Garissa Maize Millers Limited v Attorney General & 2 others (Civil Appeal (Application) 160 of 2016) [2021] KECA 197 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KECA 197 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 160 OF 2016

W KARANJA, DK MUSINGA & SG KAIRU, JJA

NOVEMBER 5, 2021

BETWEEN

GARISSA MAIZE MILLERS LIMITED ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTER OF STATE FOR DEFENCE ..... 2ND RESPONDENT

CHIEF OF DEFENCE FORCES ..... 3RD RESPONDENT

(An Application for Leave to introduce additional evidence in Civil Appeal No. 160 of 2016 being an Appeal from the Judgment and Decree of the High Court of Kenya at Garissa (Dulu, J.) delivered on 9th March, 2016 in H.C. Civil Suit No. 12 of 2013)

RULING

1. Vide a plaint dated 17th May, 2013 Garissa Maize Millers Limited (the applicant) sought from the court as against the respondents jointly and severally orders, inter alia, as follows: a declaration that several acts of the Kenya Defence Forces committed against the applicant's property were illegal; a declaration that the applicant had suffered loss as a result of the destruction of its property; payment of Kshs 407,172,000 plus interest at court rates from the date of filing suit until judgment was entered and costs of the suit.

2. In a judgment delivered on 27th July, 2016, the High Court at Garissa (Dulu, J.), found that the applicant had not proved that the burning of the premises and other items was done by the Kenya Defence Forces, thus the prayer could not be granted. On the prayer for a declaration that the applicant suffered loss as a result of destruction of properties, the court found that the applicant had failed to prove that the items were destroyed by the Kenya Defence Forces.

3. On the claim for an award of Kshs 407,172,000 plus interest at court rates from the date of filing suit until date of judgment, the court found that this being a claim for special damages the applicant had failed to prove the same and the prayer failed. The entire suit was therefore dismissed but with an order that each party bears its own costs.

4. Aggrieved by the said judgment, the appellant filed an appeal before this Court but in the meantime also filed the application dated 5th February, 2020 under Rule 29(1)b of the *Court of Appeal Rules* (the Rules) seeking orders as follows;

    a. That the Honourable Court be pleased to grant Leave to the Appellant to introduce additional evidence, namely forensic report dated 28th January, audited accounts, bill of quantities, architectural drawings and invoices;

    b. That upon granting prayer 2 herein above, this Honourable Court be pleased to order the evidence annexed to the Supporting Affidavit sworn by Hassan Ibrahim Ahamed filed herewith, namely forensic report dated 28th January 2013, audited accounts, bill of quantities, architectural drawings and invoices be deemed as part of the record;

    c. That in the alternative to prayers 2 and 3, this Honourable Court be pleased to order that the matter be referred to the High Court for re-trial on additional evidence, namely forensic report dated January 2013, audited accounts, bill of quantities, architectural drawings and invoices to be deemed as part of the record;

    d. Costs of and incidental to this application abide the result of Civil Appeal.

5. The motion is predicated on some 11 grounds on its face which are buttressed by the affidavit in support sworn by Hassan Ibrahim Ahmed, a director of the applicant on 5th February, 2020. The averments in the supporting affidavit include that the premises were burnt down and the information they wish to adduce is to only show the loss and what they would incur if the same structure was to be reconstructed; that no party would be prejudiced if the additional evidence is allowed to be introduced and these documents are material to the determination of the issues raised in the appeal; that it is imperative and material to the determination of the dispute between the parties herein on its merits and to allow justice to not only be done but to be seen to be done for them to be allowed to introduce evidence to show the extent of damage and the cost implications they shall incur to construct the same property that was burnt down.

6. The applicant reiterates its grounds explaining further that the said evidence relates to the transactions before the building and all the materials were burnt down by the KDF Officers and the said evidence was inadvertently not placed before the trial court; that had the information been available at the time the suit was being heard and determined, the same would have inevitably formed part of the applicant's documents before the High Court.

7. The respondents have not filed any replying affidavits or grounds of opposition in response to the application but oppose the application through written submissions confined to points of law.

8. In its written submissions, the applicant states that the principles and jurisprudence relating to filing of additional evidence before the Court of Appeal are well settled and cites the case of *Attorney General vs Torino Enterprises Ltd* (2019) eKLR. The applicant explains that the evidence tobe adduced includes a forensic report dated 28th January, 2013, audited accounts, bill of quantities, architectural drawings and quotations.

9. According to the applicant, the evidence relates to the quantum of loss and is material to the issues for determination raised in the Record of appeal filed in Civil Appeal Number 160 of 2016. That given that the gist of the applicant's claim in the High Court was mainly for the loss of property and monies, they submit that the evidence to be adduced through the instant application is of utmost material importance to the matter before the Honourable Court.

10. The applicant submits further that pursuant to Rules 29(1)b, 42(1) and 43 of the Rules the Honourable Court can exercise its discretion and take additional evidence but the party seeking the Court's intervention must show sufficient reason. They maintain that the appellant has satisfied this element and that the evidence sought to be introduced before the Honourable Court only became known to the applicant recently and they brought the instant application before the Court at the earliest opportunity.

11. The applicant's position is that the evidence they seek to adduce satisfies the principles outlined in the case of *Mzee Wanjie & 93 Others vs Saikwa & Others* (1982-88) 1KAR, 462 as affirmed in the case of *Mount Elgon Beach Properties Ltd vs Harrison Shikaru Mwanongo & Another* (2019) eKLR which are; the applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial, 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 lastly, the evidence must be apparently credible, although it need not be incontrovertible.

12. In conclusion, the applicant urges that it is in the interest of justice and fairness that the instant application be allowed as prayed so as to enable the Court to determine the issues raised in the Record of appeal on its merits; that if this Court deems fit to allow the appeal without having a chance to determine the issues before it without the full benefit of all material facts and circumstances obtaining, serious injustice and prejudice will be occasioned on the appellant/applicant and that conversely, no prejudice will be occasioned to the respondents if the Court allows the application.

13. They point out that the respondent has failed to file a response to the application and thus the application is unopposed and throw their weight behind the case of *Gideon Sitelu Konchellah vs. Julius Lekakeny Ole Sunkuli & 2 Others* (2018) eKLR which further highlighted the importance of filing a response to an application.

14. Citing the Supreme Court decision in *Mohamed Abdi Muhamud vs Ahamed Abdulahi Mohamad & 3 Others* (2018) eKLR, the respondentssubmit that the instant application has not attained the legal threshold required for the court to grant the orders sought as the applicant has not demonstrated that the evidence they intend to adduce was not available to them at any time before the delivery of the judgement by the trial court.

15. They point out that in the supporting affidavit sworn by Hassan Ibrahim Ahmed the deponent merely and casually states that the said evidence was inadvertently not placed before the trial court in HCCC Number 12 of 2013. It is their submission that the applicant was not interested in bringing to court the said evidence they intend to produce now; that this prayer should not be granted as the same appears to be an afterthought and litigation must come to an end.

16. They further submit that the endeavour by the applicant to introduce the intended additional evidence is an attempt to make a fresh case on appeal, fill up omissions and patch up weak points in their case which will result into delay in determination of this matter.

17. On whether the matter can be referred to the High Court for retrial on the additional evidence, the respondents submit that the prayer does not lie and places reliance on the case of *Kuwinda Rurinja Co. Ltd vs Kuwinda Holdings Ltd and 13 Others*, Civil Appeal (Application) No. 8 of 2003 (2013) eKLR.

18. In conclusion, they submit that the evidence the applicant is seeking to adduce was in their possession at the time of hearing of this case, that there are no exceptional circumstances to warrant this Court to allow the admission of the same at the appeal stage and that this is an attempt to strengthen the appeal. In the end, they submit that the application dated 5th February, 2020 lacks merit and should be dismissed with costs.

19. At the plenary hearing of the application, the applicant was represented by learned counsel Mr. Amana, while the respondents were represented by Mr. Mwange, who both reiterated their written submissions. We have carefully considered the application along with the rival submissions by learned counsel and the relevant law, particularly as espoused in the legal authorities cited to us.

20. The issue arising for determination is whether the applicant has made out a case for leave to be granted to adduce additional evidence on appeal.

21. In Civil Appeal (Application) No. 84 of 2012, Attorney General vs Torino Enterprises Limited [2019] eKLR, one of the most recent decisions from this Court on the question of whether or not an appellate Court should allow an application for adduction of new evidence, the Court citing Rule 29(1)(b) of its Rules and many other prior decisions stated:

> " In Dorothy Nelima Wafula vs Hellen Nekesa Nielsen and Paul Fredrick Nelson [2017] eKLR, it was expressed that under Rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the Court, "for sufficient reason."
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> The Court further stated that:
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> 'Though what constitutes "Sufficient reason" is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible."(Emphasis ours)

22. This Court is cognizant of the holding in Mzee Wanje and 93 Others Versus A. K. Saikwa (1982 – 88) 1 KAR 463 where the Court of Appeal, referring to Rule 29 of the Court of Appeal Rules 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."

23. Expounding on the said guidelines, the Supreme Court of Kenya in Mohamed Abdi Mohamed vs Ahmed Abdullahi Mohamed and 3 others [2018] eKLR, stated as follows:

> " 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:

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 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 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. Whether 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 filing gaps in evidence;

j. The Court must find the further evidence needful;

k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.

l. 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." [Emphasis ours].

24. It is worth noting that even with the application of the above stated guidelines, the Court would only allow additional evidence on a case-by-case basis and even then sparingly, and with abundant caution.

24. The additional documents the applicant seeks to have as part of the record include Bills of Quantities, Forensic Report and Plans, Annual reports for the Company from the Year 2009 – 2011 and invoices. These documents were therefore in existence and in the applicant's possession when the suit before the High Court was filed. The case remained pending before the High Court for about 3 years. There is

no plausible explanation as to why the said documents were not produced in court as evidence. Other than saying that the evidence was "inadvertently forgotten", there is not even an attempt on the part of the applicant to demonstrate why the documents could not be obtained by exercise of a modicum of due diligence and presented to the trial court during the hearing.

24. We also note that the invoices attached are not proof of purchase and thus may not be very helpful in proving special damages as sought in the plaint. The Bills of quantities are apt but may not assist in proving the existence of the factory that was allegedly burnt down since the trial court had found that the applicant had not proved that the burning of the premises and other items was done by the Kenya Defence Forces and that the applicant had failed to prove that the items were destroyed by the Kenya Defence Forces.

27. It is therefore not possible to ascertain whether the additional evidence will add any value to the applicant's case. Having carefully considered the nature of the additional evidence vis-à-vis the nature of the claim before the High Court and the learned Judge's findings, we are inclined to conclude that the applicant is seeking a second bite of the cherry before the trial court by filling up the gaps which only became evident to the applicant after delivery of the judgement. Such is not the situation that is meant to be remedied by Rule 29 (1)b of the Rules.

27. Accordingly, our conclusion is that this application fails to meet the threshold set for applications under Rule 29(1)b. This application is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR