



**Archer & another v Archer & 2 others (Civil Application
E058 of 2021) [2022] KECA 9 (KLR) (21 January 2022) (Ruling)**

Neutral citation: [2022] KECA 9 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E058 OF 2021
P NYAMWEYA, SG KAIRU & JW LESSIT, JJA
JANUARY 21, 2022**

BETWEEN

JAMES ARCHER 1ST APPLICANT

JOANNA TRENT 2ND APPLICANT

AND

INGER CHRISTINE ARCHER 1ST RESPONDENT

ANNALISE ARCHER CLARK 2ND RESPONDENT

HELLEN KAY HARTLEY 3RD RESPONDENT

(An application brought under Rule 29 (1) (b) of the Court of Appeal Rules, 2010 to adduce additional evidence in the pending appeal against the Judgment of the High Court (Justice C.K. Yano) dated on 26th November 2019) in (Mombasa ELC Suit 345 of 2017)

RULING

1. The Appellants herein are seeking leave to file additional evidence in support of their appeal by way of Notice of Motion dated 12th August 2021, which is brought pursuant to Rule 29 (1)(b) of the *Court of Appeal Rules*, and supported by an affidavit sworn on the same date by Timothy I. Bryant, the Appellants' advocate. The grounds for their application are that the evidence sought to be adduced could not have been with any due diligence discovered or adduced earlier because it relates to events that transpired after the conclusion of the Appellants' case and delivery of judgment in the trial Court.
2. The Appellants averred that the evidence is of relevance to the issues in the appeal, the Respondents will have no difficulty in responding to the same, and there will be no injustice or prejudice caused by its admission. They annexed copies of the documents they seek to be admitted, which are correspondence relating to land parcels Kwale/Diani Beach Block/806, 807 and 808 and Kwale/Diani Beach Blocks/1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752; and the absolute and leasehold



cards (green and white cards) for land parcels Kwale/Diani Beach Blocks/1745, 1746, 1747, 1748, 1749, 1750, 1751, and 1752.

3. The Respondents filed a replying affidavit sworn by the 3rd Respondent on 22nd October 2021, wherein they detailed the background to the proceedings in the trial Court. In summary, they stated that they inherited the suit property from their deceased father which was firstly subdivided to three properties, namely Kwale/Diani Beach Block/806, 807 and 808 and further subdivided into eight parcels of land into the parcels of land now known as Kwale/Diani Beach Blocks/1745, 1746, 1747, 1748, 1749, 1750, 1751, and 1752.
4. Further, that the said subdivisions were substantially completed in year 2011, well before the Appellants filing of the suit in the trial Court and before the status quo orders by consent entered into therein by the parties on 28th June 2012, which only restrained the Respondents from transferring their interests in the said properties pending the hearing and determination of the suit, and did not in any way restrain them from proceeding with further subdivision.
5. In addition, that the leases for each of the resultant subdivision parcels of land, the registration of the resultant subdivision parcels of at the Lands Office and the issuance of respective Certificates of Lease was completed in the year 2018 during the course of the proceedings in the trial court. The Respondents contended that the Appellants/ Applicants claim is for recovery of three quarters (3/4) of the suit properties on the basis of a purported resulting trust interest, and the documents sought to be adduced by the Applicants as additional evidence have no bearing whatsoever on the question as to whether the Applicants can demonstrate a resulting or any trust interest in the suit properties.
6. Mr. Timothy Bryant, the learned counsel for the Appellants, and Mr. Austin Omondi, learned counsel for the Respondents, highlighted their written submissions dated 23rd August 2021 and 30th October 2021 respectively during the hearing of the application on 2nd November 2021.
7. The application is grounded on Rule 29 of the Court of Appeal Rules which provides as follows:
 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.
 3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court, without any such statements of opinion.
 4. The parties to the appeal shall be entitled to be present when such additional evidence is taken.
8. Leave to adduce additional evidence is therefore at the discretion of the Court, and the principles applicable in the exercise of the Court's discretion under Rule 29 were summarized by Chesoni, Ag.



JA. (as he then was) in *Mzee Wanjia and 93 others vs A. K. Saikwa and others (1982- 88) 1 KAR 462* as follows:

—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 are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall [1954] 1 WLR 1489* at 1491 and those principles are:

1. 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 result 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.||

9. The Supreme Court of Kenya has also set out guidelines for the admission of additional evidence before appellate courts in Hon. [*Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 others \[2018\] eKLR*](#), as follows:

—[79] ... (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.
10. The Supreme Court in addition stressed that additional evidence at appellate level should be allowed on a case-by-case basis and even then — sparingly with abundant caution.
 11. Mr. Bryant, while citing the above decisions among others, submitted that at the time of the hearing in the trial Court, the Appellants had no reason to suspect that the title numbers to the suit property had been changed, as there were consent orders in place during the pendency of the hearing of the suit in the trial court which led them to believe that there would be no changes to the suit property. Further, that the new evidence sought to be adduced are the new title numbers, which have a bearing on the final orders sought at the appeal, and is relevant because without reference to the new title numbers, the Court of Appeal orders, if granted in favour of the Appellants, will be an exercise in futility.
 12. The learned counsel for the Appellants termed the additional evidence as credible, for reasons that it consists of official public documents which originate from public offices having proper custody thereof, and is not intended to fill gaps in the Appellants’ pending appeal. Lastly, that the evidence has direct bearing on the main issue in the pending appeal which is whether the Appellants have a beneficial interest in the right numbered titles comprising the suit property.
 13. Mr. Omondi on his part reiterated the averments made in the Respondents’ replying affidavit to submit that following the issuance of the respective lease documents and the corresponding certificates of lease in respect of the subdivided plots, the Respondents did not, in compliance with the status quo orders of 28th June 2012, in any way deal with their respective interests in the said plots until after the suit at the trial Court had been determined by way of dismissal. Therefore, that the additional evidence sought to be adduced is not material or useful, and has no probative value on the question as to whether the Appellants have an interest in the suit properties by way of trust as alleged, or at all. For the same reason, there is no need for this Court to evaluate their proposed adduction as evidence on the basis of volume or difficulty as has been contended by the Applicants.
 14. The learned counsel for the Respondents cited the decision in *Wanjie & Others vs Sakwa & Others* (supra) that Rule 29 of the Court of Appeal Rules 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. He thus submitted that the instant application for leave to adduce additional evidence is largely an afterthought whose primary aim was to create an opportunity for the Appellants to cast aspersions and poison the mind of this Court against the Respondents.
 15. We have considered the items of additional evidence sought to be adduced by the Appellants in the present application, and note that they consist of correspondence and documents relating to the subdivisions which were undertaken by the Respondents over the suit properties. The dates of some of the correspondence are after delivery of the judgment in the trial Court on 27th November 2019, and the obvious risk in admitting the said correspondence is the introduction of fresh evidence on



appeal. In our view, the only relevant documents on the issue before the trial Court as to whether the Appellants have an interest in the suit properties, are the documents as to the current status and title of the suit properties. This is solely for the purposes of clarity and propriety in any orders that this Court may eventually make in relation to the said properties.

16. In addition, arising from the explanation given by the Respondents, it is evident that the change in the status and titles to the suit properties took place during the pendency of the suit in the trial Court, and the said documents as to title could not have been available during the trial, even with the Appellants exercise of due diligence. Lastly, since the Respondents do not dispute the subdivision and current titles to the suit property, they will not be prejudiced by the admission of the said documents for record purposes only. It is also notable that the said documents are official documents that originate from the relevant lands Registry, and to this extent credible.
17. We accordingly find merit in the Appellants' Notice of Motion dated 12th August 2021 only to the extent of the following orders:
 1. Leave be and is hereby granted to the Appellants to adduce and file additional evidence limited to the following documents:
 - i. Absolute card for Kwale/Diani Beach Block/1752 measuring 2.6320 Ha [Part A, B and C];
 - ii. Leasehold card for Kwale/Diani Beach Block/1752 measuring 2.6320 Acres [Part A, B and C];
 - iii. Absolute Card for Kwale/Diani Beach Block/1751 measuring 0.2926 Ha [Part. A, B and C];
 - iv. Leasehold Card for Kwale/Diani Beach Block /1751 measuring 0.2926 Acres [Part A, B and C];
 - v. Absolute card for Kwale/Diani Beach Block/1750 measuring 0.3317 Ha [Part A, B and C];
 - vi. Leasehold card for Kwale/Diani Beach Block/1750 measuring 0.3317 Acres [Part A, Band C];
 - vii. Absolute card for Kwale/Diani Beach Block/1749 measuring 0.5322 Ha [Part A, B and C];
 - viii. Leasehold card for Kwale/Diani Beach Block/1749 measuring 0.5322 Acres [Part A, Band C];
 - ix. Absolute card for Kwale/Diani Beach Block/1748 measuring 0.1427 Ha [Part A, B and C];
 - x. Leasehold card for Kwale/Diani Beach Block/1748 measuring 0.1427 Acres [Part A, B and C];
 - xi. Absolute Card for Kwale/Diani Beach Block/1747 measuring 0.1722 Ha [Part A. B and C];
 - xii. Leasehold card for Kwale/Diani Beach Block/1747 measuring 0.1722 Acres [Part A, Band C];



- xiii. Absolute card for Kwale/Diani Beach Block/1746 measuring 0.6277 Ha [Part A, B and C];
 - xiv. Leasehold card for Kwale/Diani Beach Block/1746 measuring 0.6277 Acres (Part A and B);
 - xv. Absolute card for Kwale/Diani Beach Block/1745 measuring 0.4770 Ha [Part A and B];
 - xvi. Leasehold card for Kwale/Diani Beach Block/1745 measuring 0.4470 Acres [Part A, Band C]; and
 - xvii. Lease dated 27th November 2019 between the Respondents to Hannah Wambui Gatundu.
2. The additional evidence shall be adduced by means of a Supplementary Record of Appeal to be filed and served within 21 days of today's date.
 3. The costs of this application abide by the outcome of the appeal.

18. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

