



REPUBLIC OF KENYA



**KENYA LAW**

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**Dim Properties Limited v Lamu Breeze Investments Limited & 6 others (Civil Appeal  
(Application) E013 of 2021) [2023] KECA 469 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KECA 469 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E013 OF 2021  
SG KAIRU, JA  
APRIL 28, 2023**

**BETWEEN**

**DIM PROPERTIES LIMITED ..... APPLICANT**

**AND**

**LAMU BREEZE INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**EQUITORIAL COMMERCIAL BANK LTD ..... 2<sup>ND</sup> RESPONDENT**

**CHARLES MALAKWEN ..... 3<sup>RD</sup> RESPONDENT**

**LUCAS CHIMERA KENGA ..... 4<sup>TH</sup> RESPONDENT**

**THE SENIOR REGISTRAR OF TITLES ..... 5<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI ..... 6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for leave to adduce further evidence in an appeal  
against the judgment of the Environment and Land Court at Malindi  
(Olola, J.) delivered on 22nd November 2019 in ELC Case No. 224 of 2014)*

**RULING**

1. In its application dated July 22, 2022, the appellant/applicant, Dim Properties Limited, seeks an order under rule 29(1)(b) of the [Court of Appeal Rules, 2010](#) (present rule 31(1)(b) of the Court of Appeal Rules, 2010) for leave to adduce further evidence.
2. The further evidence which the applicant seeks to adduce, based on the supporting affidavit of Ashok Doshi, a director of the applicant, comprises of copies of: a letter dated September 12, 2019 from Chepkemboi Kosgei Associates Advocates to the Chief Land Registrar; a letter dated November 1, 2019 from the Ministry of Lands and Physical Planning, Chief Land Registrar, to Chepkemboi



Kosgei Associates; a letter dated January 23, 2020 from Chepkemboi Kosgei Associates Advocates to the Chief Land Registrar; a letter dated January 31, 2020 from Chepkemboi Kosgei Associates Advocates to the Director of Surveys; a letter dated February 10, 2020 from the Ministry of Lands and Physical Planning to Chepkemboi Kosgei Associates Advocates; a letter dated February 14, 2020 from Chepkemboi Kosgei Associates Advocates to the Chief Land Registrar; a letter dated February 25, 2020 from the Ministry of Lands and Physical Planning to Chepkemboi Kosgei Associates Advocates; a letter dated February 25, 2020 from the Ministry of Lands and Physical Planning, Director of Survey to Chepkemboi Kosgei Associates Advocates; and Certificate of Postal Search as on July 19, 2022 in relation to plot No 28462 Kilifi. The correspondences relate to enquiries and responses made relating amalgamation of LR No 10159 with LR No 10160 resulting in issuance of LR No 28462 CR 50357.

3. It is the applicant's case that the said documents "proves that the applicant was the legitimate owner of the suit property-title LR No 28462 Kilifi"; that the documents confirm that possession of the property has always been with the applicant since and that the respondents will not suffer any prejudice.
4. In his replying affidavit, Bhupinder Singh Dogra, a director of the 1<sup>st</sup> respondent, Lamu Breeze Investment Limited, states that the substance of the evidence shows the status of amalgamation of LR No 28462 (original numbers 10159 and 10160) and that the applicant wishes to use this evidence to salvage its case which should not be allowed; that the attitude of the applicant during the trial was dilatory; that the applicant had more than five years before the trial court to lodge all the documents and produce them in evidence and no hardship was placed on it in that regard; the record already contains several searches which would not have been issued had the Land Registry file not been available as claimed by the applicant; that what is sought to be introduced is already on record as all the letters exhibited are supposed to introduce the official search with respect to LR 28462 Kilifi and there is nothing new and will not serve any purpose.
5. Urging the application before me on November 21, 2022, learned counsel for the applicant Mr Dan Ondego in highlighting his written submission submitted that the application is necessitated by the need to adduce new and fresh evidence which could not have been obtained earlier with exercise due diligence due to "strange unavailability of the land file with the lands office in the lands registry". It was submitted that the additional evidence is relevant and would greatly impact on the applicant's claim as it proves that the applicant was the legitimate owner of the suit property LR 28462 Kilifi.
6. In opposition to the application, learned counsel Mr Muniyithya for Lamu Breeze Investment Limited and Equatorial Commercial Bank Ltd, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, in highlighting his written submissions urged that the documents sought to be introduced are not relevant as the point of departure pertaining to the opposing claims to the suit property relate to the deed plans and the documents proposed to be introduced do not refer to the deed plans; that whereas the property sought by the applicant is situated along Mombasa/ Malindi Road, the respondent's property is a beach property and the documents sought to be introduced do not speak to that and are irrelevant.
7. Counsel submitted that during the trial, the applicant was able to produce a certificate of official search showing it was the owner of the property and its claim that the lands registry file was missing is therefore not correct. It was submitted that no proper foundation has been laid to allow adduction of the additional evidence; that the evidence is not new; and that the search sought to be introduced is already part of the record.
8. It was submitted that allowing the application will occasion the respondents prejudice; that the evidence sought to be adduced comprises of correspondence; that the land registry file was not availed and tested at the trial; and that the intention by the applicant is to fill in the gaps in evidence at the trial and will not aid this court in reaching a decision on the appeal.



9. Mr Gikandi, learned counsel for Charles Malakwen and Lukas Chimera Kenga, the 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively, in supporting the application expressed that evidence should not be kept away from the court. Miss Lutta, learned counsel holding brief for Mr Munga, learned counsel for the Registrar of Titles and the Attorney General, the 5<sup>th</sup> and 7<sup>th</sup> respondents respectively, expressed that she was leaving the matter to court. Though served with notice of hearing there was no appearance for the county government of Kilifi, the 6<sup>th</sup> respondent.
10. I have considered the application, the written and oral submissions, and the authorities cited. The principles that guide the court in applications of this nature are settled. See, among other decisions, *Wanje v Sakwa* [1984] K L R 275; *Kuwindu Rurinja Co Ltd v Kuwindu Holdings Ltd* civil appeal No 8 of 2003, Court of Appeal of Kenya; and *Diana Ketbi Kilonzo v Independent Electoral & Boundaries Commission & 2 others* [2014] eKLR. More recently, the Supreme Court of Kenya in its ruling in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others*; petition No 7 of 2018 consolidated with petition No 9 of 2018 [2018] eKLR laid down the governing principles on allowing additional evidence in appellate courts 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.”

11. The Supreme Court stressed that even with the application of those principles, applications for additional evidence are to be determined on a case-by-case basis and even then sparingly with abundant caution.
12. Guided accordingly, the relevant background as set out in the impugned judgment of the Environment and Land Court (ELC) is that in the suit, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought, among other reliefs, declarations: that the registration of Charles Malakwen and Lukas Chimera Kenga as proprietors of plot No 10159 North of Kilifi Township *vide* title CR 44095 was fraudulent, illegal and null and void; that their purported title is void and incapable of conferring any lawful interest to the appellant/applicant; that the consolidation of plot No. 10159 and 10160 is null and void; that the certificate of title No CR 8245 in favour of the 1<sup>st</sup> respondent with encumbrance entry No 5 as a charge in favour of the 2<sup>nd</sup> respondent is a valid title.
13. Also sought were orders directing the registrar of titles to rectify the register and cancel the registration of Charles Malakwen and Lukas Chimera Kenga as proprietors of plot No 10159; an order for cancellation of the appellant’s title LR No 28462 Kilifi held by the applicant; and an order directing the applicant to demolish the perimeter wall around LR No 28462 and remove all debris from LR 10159 Kilifi.
14. After a trial and having considered the evidence, the learned judge of the ELC in finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had proved their case on a balance of probabilities and in upholding their claim that the registration of 3<sup>rd</sup> and 4<sup>th</sup> respondents as proprietors of the property was fraudulent and that their transfer to the applicant was therefore invalid, the judge expressed:
  - “ 44. In a matter such as this one where the 1<sup>st</sup> and 2<sup>nd</sup> defendants are being accused of fraudulently and illegally causing themselves to be registered as the proprietors of a parcel of land for which another title already existed, it was of paramount importance for the said defendants to clearly and succinctly demonstrate to the court how they came to be the beneficiaries of that parcel of land.
  45. It is otherwise common knowledge that if the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not have a proper title to the suit property, there was nothing capable of being transferred to the 3<sup>rd</sup> defendant in terms of their interest or rights over the property. Indeed, I note that while the 3<sup>rd</sup> defendant purports to have acquired the property as aforesaid from the two defendants, a copy of the title it purportedly acquired after the purchase was not produced before this court.”
15. The judge went on to state in the judgment that the date shown for the endorsement of the grant issued to the 3<sup>rd</sup> and 4<sup>th</sup> respondents was July 15, 2008 while that for the 1<sup>st</sup> and 2<sup>nd</sup> respondents was endorsed on August 27, 1987 which means the grant issued to the 1<sup>st</sup> respondent was first in time to be registered and that in the absence of any irregularity thereon, it must be allowed to prevail.
16. In view of those findings by the learned judge which are the subject of this appeal, I am not persuaded that the further evidence proposed to be adduced is “directly relevant to the matter before the court” (to use the words of the Supreme Court).
17. It is also instructive that while the impugned judgment was delivered on November 22, 2019, with the exception of the two letters of September 12, 2019 and November 1, 2019 authored close to the date



of delivery of the judgment, the other correspondence proposed to be introduced comprises of letters written subsequent to the delivery of the judgment giving credence to the assertion by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that “the appellant wishes to use this evidence to salvage its case.” In the applicant’s words, the new evidence “proves that the applicant was the legitimate owner of the suit property-title LR No 28462 Kilifi”. However, as stated by the Supreme Court:

“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.”

18. As to the contention by the applicant that the “new and fresh evidence could not, with any due diligence, have been discovered or adduced earlier in the trial” “due to unavailability of the land file with the lands office”, I note that the letter from the Ministry of Lands and Physical Planning dated November 1, 2019 in which the Chief Land Registrar, states that “we could not reply to your above letter as we were unable to trace the file”, was a response to the inquiry by Chepkemboi Kosgei Associates three weeks earlier in their letter of September 12, 2019 seeking a history of LR No 10159. An inquiry made towards the tail end of the trial in a suit that had been pending in court since 2013. It is not clear why the advocates for the applicant then on record had to wait until September 2019 to begin to make inquiries at that time when they would have done so much earlier. As guided by the Supreme Court:

“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.”

19. Furthermore, and as submitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, several searches in respect of the suit property were produced before the trial court in effect undermining the claim of non- availability of the file in the lands office.
20. All in all, I am not persuaded that this is a proper case for granting leave for the applicant to adduce additional evidence. Accordingly, the application is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**DATED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF APRIL 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

