



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, VISRAM & KARANJA, JJA)

CIVIL APPEAL (APPLICATION) NO. 93 OF 2016

BETWEEN

TANA AND ATHI RIVER DEVELOPMENT AUTHORITY.....APPELLANT/APPLICANT

AND

COUNTY GOVERNMENT OF TANA RIVER.....1<sup>ST</sup> RESPONDENT

NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT

*(An application for leave to adduce additional evidence in an appeal against the Judgment of the Environment and Land Court at Malindi (Angote, J.) dated 14<sup>th</sup> September, 2016*

*in*

*Petition No. 2 of 2015)*

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RULING OF THE COURT

1. Before us is an application under **Rule 29 (1) (b)** of the **Court of Appeal Rules** wherein the appellant seeks leave to adduce additional evidence in the appeal. The application is premised on the grounds that firstly, the evidence sought to be adduced was neither in the appellant's possession nor was it capable of being obtained with due diligence during the hearing of the suit which is subject of the appeal. Secondly, the respondents would not suffer any prejudice if leave is granted since they would be given an opportunity to controvert the same. Thirdly, that the matter being a public interest issue the leave sought ought to be granted.

2. The salient facts giving rise to the said application are that the 1<sup>st</sup> respondent filed a petition in the Environment and Land Court (ELC) being **Petition No. 2 of 2015** challenging the allocation and issuance of title over **L. R. No. 28026** (suit land) to the appellant. According to the 1<sup>st</sup> respondent, the said allocation was not above board and was contrary to the Constitution. There was no public participation prior to the said allocation; the requisite procedure of allocating the suit land which is Trust land was not adhered to; and no compensation was paid to the people of the County Government of Tana River.

3. Additionally, the appellant had undertaken agricultural activities on the suit land which not only affected the flora and fauna in the area but also changed the course of Tana River. It is on that basis that the 1<sup>st</sup> respondent sought several orders principal among them cancellation of the title issued to the appellant.

4. The appellant denied the 1<sup>st</sup> respondent's allegations and maintained that the allocation of the suit land was properly done. The appellant also averred that it had obtained the necessary approvals for engaging in agricultural activities on the suit land.

5. Upon weighing the evidence before him, the learned Judge (**Angote, J.**) in a judgment dated 14<sup>th</sup> September, 2016 found for the 1<sup>st</sup> respondent and issued the following orders:

***(a) A declaration be and is hereby issued that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents described in the Petition are in contravention of Articles 10, 40 and 56 of the Constitution.***

**(b) The grant in respect to land registered as I.R. 152049 being L.R.No.28026 and issued to the 1<sup>st</sup> Respondent be and is hereby revoked.**

**(c) A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Respondent, its servants, employees, agents or contractors from dealing with the suit land in any manner whatsoever.**

**(d) The Respondents to pay the costs of the Petition.**

6. It is that decision that provoked the appeal herein. However, before the appeal could be heard the appellant filed the application at hand. In support of the application, Steven Githaiga Ruimuku, the appellant's Managing Director, deposed that the learned Judge's decision was based on two main grounds, namely, that the appellant had not annexed any minutes to show that the Tana River County Council had approved setting a part of the suit land for allocation or evidence of how the residents of the area were compensated, if at all. Furthermore, there was no indication that public participation had taken place prior to the allocation.

7. In his view, the evidence which the appellant sought to adduce demonstrates that the suit land was government land as opposed to Trust land and compensation was paid where appropriate. The evidence in question is in the form of correspondences and minutes all of which the 1<sup>st</sup> respondent was privy to. As far as he was concerned, the 1<sup>st</sup> respondent had failed to disclose the same so as to obtain unfair advantage.

8. As to how the appellant obtained the evidence, Mr. Ruimuku deposed that following the impugned judgment the appellant consulted the Attorney General on the way forward. It is then that the appellant learnt that the Attorney General was in possession of the said evidence from a previous similar suit being H. C. C. No. 660 of 1994 - Lawrence R. Chalalu & 5 Others vs Tana and Athi River Development Authority and County Council of Tana River.

9. He went on to state that despite the appellant being a party to the aforementioned suit it appears that the documents in question were lost when the appellant shifted its office from Co-operative House to Queensway House in the year 1997. By the time the 1<sup>st</sup> respondent filed the suit subject of this appeal, about 18 years later, the then appellant's officers/employees were none the wiser about the said documents. The Attorney General could also not produce the said evidence since he was not joined as a party to the suit. In his view, the said evidence was crucial for the just disposal of the dispute.

10. Ms. Areri, learned counsel for the appellant, while reiterating the foregoing argued that the evidence sought to be adduced was credible and would have probably influenced the decision of the trial court. She urged us to allow the application.

11. In response, the 1<sup>st</sup> respondent filed grounds of opposition to the effect that the application was frivolous, vexatious and an abuse of the court. Mr. Kibanga, learned counsel for the 1<sup>st</sup> respondent, contended that the appellant had failed to demonstrate that the evidence sought to be adduced was not available during the hearing of the suit or that it could not be obtained even after due diligence. The affidavit deposed by the appellant's Managing Director was silent as to when the evidence was obtained. In his opinion the evidence was not credible to warrant this Court exercising its discretion in favour of the appellant.

12. We have considered the arguments put forth on behalf of the parties as well as the law. The principles which guide this Court in exercising its discretion to admit additional evidence are well settled. They were succinctly summarized by **Chesoni, Ag JA**. (as he then was) in the often quoted case of Mzee Wanjie & 93 Others vs A. K. Saikwa & Others [1982 - 88]1 KAR 462 as follows:

***“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 vs. Marshall [1954] 1 WLR 1489 at 1491 and those principles are:***

***(a) 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 vs Shaffique & Another [2001] KLR 97.

13. In addition this Court in Dorothy Nelima Wafula vs Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR expressed that:

***“We may add to the foregoing that in dealing with an application for the introduction of additional evidence at the appellate stage, the bench seized of application must not deal with the merit of the appeal as the appeal and the application are independent of each other.”***

14. We are also cognizant that the power to receive further evidence should be exercised with caution and sparingly. The rationale for this caution was aptly set out in the Mzee Wanjie case:

***“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.”***

15. Applying the aforementioned principles to the facts before us we are inclined to give the appellant the benefit of doubt that the evidence could not be obtained with due diligence for use at the trial. More so taking into account that a period of 18 years had elapsed between the case from which the documents were obtained and the suit filed by the 1<sup>st</sup> respondent. What was more the person from whom the documents were obtained, that is, the Attorney General was not a party to the suit in issue. Having perused the documents which the appellant intends to adduce as additional evidence we are persuaded that the same are material to the just determination of the dispute.

16. Consequently, we find that the appellant has made out a case to warrant us to exercise our discretion in its favour. We hereby allow the application and admit the documents attached by the appellant from page 230 to 270 of the record of appeal as additional evidence. The 1<sup>st</sup> respondent shall have costs of this application.

**Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**