



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU, OTIENO-ODEK JJA)

CIVIL APPEAL (APPLICATION) NO. 84 OF 2012

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

TORINO ENTERPRISES LIMITED.....RESPONDENT

(An application to introduce new evidence in the pending appeal and to file a supplementary record of appeal arising from the judgment and decree of the High Court of Kenya at Nairobi (Gacheche, J.) dated 4th July 2011

In Nairobi H.C. Petition No. 38 of 2011)

RULING OF THE COURT

1. By a constitutional petition dated 10th March 2011, the respondent company, **Torino Enterprises Limited** filed suit against the applicant claiming that on 26th April 2001, by way of transfer from **Renton Company Limited**, it acquired all that parcel of land known as LR No. 22524 Grant No. IR 85966 measuring 83.910 Hectares for a term of 99 years with effect from the year 2000. The respondent contends that on or about the year 2005, the **Department of Defence** comprising the Armed Forces encroached on the suit property and fenced off a total of 90 acres. On its part, the Department of Defence, through the applicant, asserts that the suit property has at all material times been public land and the Armed Forces have neither trespassed thereon nor is the Department liable to pay any compensation to the respondent company.

2. Upon hearing the parties, the trial court delivered its judgment on 4th July 2011 wherein the court ordered the Department of Defence to restore possession of the suit land to the respondent or in the alternative pay the respondent the sum of Ksh. 1,530,000,000/= being the current market value of the suit property. Aggrieved, the applicant, **The Hon. Attorney General**, lodged Civil Appeal No. 84 of 2012 before this Court.

3. By way of Notice of Motion dated 5th October 2017, the applicant has moved this Court seeking leave to adduce additional evidence in the Appeal as follows:

“(i) A letter from the Registrar of Companies dated 15th March 2017 confirming that an entity known as **Renton Company Limited** has never existed.

(ii) A copy of the survey plan 179/18 for LR No. 13461.

(iii) A copy of letter of allotment dated 19th December 1999.

(iv) A copy of the transfer signed on behalf of **Renton Company Limited**.

(v) A copy of a letter from the Department of Defence to the Commissioner of Lands dated 22nd February 1995.

(vi) Letters from Head of the Public Service to the Commissioner of Lands dated 3rd August 1998 and 8th July 1999.

(vii) *The Plaintiff and Defence in Nairobi ELC Case No. 282 of 2012.*”

4. In the Motion, the applicant has urged this Court to admit the additional evidence by means of an affidavit and the same be filed as a Supplementary Record of Appeal. The respondent opposes the Motion.

5. At the hearing of the instant application, Mr. Oscar Eredi, Deputy Chief State Counsel appeared for the applicant and Dr. Kenneth Kiplagat appeared for the respondent company.

6. In his submission, counsel for the applicant rehashed the grounds in support of the application as deposed in the affidavit of *Major Moses Otieno* dated 28th August 2017. Counsel submitted on the need to adduce additional evidence and explained why the additional evidence was not presented before the trial court.

7. The applicant urged that the suit property is in actual and physical possession of the Department of Defence and thereon stands the ***Embakasi Military Barracks***. The Department has secured additional evidence that was not available to the Attorney General at the time the suit was heard before the trial court and that the applicant did not present the additional evidence because the evidence was not in its possession. The reason for failure to tender the evidence during trial is the huge volume of documents, time span and turnover of officers at the Department of Defence who had been handling the case. It was submitted that had the trial judge considered the new and additional evidence, the court would probably have reached a different conclusion. Counsel urged us to note that the suit property has always been public land in possession of the Department of Defence and it was irregular for the suit land to be allocated to Renton Company Limited and subsequently transferred to the respondent company. Counsel submitted that it is in the interest of justice for the applicant to be allowed to adduce the additional evidence by way of a Supplementary Record of Appeal.

8. The respondent by Replying Affidavit dated 3rd July 2018 deposed by ***Mr. Bernard Koyyoko*** opposed the application to adduce additional evidence.

The respondent's counsel, ***Dr. Kenneth Kiplagat***, submitted the evidence sought to be introduced has always been in possession of the applicant and it would have been obtained had reasonable diligence been done; no sufficient reason has been given why the additional evidence was not tendered before the trial court; the current application is a veiled attempt by the applicant to rectify obvious errors it made at the High Court for failing to make out its case and or seek contribution or indemnity; the respondent was an innocent purchaser for value of the suit property; the letters sought to be introduced in evidence are not new documents and were produced before the trial court as exhibit PNM 3a, 3b, and 3c in the affidavit of ***Kenneth Kiptoo Boit*** sworn on 10th March 2011 in ***Petition No. 38 of 2011***.

9. The respondent company submitted it had perused the letters sought to be adduced as additional evidence and the same are inconsequential in terms of evidentiary value and could have been obtained with reasonable diligence before or during the hearing; that whereas the applicant has adduced pleadings in ***ELC Case No. 282 of 2012***, it has failed to prove the nexus between the ELC case and the instant appeal and that the ELC case No. 282 of 2012 is yet to be heard and any decision made admitting new and additional evidence in this matter will cause an injustice to the parties in ELC Case No. 282 of 2012.

10. In further opposition to the application, the respondent urged the additional evidence sought to be admitted relates to allegations against Renton Company Limited which is a company and not party to the instant proceedings and the appeal pending before this Court; the respondent company is not associated to Renton Company Limited; the respondent purchased the suit property from the Renton Company Limited and any challenge to its title of the suit property should be made in a suit in which Renton Company Limited is a party. In support, counsel submitted that the instant proceedings were initiated by way of a constitutional petition before the High Court in 2011; the evidence sought to be adduced challenges title to the suit land and that the court with competent jurisdiction is not the High Court but the Environment and Land Court. Counsel cited this Court's decision in ***The Law Society of Kenya Nairobi Branch vs. Malindi Law Society & Others, Civil Appeal No. 287 of 2016*** to support submission that the High Court has no jurisdiction over land matters. In concluding his submission, counsel perceived that the additional evidence, if admitted, is unhelpful.

11. On the jurisdictional issue, the applicant in response submitted that in 2011 when the suit was filed before the trial court, the Environment and Land Court was not in existence and as such, the High Court had jurisdiction to hear and determine land disputes.

12. We have considered the application before us and the grounds urged in support thereof as well as submissions by counsel and authorities cited. The instant application is grounded among others on ***Rule 29(1) (b)*** of the Rules of this Court which provides:

“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); 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.

13. In ***Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR***, it was expressed that under ***Rule 29 (1) (b)***, additional evidence will be introduced on appeal in the discretion of the Court, “for sufficient reason”. 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 be incontrovertible.

14. In the instant motion, it is our duty to determine: (a) if there is additional new evidence; (b) if that evidence could have been obtained by

the applicant after reasonable diligence before and during hearing; (c) if there is a probability the additional evidence would have an important influence on the result of the case and finally, (d) based on the foregoing, is there sufficient reason to admit the additional evidence?

15. The applicant in the Motion before this Court itemized the new evidence sought to be adduced and introduced in the record of appeal. One of the letters sought to be adduced in evidence is from the Registrar of Companies dated 15th March 2017 stating Renton Company Limited has never existed. The respondent in its replying affidavit attached the Certificate of Incorporation No. C65570 of Renton Company Limited dated 10th July 1995. The applicant upon sighting the said Certificate abandoned the application to introduce the letter from the Registrar of Companies confirming Renton Company Limited never existed.

16. Regarding other itemized documents, the applicant urged that they are new and additional evidence. Of relevance is the Survey Plan 179/18 for LR No. 13461 allegedly being a plan for part of the suit property; this particular survey plan was constantly referred to in the proceedings, however, the plan itself was never tendered in evidence and for completeness of record, the survey plan ought to be admitted as additional evidence. Counsel referred us to page 303 of the Record of Appeal at which the survey plan was referred to.

17. On the letter of allotment sought to be introduced as additional evidence, the applicant urged that the respondent's title to the suit property emanates from a letter of allotment to Renton Company Limited; it is thus important for this Court to have all documents showing the root of title to the suit property. In relation to letters from the Department of Defence, the applicant submitted that the suit property has always been in use, occupation and possession of the Department of Defence as a military installation being **Embakasi Military Barracks**; and that the letter dated 22nd February 1995 from Department of Defence to the Commissioner of Lands is relevant in demonstrating the suit property was always public land occupied by the military.

18. In our consideration of submissions by counsel, both the applicant and respondent urged that the items of evidence sought to be adduced as additional evidence were available and referred to in proceedings before the trial court. The respondent submitted that the letters of allotment are not new documents and were produced before the trial court as exhibit **PNM 3a, 3b, and 3c** in the affidavit of **Kenneth Kiptoo Boit** sworn on 10th March 2011 in **Petition No. 38 of 2011**. For the applicant, it submitted that the survey plan was referred to in the proceedings before the trial court. We are cognizant of the decision in **Mzee Wanje & 93 Others vs. A.K Saikwa (1982-88) 1KAR 462**, where commenting on **Rule 29** of the Rules of this Court it was 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 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.”

