this Court issued a Notice on 17th June 2021 declaring a mistrial and directed that the Appeal be heard again before a bench excluding Musinga, P and Judge Gatembu J.A
16. According to the Applicant, the reason why the additional evidence which the 5th Respondent seeks to adduce was not brought before the attention of the superior court or this Court was the fact that the matter was a judicial review matter, which by its nature concerns itself not with the merits of the matter but the process leading to a particular decision. Accordingly, it was contended, the additional evidence is thus material to the Appeal and would aid the Court in making a just determination.



17. On behalf of the Appellant it was submitted that governing principles on allowing additional evidence in appellate courts in Kenya was laid by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullabi Mobamad & 3 others* [2018] eKLR.
18. In the Appellant's submissions, the application does not satisfy the criteria set out above since the additional evidence that the Applicant intends to adduce in this appeal is not directly relevant to the issues in question in this appeal. This is due to the fact that the said evidence relates to the purported payment of the purchase price by the Applicant, for the purchase of the suit property by way of public auction yet the only issue in the judicial review matter before the High Court was the *ultra vires* nature of the actions of the 2nd and 3rd and 4th Respondents, specifically whether the proceedings, orders and consequential entries of the 2nd Respondent were *ultra vires* the powers of the Magistrate under the Civil Procedure Act and Rules, *Rating Act* and Magistrate's Court Act; whether the purported sale of the property was *ultra vires* the powers of the 3rd Respondent Auctioneer under the *Auctioneers Act* and Civil Procedure Act; and whether the registration of the purported surrender and the issue of a provisional title deed and subdivision by the 4th Respondent was *ultra vires* the powers of the Registrar under the Registration of Titles Act. This appeal therefore seeks to determine whether the learned judge of the superior court erred in law in failing to hold that the actions of the 1st 2nd 3rd and 4th Respondents outside their powers in the respective Acts of Parliament and therefore amenable to judicial review. However, the intended additional evidence relating to the payment of the consideration in form of purchase price by the Applicant to the 3rd Respondent auctioneer for Plot Number 496/1/ MN is private issue limited to them.
19. In the Appellant's view, the intended additional evidence about the Applicant's payment of the purchase price will not influence/ impact the result of the verdict of the Court in this appeal on the only issue of exercise of public power by the 4th Respondents.
20. It was further submitted that the additional evidence was not adduced in the superior court and would not have had any or any important influence on the case if it was available at the time of the trial of the judicial review matter before the High Court because the court only dealt with the exercise of public power. In addition, the Applicant has failed to demonstrate that he could not have obtained or produced the intended additional evidence with reasonable diligence for use at the trial of the judicial review matter before the High Court.
21. It was the Appellant's case that the Applicant is seeking to use the intended additional evidence to make a fresh case on appeal, remove lacunae, fill gaps in his evidence, and/ or to patch up the weak points of his case in this appeal and is actually an afterthought because the appeal had been heard and was only declared mistrial following the elevation of one of the Judges to the Supreme Court and the Applicant did not apply or see the need to apply to adduce the intended additional evidence during the initial hearing of the appeal before the Court declared a mistrial.
22. In any event, it was submitted, the Applicant filed the Application on 11/5/2022, after an unexplained inordinate delay of one (1) year since 7/6/2021 when the Court declared a mistrial of this appeal. The Appellant lamented that allowing the application will delay the hearing of the main Appeal.

Determination

23. I have considered the application, the affidavits in support of and in opposition to the application, the submissions made and the authorities relied upon.
24. It is not in doubt that under Rule 29 of the *Court of Appeal Rules*, 2010 (now Rule 31 of the 2022 edition of the said Rules), this Court has the power in its discretion and for sufficient reason, to take



additional evidence or direct that additional evidence be taken by the trial court. Such additional evidence if by this Court, may be taken orally or by affidavit and the Court may allow the cross examination of any deponent. Where the said evidence is to be taken by the trial court, that court shall certify such evidence to this Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence. Where, however, the evidence is taken by a commissioner, the commissioner shall certify the evidence to the Court, without any such statements of opinion. The provision provides that each party to the appeal shall be entitled to be present when the additional evidence is taken.

25. The section, however does not provide for the grounds upon which the court ought to exercise its discretion in allowing additional evidence to be taken. This has, however, is now well established by various court decisions. In *Aga Khan Hospital v Busan Munyambu* KAR 378; [1976-1985] EA 3; [1985] KLR127 this held that:

“On any appeal from the decision of a Superior Court sitting in the exercise of its original jurisdiction, the Court of Appeal has the power, in its discretion, for sufficient reason, to take additional evidence. There must be an affidavit in support of the application attesting that the evidence sought to be called was not available at the trial, is relevant to the issue in appeal, is credible, in the sense that it is capable of belief and, in all the circumstances, in the interest of justice the application should be allowed. In a civil appeal, except on grounds of fraud or surprise, generally leave will only be granted if the evidence could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible, though it need not be uncontrovertible. It will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and to refuse the application would affront common sense or a sense of justice.”

26. In *G M Combined (U) Ltd v A. K. Detergent Ltd and Others* [1999] 1 EA 84, it was held that:

“Justice must be administered according to the law and it is well settled that additional evidence is taken on appeal in exceptional circumstances and the exceptional circumstances are usually that the evidence was not available at the time of the trial or could not have been obtained using reasonable diligence and that the evidence is credible and likely to influence that result of the case.”

27. In *Joginder Auto Services Ltd v Shaffique & Another* [2001] KLR 97 this court held that:

“The power of the Court and more particularly the Court of Appeal, to receive further evidence is discretionary, which discretion is exercised on the broad principles, namely:

1. The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be apparently credible, although it need not be incontrovertible.

