



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJ. A)

CIVIL APPEAL (APPLICATION) No. 153 of 2019

BETWEEN

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED.....1ST APPLICANT

KIBOS POWER LIMITED.....2ND APPLICANT

AND

BENSON AMBUTI ADEGA.....1ST RESPONDENT

ERICK OCHIENG.....2ND RESPONDENT

BETHER ATIENO OPIYO.....3RD RESPONDENT

KIBOS DISTILLERS LIMITED.....4TH RESPONDENT

NATIONAL ENVIRONMENTAL & MANAGEMENT AUTHORITY...5TH RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....6TH RESPONDENT

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS...7TH RESPONDENT

(Being an application for leave to adduce additional evidence pursuant to Rule 29(1) of the Court of Appeal Rules in an Appeal from the Judgment of the Environment & Land Court at Kisumu (Hon. S. M. Kibunja J.) dated 31st July 2019 in ELC Petition No. 8 of 2018)

RULING OF THE COURT

1. Three different applications for leave to adduce additional evidence were filed in this matter. The three applications are Kisumu Civil Application No. 187 of 2019; Kisumu Civil Application No. 188 of 2019 and Kisumu Civil Application No. 189 of 2019. The additional evidence sought to be adduced as per the three applications is similar.
2. In addition, six different appeals were filed against the impugned *judgment of the Environment & Land Court at Kisumu (Hon. S. M. Kibunja J.) dated 31st July 2019 in ELC Petition No. 8 of 2018*). The six appeals are Kisumu Civil Appeal No. 153 of 2019; Kisumu Civil Appeal No.162 of 2019; Kisumu Civil Appeal No. 187 of 2019; Kisumu Civil Appeal No. 188 of 2019; Kisumu Civil Appeal No. 189 of 2019 and Kisumu Civil Appeal No. 367 of 2019. The parties in the appeals are the same.
3. By consent of the parties as endorsed by an Order of this Court made on 2nd October 2019, the six appeals were consolidated with the lead file being Kisumu Civil Appeal No. 153 of 2019. Likewise, all the three applications were consolidated and heard together. This ruling is a determination of the three consolidated applications.
4. By Notice of Motion dated 3rd September 2019, the applicants lodged an application to this Court seeking leave to adduce the following documents as additional evidence in the appeal:

(i) A copy of The County Assembly of Kisumu's Motion for the Second Assembly.

(ii) A copy of The County Assembly of Kisumu's Motion for the Third Assembly together with a Report of Water, Environment and Natural Resources Committee on the Pollution of Rivers Kibos, Auji and Lie Lango.

(iii) A copy of The National Environment and Management Authority (NEMA) Inspection Report for Kibos Sugar and Allied Industries dated 18th April 2019.

5. A further prayer in the Motion is that this Court be pleased to admit the additional evidence by way of affidavit and the same be filed as a Supplementary Record of appeal.

6. The grounds in support of the Motion as stated on the face thereof and in the supporting affidavit dated 3rd September 2019 deposed by Raghbir Singh Chathe are that the applicants are aggrieved by the judgment and decree of the Environment and Land Court dated 31st July 2019. That **Rule 29 (1) (b)** of this Court's Rules confer power on this Court for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a Commissioner. That the proposed new additional evidence comprises public documents from the County Assembly of Kisumu and the National Environment Management Authority (NEMA). That the additional evidence could not be obtained with reasonable diligence for purposes of the hearing of the suit before the trial court.

7. The 1st, 2nd and 3rd Respondents filed a replying affidavit opposing the application. The affidavit is dated 30th September 2019 and deposed by the 1st respondent, Mr. Benson Ambuti Adegga. The thrust of the replying affidavit is that the proposed additional documentary evidence was always in existence and could have been discovered and presented before the trial court. That the documents to be tendered as additional evidence are neither authentic, credible nor believable.

8. The 4th, 5th, 6th and 7th respondents made submissions in support of the instant application.

9. During the hearing of the instant application Senior Counsel Prof. Tom Ojienda teaming up with learned counsel, Ms Omire Cheryl appeared for the applicants. Learned counsel Mr. Fredrick Ngatia teaming up with learned counsel Mr. J. T. Ragot appeared for the 1st, 2nd and 3rd respondents. Learned counsel Mr. W. Gichaba teaming up Mr. F. Wasuna appeared for the 4th respondent. Learned counsel Mr. E. Gitonga appeared for the 5th respondent. Hon. James Orengo teaming up with learned counsel Mr. Jared Sala appeared for the 6th respondent and learned counsel Mr. P. D. Onyango appeared for the 7th respondent.

APPLICANTS SUBMISSIONS

10. Prof. Ojienda urged that the proposed additional documentary evidence is directly relevant to the appeal before this Court. That it is in the interest of justice that additional documentary evidence be admitted. That the documents speak to the issue whether the applicants were polluting Rivers Kibos, Auji and Lie Lango which the 1st, 2nd and 3rd respondents allege is being polluted. That there is also a report by NEMA on the inspection of the applicants' industries. That all the documents sought to be adduced as additional evidence were relevant and material to the appeal and may directly influence the outcome of the appeal.

11. Senior Counsel further submitted that the additional documentary evidence is credible and capable of belief. That the documents are public documents capable of being verified. The said documents were not voluminous making it easy for the respondents to put in their response. That the additional evidence will help eliminate vagueness or doubt over the appeal.

12. It was submitted that the documents sought to be adduced as additional evidence could not be tendered in evidence before the trial court as they were not ready and available to the applicants. That trial court gave directions on submissions to be filed by parties in March 2019. That the NEMA Report is dated 18th April 2019. The Report was only available after submissions before the trial court had been filed. That the NEMA undertook inspection of the applicants' industries in March 2019 and only shared its report with the National Assembly in April 2019. That the applicants were not able to access the NEMA Report until July 2019 when submissions had been filed before the trial court.

13. Hon. Orengo in supporting the Motion submitted that the applicants have fulfilled all the guidelines given by the Supreme Court for adduction of additional evidence as per the case of **Mohamed Abdi Mahamud -v- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**. It was submitted that the rejoinder to the instant application by the 1st, 2nd and 3rd respondent is erroneously based on licensing of the applicants' industries yet the proposed additional evidence deals with the issue of alleged pollution of Rivers Kibos, Auji and Lie Lango. That the intended additional evidence deals with the pollution question which was an issue before the trial court and is thus directly relevant to the appeal before this Court.

14. Learned Counsel Mr. Wasuna for the 4th respondent made submission in support of the application. He urged that the trial court's order cannot be executed without a NEMA Report. That in the impugned judgment, the trial court ordered continuous monitoring of the pollution of the rivers. Continuous monitoring connotes that the NEMA must prepare a report on the environmental condition of the rivers. That the instant application seeks to admit a NEMA report prepared after inspection of the applicants' factories and the report is directly relevant to any implementation or execution of the decree of the trial court.

15. Learned counsel Mr. P.D. Onyango for the 7th respondent supported the instant application and fully associated himself with submissions made by learned counsel Prof. Ojienda, Hon. Orengo and Wasuna.

1st, 2nd and 3rd RESPONDENTS SUBMISSIONS

16. Learned counsel, Mr. Fred Ngatia, in opposing the application relied on the replying affidavit deposited by the 1st respondent and dated 30th September 2019.

17. Counsel submitted that the documents sought to be adduced as additional evidence are not credible as to contents or otherwise. That the said documents are not capable of having any influence on the result of the appeal. That the Motion of the Kisumu County Assembly is not credible as it has no signature, the author is unknown, it is neither authenticated nor dated and it is not an original. That there is no evidence whether the documents were received by the Clerk of the Assembly and if the same were debated. That the Motion of the Assembly does not relate to the issue for determination in the appeal as it refers to a development of Koru-Soin Dam. That the Assembly's Motion is speculative and a worthless piece of evidence.

18. Submitting on the Copy of the County Assembly Third Motion together with the Report of Water, Environment and Natural Resources Committee, counsel urged that the Copy of the Third Motion of the Kisumu Assembly is fictitious as there is no Third Assembly in the Kisumu County Government. That there has only been two General Elections in Kenya since the promulgation of the 2010 Constitution. It follows there has only been two County Assemblies in Kisumu and there is no Third Assembly that could debate the Motion sought to be adduced as additional evidence in this matter.

19. Counsel further submitted that the alleged Report of the Water, Environment and Natural Resources Committee refers to an alleged consultation that the Committee Members purported to have with local leadership and stakeholders. The Report does not disclose the date of such meetings, the place and venue for the meeting and the nature of the consultations. To this extent, it was submitted the two County Assembly Motions are neither authentic, credible nor believable.

20. As regards the NEMA Report sought to be adduced as additional evidence, the 1st, 2nd and 3rd respondents submitted that the NEMA Report dated 18th April 2019 does not controvert the findings of the trial court. That the NEMA Report has no bearing to the outcome of the appeal in this matter. That the Report does not answer the procedural issues relating to the lack of Environmental Impact Assessment (EIA) which led to the cancellation of the applicants' licenses. That there is no explanation why the applicants never presented the NEMA Report before the trial court. That the trial court gave directions on 20th December 2018 where the applicants were given leave to file any further affidavit. That the matter came up for mention before the trial court on 12th March 2019 and a further mention on 2nd July 2019 to confirm if the parties had complied with the order for filing affidavits and written submissions. That the applicants filed their written submissions on 28th June 2019 and did not file an affidavit even after obtaining leave. That the inspection by the NEMA was done when the applicants' factories had been closed and they were not operating hence no effluent was being discharged into the environment. That the applicants are merely out to delay the hearing of the appeal in this matter.

21. Mr. Ngatia emphasized that the documents sought to be adduced as additional evidence are not new and could have been found and presented before the trial court after due diligence. That there was no impediment on the way of the applicants that prevented them from tendering the documents before the trial court. Counsel concluded his submissions by stating that there was no material before this Court indicating when the documents sought to be adduced as additional evidence were obtained by the applicants.

5th RESPONDENT'S SUBMISSIONS

22. The 5th Respondent, the NEMA, through learned counsel Mr. E. K. Gitonga opposed the application. Counsel conceded that the NEMA Report was authentic. However, it was submitted that the Report had always been available and the applicants should have produced it before the trial court.

23. Prof. Ojienda in response to the submissions by the 1st, 2nd, 3rd and 5th respondents urged that one of the key issues for determination before the trial court and this Court is on pollution. That the Petition before the trial court was grounded on allegations of pollution of Rivers Kibos, Auji and Lie Lango. Counsel urged us to look at paragraphs 32 to 38 of the Petition which raise the pollution issue. Counsel submitted that it was misleading for the 1st, 2nd and 3rd respondents to assert that the only issue before the trial court related to licensing of the applicants' factories.

ANALYSIS and DETERMINATION

24. Before us is an application for adduction of additional evidence under **Rule 29** of the **Rules** of this Court. We have considered the application and the affidavits filed by all parties herein. We have also considered the submissions made by all counsel 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.

25. In the UK case of **The National Guild of Removers & Storers Limited –v- Bee Moved Limited and Others [2018] EWCA Civ. 1302**, it was stated that in determining whether an appellate Court can admit additional evidence, the Court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result.

26. 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.’

27. In **LADD – v- Marshall [1954] 1 WLR 489 page 491** Lord Denning stated (and as approved in **K. Tarmohammed - v- Lakhani [1958] EA 567** – that:

“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

Secondly, the evidence must be such that if given, it would probably have been an important influence on the result of the case, though it need not be decisive;

Thirdly, 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.”

The court further stated that:

“..... except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available”

28. 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. (See also **Uganda case of Attorney General –v- Paul Kawanga Semwogerere & Another, Constitutional Application No. 2 of 2004 (SC)**).

29. 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.”

30. Following the guidelines as given by the Kenya Supreme Court, it is our duty to consider and determine if the instant application fulfills the guidelines for adduction of additional evidence as given. Of significance is whether the additional evidence sought to be introduced by the applicants is directly relevant to the appeal before this Court and if given, it would influence or impact on 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 applicants.

31. The applicants submitted that the proposed additional evidence is relevant because it directly touches on the pollution question which is an issue in the appeal. We have examined paragraphs 32 to 38 of the Petition dated 25th October 2018 filed before the trial court. The allegations contained in the paragraphs is that the applicants have been polluting the environment by discharging raw effluent into Rivers Nyamasaria, Kibos and Lie Lango. It is further alleged at paragraph 34 of the Petition that the applicants are discharging raw effluent from the distillery and specifically discharging Vinessa which is polluting the environment.

32. Counsel for the 1st, 2nd and 3rd respondents urged that the documents sought to be adduced as additional evidence are irrelevant as they do not deal with Environmental Impact Assessment and the irregular licensing of the applicants' factories. Founded on this submission, the 1st, 2nd and 3rd respondents urged that the documents sought to be adduced as additional evidence have no direct relevance to the appeal and will have no influence on the outcome of the appeal.

33. We have considered the rival submissions by the parties as to whether the documents sought to be adduced as additional evidence are relevant and have a direct bearing on the appeal. The NEMA Report and the Third County Assembly Motion as well as the Kisumu County Assembly Report by the Water, Environment and Natural Resources Committee deal with the issue of pollution. The Petition filed before the trial court raised issues of environmental pollution and more specifically alleged discharge of raw effluent into the three rivers. Taking into account the alleged pollution of Rivers Nyamasaria, Kibos and Lie Lango as stated in the Petition, we find that the documents sought to be adduced as additional evidence are relevant to the appeal before this Court and may *prima facie* impact or influence the outcome of the appeal. The NEMA Report is also relevant as it gives a bird's eye view perspective on NEMA's involvement to the pollution dispute between the parties. (Comparatively, see **Uganda Supreme Court case of Commissioner Land Registration & Another -v- Emanuel Lukwaju Civil Application No. 12 of 2016**).

34. Further, learned counsels for the 1st, 2nd, 3rd and 5th respondents in their oral submissions did not cast doubt on the credibility and authenticity of the NEMA Report dated 18th April 2019. We thus find that the NEMA Report is credible and believable. The Report deals with the issue of pollution which is one of the issues for consideration and determination in the appeal before this Court. Further, on the issue of credibility of the documents sought to be adduced as additional evidence, we note that the NEMA and the Kisumu County Assembly are public institutions. A document from a public institution is *prima facie* credible unless otherwise proven. (See the **Evidence Act Section 79 (1) (a) (ii) and (iii)**).

35. On the two Motions from the Kisumu County Assembly, the 1st, 2nd and 3rd respondents urged that the said documents are neither authentic nor credible. That the documents are neither dated and their source is unknown. It was also urged that the documents do not deal with the issue of Environment Impact Assessment and the irregular licensing of the applicants' factories.

36. We have considered the submissions by the 1st, 2nd and 3rd respondents. Under **Sections 5, 6 and 7 Evidence Act**, all relevant evidence is admissible. The two documents from the Kisumu County Assembly and the Report of the Water, Environment and Natural Resources Committee are pertinent to the extent that they speak to the alleged pollution of the three rivers. The alleged pollution of the three rivers in this matter is not a static but a continuous process. It follows that any visitation to the rivers or the applicants' premises for purposes of determining the existence or non-existence of environmental pollution as alleged in the petition is relevant.

37. The 1st, 2nd and 3rd respondents in opposing the instant application urged that the documents sought to be produced as additional evidence go towards making a fresh case in the appeal. That the documents are aimed at filling up omissions and patching up the weak points in the applicants' appeal. The respondents have not demonstrated to us how the documents patch up weak points in the appeal or how a fresh appeal is being made out through the documents sought to be adduced as additional evidence.

38. A point urged by the 1st, 2nd, 3rd and 5th respondents is that the documents sought to be adduced as additional evidence could have been produced before the trial court if due diligence had been exercised by the applicants. It was urged that the documents were always in existence during trial and are neither new nor recently discovered. That the applicants were given leave to file an affidavit and they opted to file their submissions before the trial court without filing any affidavit to adduce the additional evidence.

39. It is trite that in an application to adduce additional evidence, the applicant must first demonstrate that the additional evidence sought to be tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence. If the evidence was available at trial, it may still be admissible on appeal if the applicant can meet the burden of establishing that exclusion of the evidence would lead to a miscarriage of justice, in that, if it had been available at trial it would have affected the verdict. (See **LADD - v- Marshall [1954] 1 WLR 1489 and Skone - v- Skone [1971] KLR**)

40. We have considered the submission whether the documents could have been discovered and produced before the trial court after due diligence.

41. The 1st, 2nd and 3rd respondents in the replying affidavit deposed by the 1st respondent aver that the trial court gave directions on 20th December 2018 where the applicants were given leave to file any further affidavit. That the matter came up for mention on 12th March 2019 and a further mention on 2nd July 2019 to confirm if the parties had complied with the order for filing affidavits and written submissions. That the applicants filed their written submissions on 28th June 2019 but they never filed a further affidavit even after obtaining leave.

42. The applicants on the other hand aver that the trial court gave directions in March 2019 and that the NEMA Report is dated 18th April 2019 well after directions had been given by the trial court on filing of submissions. It was further submitted that the NEMA Report and its forwarding letter is addressed to the Clerk of the National Assembly in Nairobi and not the applicants. That the applicants could not be reasonably have been expected to have knowledge of the existence of the NEMA Report or to have received the Report on 18th April 2019.

43. We agree with counsel for the 1st, 2nd and 3rd respondents that the applicants have not indicated when they received the documents sought to be adduced as additional evidence. Nevertheless, taking into account that the NEMA Report is dated 18th April 2019 and directions were given by the trial court in March 2019, and also considering that the NEMA Report is addressed to the Clerk of the National Assembly and not the applicants as direct recipients, we are satisfied that the applicants could not reasonably have been aware of and procured the NEMA Report in the course of trial. We further note that the Report of the Kisumu County Assembly Water, Environment and Natural Resources Committee is dated July 2019 and is signed by a majority of the Committee Members. The July 2019 date is after submissions by the applicants were filed before the trial court.

44. Ultimately, persuaded by the merits of the dicta in the UK case of **The National Guild of Removers & Storers Limited –v- Bee Moved Limited and Others** (supra), we find that it is in the interest of justice to admit the additional documentary evidence.

45. For the various reasons stated above, the Notice of Motion dated 3rd September 2019 has merit. We hereby grant leave to the applicants to adduce the following documents as additional evidence in the appeal:

- (i) A copy of The County Assembly of Kisumu’s Motion for the Second Assembly.
- (ii) A copy of The County Assembly of Kisumu’s Motion for the Third Assembly together with a Report of Water, Environment and Natural Resources Committee on the Pollution of Rivers Kibos, Auji and Lie Lango.
- (iii) A copy of The National Environment and Management Authority (NEMA) Inspection Report for Kibos Sugar and Allied Industries dated 18th April 2019.

46. We further make an order that the additional evidence be adduced by way of affidavit and the same be filed as a Supplementary Record of appeal. The Supplementary Record of Appeal to be filed and served within five days of the date hereof.

47. We direct that the applicants and all parties in support of the instant application to file and serve written submissions, if any, on the additional evidence within seven days of the date hereof. The 1st, 2nd and 3rd respondents to file and serve written submissions to the additional evidence, if any, within seven days of service. The costs in this application to abide by the outcome of the appeal.

Dated and delivered at Kisumu this 9th day of October, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR