



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME, MUSINGA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL (APPLICATION) No. 276 of 2008

BETWEEN

SAFE CARGO LIMITED.....APPLICANT

AND

EMBAKASI PROPERTIES LIMITED.....1ST RESPONDENT

THE COMMISSIONER FOR LANDS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an application for introduction of additional evidence in an appeal from the Judgment and Decree of the High Court (Angawa J.) delivered on 29th May 2007

in

HCCC No. 411 of 2003)

RULING OF THE COURT

1. It is common ground that the main appeal has been heard and was pending delivery of judgment when this motion was filed. It follows the application is unique as the hearing of the main appeal has been concluded.
2. Before us is a Notice of Motion application dated 31st December 2018 brought *inter alia* under **Rule 29 (1) (b)** of the **Rules** of this Court seeking orders as follows:
 - (i) *The supporting affidavit of Ajit Shah.*
 - (ii) *The affidavit of Priscilla Njeri Wango.*
 - (iii) *The affidavit of Gordon Ochieng.*
 - (iv) *The annexed witness statements of Priscilla Njeri Wango and Gordon Ochieng filed in ELC Case No. 233 of 2009 (Embakasi Properties Limited -v- Kuehne and Nagel Limited & 3 Others).*
3. At the hearing of the application, learned Senior Counsel **Mr. George Oraro**, appeared for the applicant, **Mr. Mohammed Nyaoga** appeared for the 1st respondent while **Mr. Eredi**, Senior Deputy Chief State Counsel appeared for the 2nd and 3rd respondents. All parties filed a digest of authorities in support of their submissions. The applicant and 1st respondent filed written submissions and a replying affidavit respectively.

APPLICANT'S SUBMISSION

4. Counsel for the applicant restated the grounds in support of the application as specified on the face of the Motion and in the supporting affidavit of **Mr. Ajit Shah**. The grounds in support of the application are that in the course of hearing of **Embakasi Properties Limited -v- Kuehne and Nagel Limited & 3 Others - ELC Case No. 233 of 2009** now ongoing before the Environment and Land Court, the applicant has come across new and additional evidence, relevant to the appeal and which evidence could not have been available even after exercise of due diligence search and investigation; the proposed additional evidence raises serious legal and factual issues on validity of the 1st respondent's title on matters raised in the instant appeal; the intended additional evidence is to enable this Court reach a fair determination of the appeal.

5. It was further urged that the appeal in this matter arises out of a claim by the 1st respondent that the applicant's title to LR No. 902/290 together with that of LR No. 9042/303 were derived from its title LR No. 9042/224; that in the course of hearing before the Environment and Land Court, statement has emerged that the 1st respondent was allotted property LR No. 9042/224 on 9th January 1982, valid for a period of 30 days, but did not take up the offer until eight years later on 18th January 1990; that an additional new statement is that the **Commissioner of Lands** has filed evidence in HCCC No. 233 of 2009 showing not only that the Deed File in respect of the 1st respondent's land was non-existent but also that before the issuance of the said title, a Part Development Plan had been issued showing that the division and use of the said land which was inconsistent with the Deed Plan issued to the 1st respondent; and that the Commissioner of Lands and the Attorney General have filed statements from the Department of Survey showing the Deed Plan used on the 1st respondent's title was an office copy not capable of being attached to a title.

6. Based on the foregoing grounds, the applicant urges this Court to allow what it calls additional evidence to be admitted in this appeal; and that it is in the interest of justice all relevant and material evidence be placed before this Court.

1st RESPONDENT'S SUBMISSIONS

7. Learned counsel Mr. Nyaoga submitted that the instant application does not meet the threshold for adduction of additional evidence; that the document the applicant seeks to introduce is a Part Development Plan (PDP) which is the applicant's own document; the document has been in the applicant's possession for the last three decades and is not a new item of evidence; the affidavit of Mr. Gordon Ochieng sought to be tendered in evidence introduces no new issue as the deponent gave evidence before the trial court and was examined and cross-examined; as regards the third affidavit of **Ms Priscilla Njeri Wango**, counsel submitted that the deponent did not testify before the trial court and in the instant application, no evidence had been led to show why she could not be a witness before the trial court or why her evidence could not be procured timeously with diligence.

8. The 1st respondent further submitted that there is no discernible connection between the Part Development Plan that has been annexed to the instant application and the property the subject matter of the appeal; that a five judge bench of this Court was constituted to hear and determine a substantial point of law; and that it has not been shown how the evidence sought to be adduced would shed light on the point of law that has been placed before this Court for determination in the main appeal.

9. Counsel urged us to proceed with caution before admitting any additional evidence because the additional evidence sought to be produced is from a live matter before the **Environment and Land Court (ELC)** and the ELC will have to make a determination on the probative value and relevance of the additional evidence sought to be adduced in this Court. The 1st respondent reiterated the instant application is premature because when the ELC shall render its decision, an aggrieved party will have a right of appeal to this Court.

2ND AND 3RD RESPONDENTS SUBMISSIONS

10. **Mr. Eredi**, the Deputy Chief State Counsel urged us to note the applicant has annexed in its application two supporting affidavits of **Mr. Gordon Ochieng** and **Ms Priscilla Njeri Wango**; that these affidavits are stated to be drawn by the Attorney General Office; that he has the conduct of this appeal on behalf of the Office of the Attorney General; that the two affidavits have not been drawn by the Attorney General; and that as the counsel having the conduct of this matter, he is not aware of the two affidavits. On the merits of the instant application, counsel urged us to follow the guidelines for adduction of additional evidence as given by the Supreme Court in **Mohammed Abdi Mahamud - v- Ahmed Abdullahi Mohammed & 3 others, SC Petition No.7 & 9 (consolidated) of 2018 [2018] eKLR**.

