IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 102 OF 2018

BETWEEN

MOUNT ELGON BEACH PROPERTIES LIMITED .....APPELLANT

AND

HARRISON SHIKARU MWANONGO.....1ST RESPONDENT

KALUME MWANONGO MWAGARO.....2ND RESPONDENT

(Being an application for leave to adduce additional evidence pursuant to Rule 29(1) be of the Court of

Appeal Rules in an Appeal from the Judgment of the Environment & Land Court at Malindi (Angote, J.)

dated at Machakos on 18th September, 2017 and delivered at Malindi by (Olola, J.) on 5th October, 2017

in

ELC Case No. 85 of 2015.)

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RULING OF THE COURT

1. The principles that guide this Court when exercising its discretionary power under **Rule 29** of the Rules of the Court are well settled. Those principles were well summarized by **Chesoni, Ag. JA**. (as he then was) in ***Mzee Wanjie and 93 others v A. K. Saikwa and others (198288) 1 KAR 462*** where he stated:

> ***"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."***

See also ***Joginder Auto Services Ltd v Mohammed Shaffique and another Civil Appeal (Application) No. Nai 210 of 2000 (2001) eKLR*** and also ***Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd Civil Appeal No. 8 of 2003***

2. The Supreme Court of Kenya in its recent decision in **Hon.Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 others Sup Petition No. 7 of 2018** consolidated with **Petition No.9 of 2018** expounded on the above guidelines splitting them up but still maintaining the principles behind them. Two of those guidelines are relevant for purposes of this Ruling. These are:-

"(i) The Court must be satisfied that the additional evidence is not utilised for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful, and

(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."

The Supreme Court however repeated the caution that even with the application of the above principles, the Court will only allow additional evidence on a case to case basis and even then, sparingly with abundant caution.

3. Having set out the law, we shall now come to the specific application and see if it meets the threshold set by the above guidelines. The Notice of Motion dated 31st October, 2018, the subject of this Ruling is predicated on **Rule 29 (1) (b)** of the Court of Appeal Rules which provides as follows:-

"29…

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

(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."

4. It is clear from the outset therefore that leave to adduce additional evidence is purely at the discretion of the Court. Like in all matters calling for the court's discretion, although the discretion is unfettered, the same must be exercised within specific parameters or guidelines. In its application, the applicant's prayers are twofold. In the first instance, the applicant seeks leave to file additional documentary evidence or in the alternative, the court be pleased to order for a site visit either through itself or through the Deputy Registrar or through the trial court and the report of the visit be admitted as evidence in court.

5. In the grounds on the face of the application, the applicant states that it has "*managed to obtain*" additional evidence which is crucial for the fair and just determination of the case. The additional evidence however includes photographs and a surveyor's report which were obtained after the suit in the Environment and Land Court (ELC) had been heard and concluded.

6. In the affidavit sworn by Mohammed Mbarak, the applicant's manager in support of the application, the evidence intended to be adduced is annexed. The documents include a survey report and photographs of the suit property. The deponent does not however even endeavour to explain why he had not procured the evidence in question before or during the pendency of the matter before the ELC. All he says is that none of the parties risks suffering prejudice should the application be allowed.

7. The application is resisted by the respondents through their counsel **Mr. Gikandi** who swore the affidavit in reply dated 22nd January, 2019. According to **Mr. Gikandi**, the application is a total abuse of the process of the Court and a waste of judicial time. To start with, **Mr. Gikandi** discloses that the applicant had made an application for a site visit before the ELC but the same was declined, and further that the said refusal is a ground of appeal in the appeal before this Court. According to **Mr. Gikandi** the applicant is just trying to fill up the lacunae in its case by introducing new evidence. Furthermore, the evidence in question could have been procured with exercise of due diligence and it is not new. He urged the Court to dismiss the application terming it scandalous, frivolous and vexatious.

8. Parties filed written submissions pursuant to the Court's directions given on 5th December, 2019. We have read the contents of the said submissions. They basically expound on the principles we have set out above and the law. Luckily, the facts as to what transpired before the trial court are not disputed. We wish to point out however that although the applicant seems to place heavy reliance on **section 78 (1) d** of the Civil Procedure Act and **Order 42 Rule 27** of the Civil Procedure Rules, the same do not derogate from the provisions of **Rule 29 (1)** of the Rules of this Court. The provisions are the same, the only difference being that **section 78** and **O.42 Rule 27** also cater for the High Court sitting as an appellate Court while Rule 29 of the Rules of this Court is confined to applications before this Court. The principles are also the same. While on that, we wish to point out that **Article 159 (2) (d)** of the Constitution and **Article 259** of the Constitution should not be bandied around with abandon in the manner the applicant seeks to do. We say so because where there are clear unequivocal Rules applying to specific situations, then the provisions of the Constitution should not be needlessly invoked.

9. In this case, the application falls squarely within the ambit of **Rule 29(1)** of the Rules of this Court and we do not need to improvise by calling in aid provisions of the Constitution. As stated by the Supreme Court in the Muhammed Case (*supra*) each case must be considered within its own circumstances. That being so, we find this case totally different from the circumstances surrounding the Muhammad case. We shall not therefore borrow too much from that case.

10. That said, we now need to fit the facts of this application to the principles we have set out above and make a determination as to whether the application before us passes muster. The first question is whether the maps/report and photographs in question could have been obtained during trial with due diligence. The applicant has not told us why he did not instruct the surveyor to visit the site, draw the map and take photographs when the matter was still pending hearing. It could have done so and the said evidence could have been availed to the trial court before judgment was rendered. The application therefore fails the very first test. That in our view is a hurdle that an applicant in an application such as this one must overcome before even attempting to pass the rest of the requirements. The information was not new. It was always there and all the applicant needed to do was to instruct the surveyor in good time, and the said evidence would have been placed on record before conclusion of the case.

11. On the issue of the site visit, we note that the same forms a ground of appeal and the court seized of the appeal will therefore have an opportunity to consider whether the request for a site visit ought to have been allowed or not and then make a determination on the issue. We

cannot therefore be invited to deal with that point vide this application while it awaits determination by the court hearing the appeal. We agree with **Mr. Gikandi** that raising that issue in this application and in the appeal itself amounts to abuse of the process of the Court. Learned counsel for the applicant conceded in his oral submissions that some of the evidence they seek to adduce is not new evidence and was available when the matter was heard before the High court. We are inclined to conclude that the applicant is just seeking to patch up its case which is not what **Rule 29(1)** is meant to address.

12. In all, we are not persuaded that the application meets the threshold circumscribed by the law as analysed elsewhere in this Ruling. In the circumstances we find this application lacking merit. We dismiss it with costs in the main appeal.

Dated and delivered at Mombasa this 14th day of March, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR