Afrison Export Limited & another v National Land Commission & 9 others (Civil Appeal (Application) 303 of 2019) [2023] KECA 1442 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1442 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 303 OF 2019

DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

AFRISON EXPORT LIMITED ..... 1ST APPLICANT

HUELANDS LIMITED ..... 2ND APPLICANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI ..... 2ND RESPONDENT

DIRECTOR OF SURVEYS ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

CABINET SECRETARY OF EDUCATION SCIENCE AND TECHNOLOGY ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 7TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 8TH RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 9TH RESPONDENT

PATRICK THOITHI KANYUIRA ..... 10TH RESPONDENT

(An application to adduce additional evidence in the pending appeal against the Judgment of the Environment and Land Court (Obaga, J.) dated on 28th June 2019 in Nairobi ELC Reference No. 1 of 2018)

RULING

1. The applicants are seeking leave of this Court to amend the memorandum of appeal as well as to adduce further and additional evidence in support of their appeal.

2. A brief background to this application is that the National Land Commission, the 1st respondent, filed a Reference before the Environment and Land Court (ELC) under Article 162(2) (b) of the *Constitution* and sections 127 and 128 of the *Land Act*, seeking a determination of various issues, including the construction, validity and effect of title documents with respect to Lr 7879/4 ("suit property"); whether the compulsory acquisition of the suit property met the constitutional threshold of public purpose; whether there had been loss of public funds; and to whom compensation was payable.

3. The reference was heard by a three-judge bench (Obaga, Bor & Eboso, JJ.). In the judgment delivered on 28th June 2019, the learned Judges found, *inter alia*, that the Ruaraka High School and Drive-in Primary School ("the schools") were already established in the portion of the suit property which was being acquired by the 1st respondent; that the portion on which the schools sit had been surrendered for public purposes; that the compulsory acquisition of the portion on which the schools sit did not meet the threshold of public purpose and should not have been undertaken; and, that the 1st respondent misled the Ministry of Education into undertaking the compulsory acquisition exercise which was unnecessary, leading to loss of public funds.

4. In addition, that a search on any title issued by the Lands office should be conclusive evidence of proprietorship, but may not necessarily be a true reflection of the correct position. In the case of the suit property, there were two search certificates with contradictory results. That since the searches were generated by the Registrar of Titles and the 1st respondent works closely with the Ministry of Lands, the 1st respondent should have gone a step further to ascertain the true status of the title to the suit property. Such due diligence included the final survey and determination of the acreage, boundaries and ownership of the suit property before the compulsory acquisition. In the end, the reference was dismissed.

5. The applicants were dissatisfied with the judgment of the ELC and lodged the instant appeal, whereupon they filed the application under consideration.

6. The application is by way of Notice of Motion dated October 31, 2022, brought pursuant to several provisions of the law, but of concern to us is rule 29 (1)(b) of the *Court of Appeal Rules*. The application is supported by an affidavit sworn on the same date by Francis Mburu Mungai, the applicant's Managing Director.

7. From the grounds and affidavit in support of the application, the following emerges: that the evidence sought to be adduced could not have been discovered even with due diligence because it relates to events that transpired after the delivery of judgment in the ELC. That the main issues for determination in the appeal include who owns the 13.5 acres of the suit property; when the applicants acquired and occupied the suit property, and if they legally acquired it; whether it was public land or private, and if it was private, whether it was legally surrendered by the applicants for public use; whether the conditionally approved subdivision plan of 1984 was fully implemented by the applicants or it was cancelled; or whether it automatically lapsed after the year 1984 subject to section 19 of the *Land Planning Act*; and lastly, whether the illegal structures erected by third parties (squatters), including the schools, complied with the conditional sub-divisional plan of 1984. The applicants state that

they intend to rely on the comprehensive report by the then Cabinet Secretary, Ministry of Lands and Physical Planning, dated April 17, 2018, the Departmental Committee Report on Lands of the National Assembly and the Committee of the Senate dated July 3, 2019.

8. The applicants state that they also intend to adduce the new evidence that was filed in the case of *Okiya Omtata & another v Afrison Export Import Limited & another*, Petition 1488 of 2016. They take the view that the evidence is relevant to the issues in the appeal and the respondents will have no difficulty in responding to the same, and no injustice or prejudice will be occasioned to them by its admission. They have annexed to the affidavit in support of the application copies of the several documents they seek to adduce as additional evidence in the appeal.

9. The 7th respondent filed a replying affidavit sworn by Alfred Joel Mwendwa, a member of the team that investigated the allegations that gave rise to the reference filed in the ELC. He states that none of the evidence sought to be adduced, including the pleadings and submissions in matters filed by or against the applicants in relation to various portions of the 96 acres of the suit property, is new. He further avers that even the judgments, findings and recommendations by Parliamentary Committees, title documents, searches and correspondences, among others, sought to be adduced as additional evidence predate the reference. It is the 7th respondent's position that the petition and the amended and further amended petition referred to by the applicants did not relate to the 13.5 acres occupied by the schools but rather the said petition seeks compensation for the portion extensively developed by squatters allegedly sanctioned by the 2nd respondent. This is the essence of HCCC No. 617 of 2012 *Afrison Export Import Limited & Another v Attorney General*. As for *Okiya Omtata Okoiti & Anor v Afrison Export Import Limited & 5 Others and 6 Interested parties*, ELC Pet. No. 1488 of 2016, the same relates to a different issue in which the prayer is for prohibition of payments to the applicants for a portion of the GSU land compulsorily acquired for Kenya Urban Roads Authority (KURA). That as such, the two cases are totally different from the reference that has resulted in this appeal. That most of the annexures in the application sought to be introduced as additional evidence are the same annexures that were introduced by the applicants in their replying affidavit in response to the reference and which the trial court considered in its determination. As such, nearly all the documents sought to be introduced as new evidence have always been available.

10. The 7th respondent further contended that some of the annexures are minutes of meetings of the National Land Commission. This is a public body whose minutes and reports are available to the public on request and there is no justification given by the applicants for not having produced them before the ELC. That the reports by the Departmental Committee on Lands of the National Assembly, the Sessional Committee on County Public Accounts and Investment of the Senate; Submissions of the Cabinet Secretary, Ministry of Lands and the Governor, Nairobi City County before the Departmental Committee on Lands of the National Assembly were the same documents that were filed in court by the parties in the reference.

11. The other parties did not file their responses to the motion. Instead, they filed written submissions. The application came up for hearing on October 25, 2023 on a virtual platform where Mr. Gaita, learned counsel, appeared for the 1st applicant, Mr. King'ara, learned counsel appeared for the 2nd applicant, Mr. Odhiambo Isaac, learned counsel was present for the 2nd respondent, Ms. Kibogy, learned counsel was for the 7th respondent, and Mr. Kinyanjui, learned counsel appeared for the 9th respondent. When the Court pointed out the omnibus nature of the application, the parties elected to pursue the prayer for adduction of additional evidence only.

12. Mr. King'ara indicated that Mr. Gaita would submit on the application, and he would reply after the respondents had responded to the application.

13. Mr. Gaita, and whose position was supported by Mr. King'ara, relied on various affidavits and written submissions that he had filed. While orally highlighting his submissions, counsel stated that the current application had been necessitated by the fact that in the course of preparing for the hearing of this appeal, it turned out that there was need to amend the memorandum of appeal and also seek leave to adduce additional evidence that was not available and could not have been adduced by the applicants at the time the reference was heard in the ELC.

14. Counsel submitted that the principles regarding adduction of further evidence are settled and relied on the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, for the proposition that the most important consideration is that the new evidence is relevant and could not have been obtained through the exercise of due diligence. He further submitted that they had demonstrated that the new evidence touches on the issue of surrender of the suit property and allocation of the same to the schools. It was submitted that the new evidence is pertinent to the determination of the issues in the appeal. Some of the new evidence was obtained after the Senate hearings that came after the judgment, while some of the evidence came out in subsequent cases that were filed after the judgment, yet other evidence was obtained from their advocates who were sick at the time and the evidence could therefore not have been obtained. He submitted that this was a proper case for the Court to exercise its discretion in the interest of justice and allow the application.

15. In opposing the application, Mr. Odhiambo wholly relied on his submissions dated February 4, 2023 and stated that the Supreme Court had set the grounds upon which an application for adduction of further evidence must be based on in the case of *Mohamed Abdi Mohammud* (*supra*). That even with the set guidelines, the court should only allow such an application sparingly and with abundant caution, and that the guiding principles set in the above case should not be looked at disjunctively but conjunctively, so that if one of the principles is found wanting, the court ought not to allow the application. In this case, the evidence sought to be adduced was not new as it existed even during the hearing of the reference in the ELC. If the documents were of evidential value, they should have been introduced through an application before the judgment was rendered by the ELC, which the applicants did not do.

16. In opposing the application, Ms. Kibogy relied on the replying affidavit sworn on January 23, 2023 by Alfred Joel Mwendwa, an investigator with the 7th respondent and written submissions. She submitted that the issue in contestation was the surrender of the suit property for purposes of public utility, which in this case were the schools. While also relying on the case of *Mohamed Abdi Mohammud* (*supra*), she submitted that the Supreme Court had set the threshold on what should be considered in allowing an application for adduction of additional evidence. That the documents intended to be produced were voluminous, making it difficult for the respondents to respond effectively. Secondly, none of the evidence sought to be adduced is new as some of the annexures are already part of the record and they were annexed by the applicants themselves and some of the respondents during the hearing in the ELC. That another substantial set of annexures have no relevance at all to the appeal as the subject matter in the appeal is the question of surrender of the 13.5 acres out of the 96 acres of the suit property that was registered in the name of the applicants. The other portions of land are subject to other proceedings which are not relevant to the question of surrender.

17. Counsel submitted further that the documents sought to be produced as new evidence could have been obtained and presented during the trial with reasonable diligence by the applicants. That in any event, all the documents pre-date the reference and the delivery of the judgment. Finally, counsel submitted that the findings of the Committees of the National Assembly and the Senate are decisions of those Committees and they cannot be deemed as evidence on the basis that they were at variance with the findings of the trial court. In any case, the same evidence that was placed before those committees

was the same evidence that the ELC had the opportunity to interrogate. She therefore prayed that the application be dismissed as its only aim was to convolute the issues for determination in this appeal.

18. Mr. Kinyanjui, learned counsel for the 9th respondent associated himself with the submissions of the 7th respondent. He also maintained that the applicants should have filed a formal application for review in the trial court, that there was no new evidence being presented by the applicants, and there had been substantial delay in presenting the application.

19. The reply by Mr. King'ara merely reiterated and reinforced the submissions by Mr. Gaita.

20. We have considered the application, the responses, the respective submissions, the authorities cited and the law.

The relevant part of rule 29 of the *Court of Appeal Rules* provides as follows:

"29.

(1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power:

a. to re-appraise the evidence and to draw inferences of fact; and

b. in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

(2) When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent...."

21. In the case of *Mohamed Abdi Mahamud* (*supra*), the Supreme Court considered jurisprudence from various jurisdictions on the question of adduction of additional evidence on appeal and eventually collated several principles. The Court then delivered itself as follows:

> "(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
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> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
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> 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;
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> 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".

22. Earlier on in the case of *Mzee Wanjie and 93 others v A K. Saikwa & Others* [1984] eKLR, this Court cautioned that the power to receive further evidence should be exercised very sparingly and great caution should be exercised in admitting fresh evidence. The Court stated:

> " 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 authorize 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 parties to make out a fresh case or to improve their case by calling for 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."

23. In the present application, the applicants have averred that the documents they intend to adduce, which have already been set out elsewhere in this ruling, were not in their custody or reach during the hearing and determination of the reference in the ELC. The respondents have objected to the application and urged this Court to dismiss the same on various grounds already adverted to again elsewhere.

24. We have considered the additional evidence sought to be adduced by the applicants and note that it consists of correspondence and documents which are already part of the record of appeal. Further, some of the documents sought to be adduced are in the public domain or are public documents

which are from the National Assembly and the Senate, and which reports are not conclusive. They are therefore of little evidential and or probative value if at all.

25. Further, the documents are voluminous and even consist of pending cases in courts, while others are judgments of the courts. Indeed, some of them do not even relate to the issue that was in question before the ELC. We are further persuaded that had the applicants acted with due diligence, they would have been able to get most of the evidence now sought to be adduced, save the documents that came after the judgment. It is also our view, having considered the evidence sought to be adduced, that the applicants are really seeking to reopen, re-argue and or fill in the gaps or lacunae in their evidence that was before the ELC under the guise of the instant application. We do not see how the matters that have arisen post-judgment can form a basis for this application. In our view, if the application was to be allowed on that basis, it will be to assail the hallowed doctrine that there should be an end to litigation.

26. Given those considerations, we are not persuaded that the applicants have demonstrated that the additional evidence sought to be adduced would have an important impact on the result of the appeal. The appeal can effectively be determined on the evidence, both oral and documentary, already in the record. Accordingly, the application is bereft of merit and is dismissed with costs to the 2nd, 7th and 9th respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR