



IN THE COURT OF APPEAL

AT NAIROBI

(GITHINJI, KOOME & OTIENO-ODEK, JJ.A)

CIVIL APPEAL APPLICATION NO. 289 OF 2009

BETWEEN

- JOHN KIPLANGAT BARBARET.....1ST APPLICANT**
- CHRISTOPHER KIPTONUI MARITIM.....2ND APPLICANT**
- WILLIAM MAKILOT SANG.....3RD APPLICANT**
- JOSEPH KIPKOSGEI MARITIM.....4TH APPLICANT**
- SIMEON KIPLAGAT NGERECHI.....5TH APPLICANT**
- KIMUTAI ARAP KENDUIYW.....6TH APPLICANT**
- PHILIP KIPKIRUI CHESIMET7TH APPLICANT**
- BARTA TESOT.....8TH APPLICANT**
- CHEMIYWA ARAP CHEPKELAT.....9TH APPLICANT**

AND

ISAIAH KIPLAGAT ARAP CHELUGETRESPONDENT

(Being an application to adduce further evidence in an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice J.B. Ojwang.) delivered on 6th October, 2009

in

H.C. Misc. C. Appl. No. 400 of 2003)

RULING OF THE COURT

1. This appeal relates to adduction of additional evidence. By a Notice of Motion dated 21st September, 2015, the applicants who are also the appellants in **Nairobi Civil Appeal No. 289 of**

2009, have moved this Court under **Section 3A** and **3B** of the **Appellant Jurisdiction Act** and **Rule 29 (2)** of the **Court of Appeal Rules**, seeking orders as follows:

1. *The Honourable Court be pleased at the hearing of this appeal to take additional evidence in the form of:*
 - a. *the supporting affidavit of John Kiplangat Barbaret supporting this application;*
 - b. *the annexed map for LR No. Narok/Cis-mara/Ilmotio/54 showing portion of the suit land occupied by the appellants;*
 - c. *the annexed air cartography map of 1971 showing the settlement status in Sagamian area; and*
 - d. *the annexed Petition and judgment of the High Court at Nakuru made on 21st November 2014 in Nakuru HC Petition no. 41 of 2013, John Kiplangat Barbaret & Others -v- The Hon. Attorney General & Others.*
2. *That if the above prayers are granted, the said documents be deemed to be part of the record of appeal.*
3. *costs of the application be provided for.*
2. The grounds in support of the application as stated on the face thereof are that:

“i. The issue in this appeal is whether the appellants, who sued on their own behalf and on behalf of over 700 members of Sagamian Community are entitled to the suit, land by virtue of adverse possession of the suit land, LR Narok/Cismara/Ilmotiok/54.

ii. The said land is huge and consists of several segments in it; some portion have been acquired by the government; some have been occupied by some groups whilst the applicants herein occupy what is known as Sagamian, roughly a third of the entire suit land.

iii. In order to enable the court to effectively determine this appeal, there is need to bring all evidence to show the dynamics and the exact portion of land occupied by the applicants.

iv. The applicants have occupied a portion of the suit property as long as they were born and over time they have multiplied on it and today, the applicant community comprises of a whole community of between 7,000 to 10,000 people.

v. As a demonstration of the applicants’ prolonged adverse possession which has crystalized into an established community, the community has its own government administrative structures and officers including a primary school.

vi. On 21st November, 2015, the High Court at Nakuru confirmed the applicants’ entitlement to the suit land when it recognized their rights to a primary school of their own and ordered the respondent herein to process a title to the school from the suit land herein.

vii. The intended additional evidence is therefore to enable this court reach a fair determination of the appeal, taking into account, the applicants’ right to a fair hearing and access to justice.

viii. Further, the said evidence could not have been obtained with reasonable diligence at the time of the trial.”

3. The applicants wish to adduce evidence being an air cartography map prepared in 1971 showing the then un-adjudicated area of Sagamian that the applicants occupy. The affidavit in support of

the instant application deposes that the intended additional evidence is crucial as it will assist the court to reach a fair determination of the appeal taking into account *inter alia*, the applicants' right to a fair hearing and access to justice. The deponent states that in order to enable this Court to effectively determine the appeal, there is need to bring all evidence to show the dynamics and the exact portion of land occupied by the applicants. The applicants further contend that the said evidence could not have been obtained with reasonable diligence at the time of trial; that they only managed to obtain the map and to know of the various dynamics of the larger farm after the trial of the case before the High Court. The 1st applicant deposes that at the time of trial, he did not know that other groups like *Sogoo* and *Marenwa* also occupied large portions of the suit land.

4. In arguing the motion, Miss. Muhoro, counsel for the applicants, submitted that the applicants were not aware of the existence of the cartography map. It was stressed that the map was important to the appeal and urged us to admit the same as part of the record as the existence of the map was unknown to the applicants.
5. Learned counsel Mr. Simiyu who appeared for the respondents opposed the motion to adduce additional evidence. A replying affidavit sworn by *Isaiah Kiplagat Arap Cheluget* was filed. It was submitted that the applicants had every opportunity to adduce all evidence in their possession before the High Court and at no stage did they state that they lacked any evidence in support of their case, neither did they seek any direction relating to any other evidence. It was submitted that the instant Notice of Motion is blemished by delay and laches as the same had been filed six (6) years after the High Court's decision which fact militates against the exercise of this Court's discretion to grant the Orders prayed for. Counsel submitted that the principles guiding adduction of new and additional evidence does not extend to evidence or events that occurred after judgment of the High Court; that the proceedings and decision in Nakuru Petition No. 41 of 2013 occurred and came into existence after the judgment that is subject of the present appeal. Counsel submitted that the **Nakuru Petition No. 41 of 2013** and the Judgment therein do not meet the threshold of the principles necessary for this Court to exercise its discretion under **Rule 29** of the **Court of Appeal Rules 2010** and should thus not be admitted.
6. Counsel for the respondent further submitted that the cartography map intended to be adduced in evidence was prepared in 1971 and has been available for 32 years; that the map is not new evidence that was not in existence at the time of trial. He argued that even if the court were to allow the admission of the map, it will not add any weight to the applicants' case.
7. We have considered the application and the able submissions of learned counsel for the parties herein. In **Singh -v- Qurbanlite Limited (185) KLR 920** it was stated that an application for adduction of additional evidence is an application for the exercise of the Court's discretion and sufficient reason in support thereof must be given. Such an application is grounded on **Rule 29 (1)** of the Rules of this Court. **Rule 29(1)** states as follows:

“29. Power to re-appraise evidence and to take additional evidence

(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. **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.”**
8. To succeed in an application under **Rule 29**, the applicant must show that the evidence sought to be introduced could not have been obtained before or during the hearing, and that the evidence will most likely have an effect on the end result of the suit. This principle was asserted as far back as in **Karmali Tarmohamed & Another Vs. I. H. Lakhani & Company [1958] EA 567** where the predecessor to this Court, cited with approval the decision of the English court in **Ladd v**

Marshall [1954] 1 WLR 1489 , and held that:

“(i) 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.”

9. In The Administrator HH The Aga Khan Platinum Jubilee Hospital - v- Munyambu, 1985 KLR 127, this Court held “that in exercising its discretion to grant leave to adduce additional evidence, the Court will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial; if it will probably have an important influence on the result of the appeal and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront commonsense or a sense of justice.”

10. The principles upon which this Court may receive additional evidence under **Rule 29(1)(b)** was restated in Joginder Auto Services Ltd v Shaffique & Another, [2001] KLR 97 as follows:

“In summary these and several other cases decide that the power of the court and more particularly this Court to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:

- i. ***The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.***
- ii. ***The evidence must be such that if given it will probably have an important influence on the result of the case, although it may not be decisive; and***
- iii. ***The evidence must be apparently credible, although it need not be incontrovertible.***

These are general principles, but we cannot say they are the only ones. The relevant rule authorizing the adduction of additional evidence uses a general phrase, namely ‘sufficient reason’.

11. The issue before us is whether the applicants have met any of the principles to justify this Court to exercise its discretion in their favour. The applicants’ explanation for not tendering the cartography map is that they did not know that the map existed and had no knowledge of it. In our view, this explanation is plausible, reasonable and credible. The cartography map is an official public document that is neither prepared by the applicants nor the respondents; it is a credible map and its contents incontrovertible. We are satisfied that the additional evidence of the cartography map could not have been obtained at trial by the applicants in exercise of reasonable diligence. One cannot obtain what he/she does not know exists. We hereby exercise our discretion and admit as additional evidence the map for LR No. Narok/Cis-mara/Ilmotio/54 showing portion of the suit land occupied by the appellants; we also admit as additional evidence the air cartography map of 1971 showing the settlement status in Sagamian area. The two maps shall form part of the record of appeal in this matter.

12. In relation to the application to adduce additional evidence in the form of the record of proceedings and judgment delivered in Nakuru High Court Petition No. 41 of 2013, we decline to admit the same as additional evidence. Litigation in Nakuru Petition No. 41 of 2013 is ongoing. Further, the judgment the subject of appeal in this matter is in relation to **Nakuru H.C. Misc Civil Application No. 400 of 2003**. This is a totally different case from Nakuru Petition No. 41 of 2013. We foresee a risk of conflating and confusion in the main appeal if additional evidence in the form of judgment in the Nakuru Petition No. 41 of 2013 is admitted as part of the record in this appeal.

13. In the final analysis, we partially allow the instant application. We grant prayer 1 (b) and (c) of the

Notice of Motion dated 21st September 2015 and admit as additional evidence the map for LR No. Narok/Cis-mara/Ilmotio/54 showing portion of the suit land occupied by the appellants and also admit the air cartography map of 1971 showing the settlement status in Sagamian area. We decline to grant prayers 1 (a) and (d) of the Motion. Costs in the appeal.

Dated and delivered at Nairobi this 11th day of March, 2016

E. M. GITHINJI

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JUDGE OF APPEAL

M.K. KOOME

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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