ANALYSIS

11. This is an application for additional evidence under **Rule 29** of the **Rules** of this Court. We have considered the application, the submissions and the authorities cited. **Rule 29** provides as follows:

“29. (1) On any appeal from a decision of 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.

12. This Court in discussing its power to admit additional evidence under **Rule 29 (1)** stated as follows in **Republic -v - Ali Babitu Kololo (2017) eKLR**:

‘It has been said time and again that the unfettered power of the Court to receive additional evidence should be used

sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.”

13. The Uganda Supreme Court in Attorney General & Inspector General of Government - v- Afric Cooperative Society Ltd Misc. Application No. 06 of 2012 (SC), set out guidelines in determining applications for adducing additional evidence. In Kenya, the Supreme Court in Mohamed Abdi Mahamud -v- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR laid down the following principles for allowing additional evidence:

“[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.”

14. Following the guidelines as given by the Supreme Court, it is our duty to consider and determine if the instant application fulfills the principles as laid out in the case above. Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether 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 trial by the applicant.

15. In this matter, it has been submitted that the proposed additional evidence is relevant because it affects the validity of the 1st respondent’s title to the suit property LR No. 9042/224; the evidence is pertinent because it shows the Deed Plan of the 1st respondent’s title is non-existent; it is relevant as the Commissioner of Lands and Attorney General have filed evidence showing the Deed Plan used on the 1st respondent’s title was an office copy not capable of being attached to a title. Founded on this submission, the applicant submitted the additional evidence may influence or impact the verdict of this Court in this appeal. The 1st respondent in opposing the application submitted the link between the alleged additional evidence and the appeal before this Court has not been shown; and it has not been shown how the additional evidence will shed light on points of law urged in the main appeal.

16. We have considered the applicant’s submissions and the 1st respondent’s response thereto. We observe the additional evidence stems from an ongoing trial and hearing before the Environment and Land Court in Embakasi Properties Limited -v- Kuehne and Nagel Limited & 3 Others (supra) The ELC is seized of the matter and this Court should restrain itself from delving into matters that are live before another Court. In Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR the Supreme Court declined to adjudicate on an issue which was still the subject of judicial determination at the High Court. In Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Civil Application No. 2 of 2011; [2011] eKLR (Re IIEC) the Supreme Court expressed itself as follows:

“The two cases seek the interpretation of the Constitution, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a Court

duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which this Court must protect the jurisdiction entrusted to the High Court.” (Emphasis supplied)

17. Of bearing to our decision, are the two affidavits of **Mr. Gordon Ochieng** and **Ms Priscilla Njeri Wango** attached to the Notice of Motion dated 31st December 2018. The 2nd and 3rd respondents have questioned the authenticity and propriety of these affidavits. On the face of the affidavits, it is indicated that they are drawn and filed by the Attorney General. Counsel from the Attorney General’s Chambers has raised doubt on the propriety of the two. The applicant in response submitted that the two affidavits are a reproduction of statements made by the deponents in **HCCC No. 233 of 2009**.

18. We have examined the face of the two affidavits and it is stated that they have been deposed in **Civil Appeal No. 276 of 2008** which is the present suit; the affidavits state that they are drawn and filed by the Attorney General. It is not for us at this stage to determine the propriety or otherwise of the two affidavits. Seeing that the propriety and cogency of the two affidavits is in issue, we decline to exercise our discretion to allow the same to be adduced as additional evidence in this matter.

19. As to whether the proposed additional evidence could have been obtained after due diligence, the applicant submitted the additional evidence only came to its knowledge during the hearing in ELC Case No. 233 of 2009. On the other hand, the 1st respondent submitted the additional evidence particularly the Part Development Plan was always in possession of the applicant for over three decades as it is its own document. We reiterate parties cannot be allowed to fill the lacunae in their evidence at the appellate stage.

20. We have considered whether the proposed additional evidence could have been discovered after due diligence. The core additional evidence sought to be produced include Part Development Plan dated 26th November 1987 and affidavits and statements filed in ELC Case No. 233 of 2009. The Part Development Plan is a public document that the applicant, with due diligence could have obtained. As regards statements filed in ELC Case No. 233 of 2009, it is our considered view that pleadings filed in another suit pending before a trial court cannot be used as items of evidence in a different suit. Unless and until a trial court has delivered judgment in the suit, the pleadings of that suit neither prove nor establish any fact in issue. In this application, the statements sought to be adduced as additional evidence are live matters pending before the ELC on which no determination has been made. It is the ELC court that is competent to pronounce itself and establish facts from all material and evidence before it. We decline to exercise our discretion to admit as additional evidence the affidavits and statements filed in a suit whose hearing is ongoing before another court.

21. In overall, we find the proposed additional evidence could have been discovered after due diligence; the applicant has not demonstrated to our satisfaction that the proposed additional evidence removes any vagueness or doubt on the issues in the appeal before this Court. It has also not been demonstrated that the proposed additional evidence discloses a strong prima facie case of willful deception of the Court by any party. We seek not to prejudice or embarrass the ELC in its hearing and evaluation of all evidence and material before it.

22. For the foregoing reasons, we decline to allow the applicant to adduce the proposed additional evidence. We find the Notice of Motion dated 31st December 2018 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of February, 2019

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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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