These are general principles but are not the only ones since the relevant rule authorising the adduction of additional evidence uses a general phrase, namely, “sufficient reason”. Surprise or fraud are grounds upon which further evidence may be admitted. Fraud is a false



representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage. What is reasonable depends on the facts and circumstances of each case as the Court, in cases of this nature, is exercising discretionary jurisdiction. The discretion has to be exercised bearing in mind, where applicable as here, that a party who has been shown to have acted in such a way as to take advantage over another should as far as possible not be allowed to take full benefit of his wrong.”

28. According to Chesoni, AJA in *Mzee Wanje & 93 Others vs. A K Saikwa* (supra) the rule:

“...gives the court power on any appeal from a decision of a Superior Court acting in the exercise of its original jurisdiction, in its discretion, for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. The rule requires the applicant to establish sufficient reason for receipt of such further evidence, and the court can exercise the discretion to receive further evidence only after sufficient reason has been shown. The principles that guide the court in deciding whether or not to receive additional evidence are

- (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial
- (ii) 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
- (iii) 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...

This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

29. The Supreme Court summarised the said grounds in *Kanyuira v Kenya Airports Authority* (Petition 7 of 2017) [2021] KESC 7 (KLR) (Civ) (8 October 2021) (Ruling) where the Court expressed itself, inter alia, as follows:

“In paragraph 79 of our Ruling in the *Mohamed Abdi Mahamud* case (supra), the court declared the circumstances under which additional evidence may be admitted, expanding three-part test in *Ladd v Marshall* [supra] as follows;

‘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 would 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 made aware of and procured the further evidence in the course of the 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 the 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 the 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.’

The court also stressed that, in exercise of its absolute discretion, it will only allow additional evidence sparingly and with abundant caution on a case-by- case basis.”

30. It is clear that the matter before the High Court which was initiated by way of judicial review application revolved around the alleged ultra vires nature of the actions of the 2nd and 3rd and 4th Respondents, specifically whether the proceedings, orders and consequential entries of the 2nd Respondent were ultra vires the powers of the Magistrate under the Civil Procedure Act and Rules, Rating Act and Magistrate's Court Act; whether the purported sale of the property was ultra vires the powers of the 3rd Respondent Auctioneer under the Auctioneers Act and Civil Procedure Act; and whether the registration of the purported surrender and the issue of a provisional title deed and subdivision by the 4th Respondent was *ultra vires* the powers of the Registrar under the Registration of Titles Act. This appeal therefore seeks to determine whether the learned judge of the superior court erred in law in failing to hold that the actions of the 1st 2nd 3rd and 4th Respondents outside their



powers in the respective Acts of Parliament and therefore amenable to judicial review. The intended additional evidence, however, relates to the payment of the consideration in form of purchase price by the Applicant to the 3rd Respondent auctioneer for Plot Number 496/1/MN. That was not the matter before the High Court and its determination is not crucial to the determination of the appeal. In fact, the Applicant has appreciated this by submitting that reason why he did not seek to adduce that evidence was because the dispute was a judicial review application which is not concerned with the merits of the case.

31. In this case, the Applicant has not expounded on the relevance of the said additional evidence to this appeal. His only contention was that in his submissions, the Appellant alluded to the said payment. In determining whether or not to allow additional evidence, the Court must determine whether the additional evidence was central to the determination of the High Court. It is not every submission made before the Court by the parties that is central to the determination. In this case, the Applicant has not satisfied me that the payment in question was central to the determination made by the High Court and therefore relevant to this appeal.
32. Apart from that, there was no evidence that the said additional evidence would 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 by the Applicant herein. To the contrary, the Appellant contends that the said evidence was at all times available. In those circumstances, the application to adduce the said evidence may only be explained on the basis of an attempt to make a fresh case in the appeal, fill up omissions or patch up the weak points in the case.
33. This appeal is before this Court as a result of a mistrial. The appeal was heard but due to the appointment of one of the Judges, Ouko, JA, as he then was, to the Supreme Court, judgement could not be delivered. It is not contended that there are any new grounds that have arisen since then or that the status of the appeal has been altered. Further, the decision declaring mistrial was made on 17th June, 2021. This application was not filed till 28th September, 2022, more than a year later. No explanation has been given to justify this delay. In *Kanyuira v Kenya Airports Authority* (supra), the Court addressed itself on the issue as follows:

“[27]. The original action was instituted in 2012, some ten years ago, while the petition before this court was brought four years ago. There is no explanation for this delay. If this so-called additional evidence was indeed crucial to the applicant’s case, why did he have to wait till the 11th hour to seek to introduce it? The bodies from which the documentary have been obtained have been in existence way before the commencement of the proceedings in the High Court, what prevented the applicant from obtaining this evidence from them in time to present the same to the trial court?”

[28]. It is our considered view that the application is an attempt by the applicant to make a fresh case in this petition or fill up omissions or patch up his case. We believe too that if leave is granted for additional evidence, the respondent will suffer prejudice.”

34. In conclusion the court stated that:

“[31]. The overarching consideration in an application for the production of additional evidence is whether it is in the interest of justice to do so, bearing in mind the broader impact of allowing such evidence to be admitted. To achieve this, and to ensure adherence to the objectives of Rule 18 aforesaid, the



court will assiduously scrutinize any piece of evidence presented as additional evidence.”

35. It is my considered view, based on the foregoing, that the application has not met the conditions precedent in the *Mohamed Abdi Mahamud* Case and for that reason the Motion dated 9th May, 2022 lacks merit and is hereby dismissed with costs to the Appellant.

36. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

