



**Ndungu v Macua (Environment and Land Appeal 60 of 2021)
[2024] KEELC 1219 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 60 OF 2021**

JG KEMEI, J

MARCH 7, 2024

BETWEEN

MORRIS GITAGIA NDUNGI APPLICANT

AND

ALICE WAKANYI MACUA RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion dated 5/10/2022 and filed on 6/10/2022 brought under the provisions of Order 42 Rules 27 and 28 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) seeking Orders that;
 - a. The honorable Court be pleased to grant the Appellant/Applicant leave to adduce additional evidence in the appeal as follows; green cards for title numbers; Kiambaa/Kihara/367,Kiambaa/Kihara/355,Kiambaa/Kihara/952&Kiambaa/Kihara/1200.
 - b. The honorable Court be pleased to admit the additional evidence by means of an Affidavit and the same be filed as a supplementary record of appeal.
 - c. Costs be provided for.
2. The application is premised on grounds that the failure to tender additional evidence in the trial Court was a mistake on the Appellant's former Advocates M/s Ngari & Kaburu who failed to file the same in Court; the new evidence would probably have had an important influence on the outcome of the case had it been tendered in Court and lastly that the additional evidence shows the root title of the suit property which would have shown that the suit land was not encumbered by a customary trust as found by the lower Court. The Appellant further states that the Respondent will not be prejudiced in any if the orders sought herein are granted.



3. The application is accompanied by the Supporting Affidavit of even date sworn by the Appellant, Morris Gitagia Ndungi. Reiterating the above grounds, he deponed that the realization of additional evidence was upon instruction from his new Advocates. That the evidence sought to be adduced is not voluminous thus the Respondent will not have any difficulty in responding thereto. Copies of the said additional evidence in form of green cards is annexed and marked MGN.
4. The administrator of the Respondent's estate David Ngugi Maina filed his Replying Affidavit sworn on 17/10/2022. He averred that the application is frivolous and a gross abuse of the Court process noting that the Appellant filed his suit on 13/9/2018 and therefore had ample time to avail the documents during trial. That accordingly, the Appellant cannot seek to adduce the purported additional evidence which was in his possession since 2018. That the said evidence will not be subjected to cross-examination and the matter having conclusively determined by a Court of competent jurisdiction, the instant application is an attempt to prosecute an appeal and a review simultaneously. That the additional evidence clearly dated May and June 2022 reveal that they were obtained post Judgement.
5. The deponed further deposed that additional evidence was always in the Appellant's possession and would have adduced it upon reasonable diligence. That a case belongs to a litigant expected to pursue its prosecution and not his Advocate. He urged the Court to disallow the application as he stands to suffer prejudice by way of denial the fruits of his Judgement.
6. On 11/10/2022 directions were taken and parties agreed to canvass the motion by way of written submissions.
7. The firm of Ayub Muhuni & Co. Advocates filed submissions dated 13/12/2022 on behalf of the Appellant.
8. A singular issue was drawn for determination to wit; whether the Applicant has established a case for leave to adduce additional evidence. The Applicant relied on the case of *Attorney General v Torino Enterprises Limited* [2019] eKLR where the Court outlined the factors to consider in such an application namely an Applicant must show that the evidence could not have been obtained by reasonable diligence before and during the hearing; the new evidence would probably influence the result of the case and lastly that the evidence is credible, though it need not be incontrovertible. Further reliance was placed on the SC decision in *Mohamed Abdi Mahamud Vs Ahmed Abdullabi Mobamad & 3 others* [2018] eKLR which set the guidelines for admission of additional evidence in appellate Courts.
9. The Appellant submitted that the new evidence is credible as it emanates from the official government records in the Ministry of Lands and will show the history of the subdivisions and combinations of the suit land to oust a claim for customary land. That the Respondent's claim ought to have been founded on Kiambaa/Kihara LR.1200 and Kiambaa/Kihara LR.1246 which belonged to Ndungi Kiroge, the father to the parties herein hence ancestral land.
10. In rebuttal, the Respondent through the firm of Mosongo & Co. Advocates filed submissions dated 17/11/2022.
11. Similarly, she submitted that the sole issue for determination was whether the Appellant is entitled to the orders sought. The answer was in the negative arguing that the Appellant is making afresh case, filling up omissions and patching up weak points of his case. That the Appellant had ample time to tender his evidence since filing his suit in 2018 but failed to do so. That the copies of green cards certified on 26/5/2022, 10/6/2022 and 27/6/2022 were obtained after Judgement yet he could have tendered it upon conducting due diligence. That the Appellant has not established exceptional circumstances



and sufficient reason for adduction of additional evidence to be adduced. Reliance was placed on the cases of *Mahamud supra*, *Ladd Vs. Marshall* (1954) 1WLR 1489, *Mzee Wanje & 93 Others Vs. A.K Saikwa* (1982-88) 1KAR 462 and *Safe Cargo Limited Vs. Embakasi Properties Limited & 2 Others* (2019)eKLR.

12. The key issue for determination is whether the Appellant has satisfied the criteria for adducing additional evidence on appeal.
13. The guiding law in an application of this nature is anchored in Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules*, 2010.
14. Section 78 of the *Civil Procedure Act* states;
 - (1) Subject to 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.
 2. Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.
15. Additionally Order 42 Rule 27, 28 and 29 *Civil Procedure Rules* provide;
 - “27. Production of additional evidence in appellate Court [Order 42, rule 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. Mode of taking additional evidence [Order 42, rule 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. Limits to be defined and recorded [Order 42, rule 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.”

16. A reading of Rule 27 above indicates that the adduction of additional evidence on appeal is not automatic. Inter alia the appellate Court has to be satisfied that the trial Court refused to admit such evidence which ought to have been admitted. As rightly submitted by the parties, the Supreme Court in the case of *Mohammed Abdi Mohamud Vs. Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR laid down the criteria to be followed by appellate Courts in determining whether or not to allow additional evidence on appeal as follows;

- “79. ... 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.”

17. In the instant case, the Appellant urged the Court to allow him adduce additional evidence that his erstwhile Advocates M/s Ngari Kaburu Advocates failed to adduce at trial. That the evidence is credible as it would alter the outcome of the appeal before Court. The Respondent opposes the application and terms a fresh case on appeal intended to patch up his gaps in the trial case calculated to deny him fruits of his Judgement. It was further pointed out that the purported evidence was obtained post-Judgement and therefore no due diligence was taken to tender the same during trial.
18. Applying the criteria in the case of *Mahamud* (supra), a mistake or omission of counsel when conducting a case does not amount to a precondition to allow additional evidence. If that was to be the case, then the appellate Courts would be swamped with numerous similar cases yet there is a mechanism in law for an Advocate’s failure to deliver on his mandate to his client as expected.
19. It is trite that a case belongs to a litigant and it is not enough to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. See the Court of Appeal decision in *Habo Agencies Limited Vs. Wilfred Odhiambo Musingo* [2015] eKLR. Further the same Court in the case of *Beltrami Vs. Mtwapa Bay Investments Ltd* (Civil Appeal E045 of 2021) [2024] KECA 78 (KLR) emphasized that mistake of counsel does not avail excuses to a litigant whose hands are soiled with procedural transgressions.
20. Besides the Appellant has not demonstrated that the additional evidence was not within his knowledge and/or could not produce it had he reasonably and diligently sought it. This is because a perusal of the copies of green card annexed as MGN in particular for parcels 952 and 1200 show entries of the Appellant’s name from way back on 15/8/1958 and 10/9/1981 respectively. The Appellant cannot therefore feign ignorance of such critical information.
21. The Respondent’s averment that the Appellant is attempting to fill in gaps and weak points of the trial Court case by adducing green cards which are kept in a public office case remain uncontroverted. He further averred that the application is only meant to frustrate enjoyment of the fruits of his Judgement.
22. Recently the Supreme Court in the case of *Barclays Bank of Kenya Limited (Now Absa Kenya PLC) Vs. Commissioner of Domestic Taxes (Large Taxpayer’s Office); Kenya Bankers Association & another (Interested Parties)* (Petition (Application) 12 (E014) of 2022) [2023] KESC 91 (KLR) followed its



earlier guidelines in the case of Mahamud (supra) and dismissed an application to adduce additional evidence in form of information in the public domain. The Court *inter alia* held;

“Had the Applicant’s Advocates on record exercised due diligence and taken time to peruse the Court’s record, they would have spared this Court’s judicial time as well as their client’s and other parties’ time and resources.”

23. Relying on the above decision and totality of the material before Court, I find that the application is bereft of merit.
24. It is for dismissal with costs to the Respondent.
25. Orders accordingly

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muhuni for the Appellant

Ms. Odhiambo for the Respondent

Court Assistants – Phyllis/Oliver