19. In **Raila Odinga and 5 Others vs. Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR** the Supreme Court commenting on reception of additional evidence in the context of presidential election petition expressed itself thus:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence...is such as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

Electoral and Boundaries Commission & Robert K. Ngeny [2015] eKLR, the Supreme Court when considering an application for leave to file a document out of time in the context of an election petition articulated it is essential for a court in exercising its discretion to admit additional evidence to ensure no prejudice is occasioned to a party if the evidence is admitted.

21. In considering the instant application, we remind ourselves in **John Kiplangat Barbaret & 8 others vs. Isaiah Kiplangat Arap Cheluget [2016] eKLR**, this Court allowed adduction of additional evidence in the form of a survey map for LR No. Narok/Cis-mara/Ilmotio/54 showing portion of the suit land occupied by the appellants; the Court also admitted additional evidence of the air cartography map of 1971 showing the settlement status in Sagamian area.

22. In **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**, the Supreme Court laid guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out 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:

(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.

[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

23. In this matter, we have considered the items of additional evidence sought to be adduced by the applicant and evaluated each of them against the guidelines and criteria laid down by the Supreme Court in **Mohamed Abdi**

Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR. We observe that the guidelines given by the Supreme Court are not necessarily conjunctive but an applicant must substantially comply with the guidelines. Whether the additional evidence will impact the result of the case is a matter to be determined on merit upon evaluation of the additional evidence with all other evidence on record.

24. One of the contestation between the parties herein is whether the suit property is public land that was not available for allotment and if so, whether the applicant should compensate the respondent for the said land. We are satisfied that the survey plan and correspondence between the Department of Defence and Commissioner of Land that was sought to be admitted in evidence may probably influence and impact on the result of the pending appeal before this Court. The additional evidence is relevant and is needful. We note that the additional evidence sought to be admitted is not voluminous – it comprises of six items of evidence totaling about 25 pages. It is small and limited and the respondent company will have no difficulty in making response to the documents; in any event, we are satisfied that the respondent company is not seeing the documents for the first time.

25. On whether the items of additional evidence could have been tendered before the trial court in exercise of due diligence, we have considered the applicant’s explanation that the documents were with the Department of Defence and werenot available to the Hon. Attorney General at the time of trial. This explanation though plausible cannot at all times excuse or justify adduction of additional evidence at the appellate stage. We reluctantly accept the explanation and note that the respondent’s submission of adduction of the new evidence will not prejudice it as such additional evidence is according to the respondent unhelpful even if admitted.

26. We are further satisfied that the additional evidence is credible as it consists of official documents written and received in the course of public duty and the documents originate from a public office having proper custody thereof. We note the authenticity and veracity of the itemized documents has not been impugned. We are satisfied that the additional evidence is not meant to bolster or fill gaps in the applicants pending appeal rather, *prima facie*, the additional documents are aimed at removing any vagueness or doubt over the suit property and the documents have a direct bearing on the main issue in the pending appeal.

27. Overall, we are satisfied that the additional evidence sought to be adduced substantially meets the criteria and guidelines laid out by the Supreme Court in **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR.** Accordingly, the Notice of Motion dated 5th October 2017 has merit and is hereby allowed on the following terms:

(i) Leave be and is hereby granted to the applicant to adduce and file additional evidence limited to the following documents:

1. A copy of the survey plan 179/18 for LR No. 13461.

2. A copy of letter of allotment dated 19th December 1999.

3. A copy of the transfer signed on behalf of Renton Company Limited.

4. A copy of the letter from the Department of Defence to the Commissioner of Lands dated 22nd February 1995.

5. Letters from Head of the Public Service to the Commissioner of Lands dated 3rd August 1998 and 8th July 1999.

6. The *Plaint and defence in Nairobi ELC No. 282 of 2012.*

(ii) The additional evidence be adduced by means of affidavit and be filed as Supplementary Record of Appeal within 14 days of the date hereof.

(iii) The respondent to file a Replying Affidavit, if any, to the Supplementary Record of Appeal within 14 days of service.

(iv) Costs of this application abide by the outcome of the appeal.

Dated and delivered at Nairobi this 22nd day of February, 2019

P.N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR