



**Kipkulei v Musk Deer Limited & another (Environment & Land Case 1 of 2019) [2024] KEELC 5729 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5729 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 1 OF 2019  
LL NAIKUNI, J  
JULY 29, 2024  
[FORMERLY HIGH COURT CIVIL APPEAL NO.178 OF 2007]**

**BETWEEN**

**BENJAMIN K KIPKULEI ..... APPELLANT**

**AND**

**MUSK DEER LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MUNICIPAL COUNCIL OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 11<sup>th</sup> February, 2011 instituted by Benjamin K. Kipkulei, the Appellant/Applicant herein. The application was brought under the dint of the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Cap. 21 and Order 42 Rule 27 of the Civil Procedure Rules, 2010.
2. Upon service of the same, the 1<sup>st</sup> Respondent responded to the application through grounds of opposition dated 9<sup>th</sup> November 2011 and Replying Affidavit dated 16<sup>th</sup> November 2011.

**II. The Appellant/Applicant's case**

3. The Appellant/Applicant sought for the following orders:-
  - a. The Affidavits of G.K. Meenye and Peter Kinyua Muchendu filed herein on 12<sup>th</sup> January 2011 and 1<sup>st</sup> February 2011 respectively be admitted in evidence in this Appeal.
  - b. Costs of this Application be provided for.



4. The application was premised on the grounds, testimonial facts and averments of the five (5) Paragraphed supporting affidavit of BENJAMIN K. KIPKULEI, dated 11<sup>th</sup> February, 2011. He averred that:-
- a. He was an adult male and a retired Civil Servant. Save where otherwise stated to the contrary, the facts deponed to herein were within his own personal knowledge. Where they were derived from information or are based on documents received or in his possession, the sources of such information and grounds of belief were stated all of which he verily believed to be true.
  - b. He had read the Affidavits of G. K. Meenye sworn on the 11th day of January 2011 and 9<sup>th</sup> day of February 2011 and filed herein on the 1<sup>st</sup> and 10<sup>th</sup> days of February 2011 respectively as well as the Affidavit of Peter Kinyua Muchemi sworn on the 1<sup>st</sup> day of February 2011 and filed herein on the same day, all of which I understand were filed following the orders of this Honourable Court requiring the attendance of Mr. Meenye and Mr. Kinyua as regards the account for the monies received upon the purported sale of his property which was the subject of these proceedings.
  - c. The evidence contained in the said Affidavits was fundamentally crucial and important to enable this Honourable Court make a just determination of the issues at hand in accordance with the overriding objective envisaged in law.
  - d. No party would be prejudiced particularly given that he verily believed that any rights that can accrue to the 1<sup>st</sup> Respondent could only so accrue in the event that the proceedings in the Sub-ordinate Court was said to have been validly and lawfully conducted with jurisdiction. If not, then no rights could possibly accrue to the 1<sup>st</sup> Respondent as the very Judgement on which any rights they could have acquired would be a nullity and of no consequence whatsoever.
  - e. It was in the interest of justice that the Appellants' present application be allowed and prayed that this be granted.

### **III. The Grounds of Opposition by the 1<sup>st</sup> Respondent**

5. While opposing the Notice of Motion application dated 11<sup>th</sup> February, 2011 by the Appellant herein, the 1<sup>st</sup> Respondent raised eight (8) grounds of opposition dated 9<sup>th</sup> day of November, 2011 on the following grounds that:-
- a. There were no good reasons advanced in support of the Orders sought.
  - b. The decision before the lower Court arose out of a preliminary objection on a point of law.
  - c. There was a approbation and reprobation at the same time which should not be condoned nor sanctioned in law.
  - d. The Orders sought were to unfairly prejudice the 1<sup>st</sup> Respondent's Case at appeal stage and should not be allowed.
  - e. The rights of a bona fide purchaser for valuable consideration in an auction without notice took priority, was absolute and should not be interfered with.
  - f. The Affidavits sought to be admitted was from the face clearly a well calculated conspiracy and collusion lodged without locus as the deponents were not parties to the appeal with an intention to defeat the rights of the 1<sup>st</sup> Respondent.
  - g. The Application was an abuse of the court process.



#### IV. The Replying Affidavit by the 1<sup>st</sup> Respondent

6. The 1<sup>st</sup> Respondent a 30 Paragraphed Replying Affidavit sworn by AMRITLAL PURSHOTTAM BHIMIJ DEVANI and dated on 16<sup>th</sup> November, 2011. He averred as follows:-
- a. He was the Operations Director of the 1<sup>st</sup> Respondent's Company and was familiar with the matters the subject of this appeal. Thus, he was authorized to make this affidavit on behalf of the company.
  - b. He made this affidavit in response to the Appellant's Notice of Motion dated 11<sup>th</sup> February, 2011 and filed two months later on 12<sup>th</sup> April, 2011 and to its supporting affidavit sworn on 11<sup>th</sup> February, 2011, and in opposition to the application therein to admit additional evidence in this Appeal.
  - c. The application sought to admit certain affidavits, by Mr. G.K. Menye Advocate and/or the Auctioneer, Mr. Kinyua.
  - d. The said affidavits arose out of the interrogation of the deponents thereof carried out in respect of inquiries into possibly criminal activities by them.
  - e. The interrogation was at the instance of the then Resident Judge in Mombasa and of the Criminal Investigation Division (The C.I.D).
  - f. The said interrogation, summons of the deponents, inquiry into the said funds and any orders and steps in respect thereof were not part of this Appeal nor part of the proceedings in this Appeal. Nor in law could they be.
  - g. The criminal inquiry was into whether any offence was disclosed against Mr. Menye Advocate in relation to moneys belonging to the Municipal Council of Mombasa for whom he had been acting in the sale of the suit property.
  - h. The criminal inquiry never related to the auction sale or transfer of the suit property. The Learned Resident Judge on several occasions expressly stated that he was summoning Mr. Menye Advocate and the Auctioneer to determine where the monies were.
  - i. On one occasion during the hearing of this appeal by the said Learned Resident Judge, the Learned Judge announced that he was adjourning the hearing for a while so as to enable him to be present during the said criminal inquiries at the Court, (which were directed at the Magistrate's Court Civil Registry file), together with the C.I.D.
  - j. None of these questions were issues in this appeal.
  - k. As a result, the then advocate for the 1<sup>st</sup> Respondent, Mr. William Mogaka Esq., Advocate, drew the attention of the Learned Judge to his position as Investigator, Prosecutor and Judge and the prejudice to the Appellant and whether it would not affect his ability to hear the appeal.
  - l. The Learned Judge then expressly stated that these inquiries were not part of this appeal.
  - m. The Learned Judge then adjourned the hearing and carried out his investigations together with the C.I.D. Neither the 1<sup>st</sup> Respondent nor any of its advocates were present during these aforesaid inquiries and interrogations of Mr. Menye Advocate and/or the Auctioneer Mr.Kinyua.



- n. Mr. Menye and Mr. Kinyua filed the subject affidavits. There was no Court Order directing them to file these affidavits. There was no application for leave to do so. Mr. Menye and Mr. Kinyua were not parties either in this appeal or in the suit in the lower Court.
- o. The said affidavits were by parties without any standing or interest in this appeal, without any authority to be placed on the Court file, and were meant to prejudice this Honourable Court in the hearing of the appeal against the 1<sup>st</sup> Respondent.
- p. All this was a manifest abuse of the process of this Honourable Court.
- q. The said criminal inquiries by the Learned Judge and the C.I.D. were in respect of public moneys belonging to the Municipal Council of Mombasa being possibly misappropriated by Mr. Menye, Advocate after the sale price had been received by the Auctioneer from the Purchaser and been paid over to Mr. Menye Advocate by the Auctioneer.
- r. The issue in the appeal was in respect of the Preliminary Objection upheld in the lower court on a point of law.
- s. Admission of the said affidavits of Mr. Menye, Advocate and Mr. Kinyua as sought would mix up disparate issues and prejudice the fair hearing of the appeal.
- t. The application was inconsistent with a fair hearing of the appeal.
- u. The orders sought were to and would, unfairly prejudice the 1<sup>st</sup> Respondent's case at the appeal stage and should not be allowed.
- v. There was approbation and reprobation at the same time on the part of the deponents contrary to law and in defeasance of the application.
- w. The said affidavits sought to be admitted were ex facie collusive and a well calculated conspiracy to defeat the protected rights of the 1<sup>st</sup> Respondent.
- x. The application and the said affidavits never met the requirements of the law.
- y. The rights of a bona fide purchaser for valuable consideration without consideration in an auction took priority, were absolute and could not be interfered with.
- z. The application sought to have the Court exercise its discretion in disregard of express statutory and constitutional provisions and protections, which could not be done in law.
- aa. The application was an abuse of court process.
- ab. Save in so far as the application, its grounds and its supporting affidavit consisted of admissions, the 1<sup>st</sup> Respondent each and every allegation therein contained as if the same were seriatim set out here and seriatim traversed herein.
- ac. He expressly denied the contents of grounds (a),-(b), (c) and (d) of the aforesaid notice of motion and each of them and state that the same were not correct.
- ad. He expressly denied the contents of Paragraphs 3, 4 and 5 of the supporting affidavit of the Appellant sworn on 11<sup>th</sup> February, 2011, and filed two months later on 12<sup>th</sup> April, 2011, and of each of them.



## V. Submissions

7. On 18<sup>th</sup> March, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 11<sup>th</sup> February, 2011 be disposed of by way of written submissions and all the parties complied. On 28<sup>th</sup> May, 2024, Mr. Sanjiv Khagram Advocate for the Appellant/Applicant and Mr. Kilonzo Advocate for the 1<sup>st</sup> Respondent were both accorded an opportunity to orally highlight their written submission. Indeed, they executed their mandate so effectively, efficiently and dedicatedly to the satisfaction of the Honourable Court. Pursuant to that on 28<sup>th</sup> May, 2024 a ruling date was reserved on 16<sup>th</sup> July, 2024 by Court accordingly.

### A. The Written Submissions by the Appellant/ Applicant

8. The Appellant through the Law firm of Messrs. A.B. Patel & Patel filed his written submissions dated 15<sup>th</sup> March, 2024. Mr. Khagram Advocate commenced by stating that before the Honourable Court was the Appellants Notice of Motion Application dated 11<sup>th</sup> February 2011 and filed on 12<sup>th</sup> April 2011 (hereinafter referred to as “the Appellant’s Application”) seeking “inter alia’ for the above stated orders.
9. The 1<sup>st</sup> Respondent in opposition to the Application filed grounds of opposition dated 9<sup>th</sup> November, 2011 and Replying Affidavit dated 16<sup>th</sup> November, 2011.
10. Further to this, the Learned Counsel provided the Court with a brief background of the case. He held that the Municipal Council of Mombasa purported to make rate demands against the Appellant for alleged outstanding rates. They obtained an order and purportedly proceeded to sell the suit property. The Appellant moved Court whereby he raised a Preliminary objection on grounds of not having been served with the pleadings and that the said Court lacked jurisdiction to deal with the matter. However, the objection was dismissed by the Magistrate’s Court on the basis that the property had already been sold off. Subsequently, the Appellant being aggrieved by that decision by the lower court preferred this appeal.
11. The Learned Counsel submitted that this Honourable court on 4<sup>th</sup> February, 2011 ordered the attendance of Mr. Meenye and Mr. Kinyua to explain to the court on the account for the monies received upon the purported sale of the property of the Appellant.. Pursuant to this order, Mr. Meenye and Mr. Kinyua swore affidavits dated 11<sup>th</sup> January, 2011 and 1<sup>st</sup> February, 2011 explaining how the instructions were issued to undertake rates arrears collection on behalf of the 2<sup>nd</sup> Respondent and the sale of the property. The evidence contained in the said affidavits was essential in answering the question as to whether the Sub - ordinate Court had jurisdiction to hear the suit filed before it. The application was supported by the affidavit of Benjamin Kipkulei (Appellant/Defendant) and feebly opposed by the 1<sup>st</sup> Respondent.
12. On legal analysis the Learned Counsel averred that the Appellant had filed this appeal against the ruling of Hon. M.K. Mwangi dated 4<sup>th</sup> October 2007 on grounds that the Learned Resident Magistrate erred in law in allowing a preliminary objection when the Defendants Application dated 22<sup>nd</sup> June 2007 was partly argued. The gist of the Appellant’s Application of 22<sup>nd</sup> June 2007 in summary was to set aside the ex - parte Judgment entered against the Defendant on 20<sup>th</sup> July 2006 upon which all subsequent prayers were premised. Further, if the ex - parte Judgment against the Judgment was a nullity all consequential orders including the sale of the Defendants property in execution of the purported Judgment would be a nullity.
13. The Affidavits filed by Mr. Kinyua and Mr. Meenye raised great concern on how instructions and the sale of the property were carried out. The Learned Counsel cited the provision of Section 78 of the



Civil Procedure Act, discretion is given to the Appellate Court to take additional evidence or to require evidence to be taken. It said provisions state that:

- “(1) Subject to conditions and limitations as may be prescribed, an appellate court shall have power:
  - (a) To determine a case finally
  - (b) To remand a case
  - (c) To frame issues and refer them for trial
  - (d) To take additional evidence or to require the evidence to be taken;
  - (e) To order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits.”

14. The Learned Counsel submitted that in exercising its discretion on identifying the dominant issues and the yardstick by which the Court should admit evidence pursuant to Section 78(1)(D) of the Civil Procedure act, the Appellate Court ought to follow the guidelines as stipulated by the Supreme court in the case of:- “Mohamed Abdi Mahamud – Versus - Ahmed Abdulahi Mohamed & 3 others {2018} eKLR” (attached and marked ‘A’) which held:

- “ 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 results 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 for 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 issues 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.”
15. Additionally, the Learned Counsel also cited the legal ratio from the Court of Appeal case of: “Nayan Mansukhlal Salva – Versus - Hanikssa Nayan Salva [2019] eKLR”. This Honourable Court in finding whether the trial court was justified in hearing the Preliminary Objection in the middle of a part heard application, which was the subject of the objection, ought to appreciate the mischief of the party in filing the preliminary objection. These affidavits being sought to be allowed as new evidence shall shed light on the purpose of the preliminary objection rather than the nature of the objection which issue is the subject of the appeal.
16. The 1<sup>st</sup> Respondent, who filed the Preliminary objection, was in essence the ultimate benefactor of the ex-parte judgment and decree orders granted by the trial court which allowed the Second Respondent to collect rates and eventually auctioning the property of the Appellant herein. Mr. Meenye, who was the advocate on record then, in his affidavit, states that the firm was instructed by Hon. Lerry Kivuti/ Geo maps in February 2006 to undertake collection of rates for the Second Respondent whereas the affidavit of Mr. Kinyua, the auctioneer, refutes allegations of the affidavit of Mr. Meenye in so far as what was the status of the property. This information was only known to the Appellant after the affidavits were filed before this Honourable court. These affidavits are directly relevant to the appeal and may have an impact on the result of this Honourable courts verdict taking into consideration the prayers being sought in the appeal.
17. The prayers sought in the Appeal were “inter alia”:
- a. The Learned Resident Magistrate’s order upholding the Affected Party’s preliminary objection be set aside;
  - b. An order be made (and substituted thereof) to the effect that the Affected Party’s preliminary objection raised on 20<sup>th</sup> August 2007 be dismissed with costs to the Appellant.
  - c. An order be made reinstating the Defendants Notice of Motion Application dated 22<sup>nd</sup> June 2007 to gearing as well as the order to maintain status quo made thereupon and directing a court of competent jurisdiction other than that of the learned magistrate Mr. M.K. Mwangi to hear the same expeditiously
18. According to the Learned Counsel, in reliance to the case of:- “Mohamed case” above, this evidence meets the threshold of new evidence that can be admitted on appeal. The Learned Counsel held that the auction was done by Mr. Kinyua and Mr. Meenye whereby there was no jurisdiction. Through that they deprived the Appellant his right to private property as provided for under Article 40 of *the Constitution* of Kenya, 2010. Without belabouring much into the merits of the appeal the Learned Counsel submitted that these affidavits if admitted will shed light on the illegality of the proceedings in the trial court, the misapplication of the law on preliminary objections by the learned resident magistrate and subsequent fraudulent sale of the property.



19. The trial court ought to have seen beyond the party's mischief, especially when an application seeking similar orders which aimed to bring out the fraudulent actions by the parties was already before the court and partly heard. The preliminary objection sought to dismiss the suit while the Application sought to demonstrate to the court that the proceedings from the beginning and any subsequent order were a nullity for want of jurisdiction.
20. It had been the tradition following the case of "Mukisa Biscuits Co. Ltd – Versus - West End Distributor Ltd [1969] EA 696" that a preliminary objection once raised may be dispense of the sit in the first instance and ought to be heard first. However this benchmark was slightly altered by the Supreme Court of Kenya in the case of "Independent Electoral & Boundaries Commission – Versus - Jane Cheperenger & 2Others [2015] eKLR" where the court held:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection-against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
21. In this circumstance the parties utilized the preliminary objection to cover up their illegalities on how the property was acquired and these Affidavits demonstrate a strong prima facie case of willful deception to the court by the parties. The Respondents wrongfully utilized the tenets of the law in achieving their desired outcome.
22. According to the Learned Counsel the Appellant shall suffer great prejudice if this Application is not allowed as he has been deprived his right to property and quiet enjoyment. These affidavits were clear evidence of fraud and will enable the court to fully appreciate the extent of fraud not only to the Appellant but also to the court.
23. In conclusion, the Learned Counsel submitted that the Notice of Motion Application has merit and pray the same be allowed as prayed.

#### **B. The Written Submissions by the 1<sup>st</sup> Respondent**

24. The 1<sup>st</sup> Respondent through the firm of Messrs. Oluga & Company Advocates filed its written submissions dated 27<sup>th</sup> May, 2024 where the Learned Counsel on the background submitted that this suit was originally commenced at the lower court on 23<sup>rd</sup> June 2006 by the 2<sup>nd</sup> Respondent herein. In the Plaint, the 2<sup>nd</sup> Respondent sought for a sum of Kenya Shillings Seven Fifty Two Thousand Five Hundred and Seven (Kshs. 752,507.00/=) being the rates arrears and penalties due in respect of the suit property. Vide a Decree for Rates issued on 18<sup>th</sup> August 2006 by Resident Magistrate M.K Mwangi, as he then was, the Appellant herein was ordered to pay to the 2<sup>nd</sup> Respondent the sum of Kenya Shillings Eight Sixty Nine Thousand Three Hundred and Two and Seventy Cents (Kshs. 869,302.70/=). The 2<sup>nd</sup> Respondent via the firm of Meenye & Kirima Advocates applied for execution of the said decree. On 14<sup>th</sup> November 2006, the court issued a Notification of Sale of the suit property. On 2<sup>nd</sup> February 2007, the 2<sup>nd</sup> Respondent wrote to the Executive Officer of the court requesting for extension of the Notice of Sale and also allocate the same to Kinyua & Company Auctioneers.
25. Vide a letter dated 12<sup>th</sup> April 2007, Kinyua & Company Auctioneers wrote the court informing the court that the 1<sup>st</sup> Respondent was the highest bidder at a sum of Kenya Shillings Fifteen Million (Kshs.



- 15,000,000.00/=). After deducting all the costs and VAT, the auctioneers informed the court that a sum of Kenya Shillings Fourteen Million Two Hundred Thousand (Kshs. 14,200, 000.00/=) was remitted to Meenye & Kirima Advocates. The court confirmed the sale by issuing a Certificate of Sale which was issued on 13<sup>th</sup> April 2007. The court also issued a vesting order on 13<sup>th</sup> April 2007 after the 1<sup>st</sup> Respondent herein applied for the same. Vide an order issued on 8<sup>th</sup> June 2007, the court directed the Registrar of Titles to issue the 1<sup>st</sup> Respondent with the Provisional Certificate to the property. The court also directed the removal of any squatters or any other persons in possession of the suit property.
26. The Learned Counsel submitted that by an application dated 22<sup>nd</sup> June 2007, the Appellant sought for orders inter-alia that the court Bailiff be ordered to restore possession of the suit property comprised in the Title register at the Land Titles Registry. The 1<sup>st</sup> Respondent who was the Affected Party in that suit filed a Preliminary Objection dated 20<sup>th</sup> August 2007. Vide a ruling delivered on 4<sup>th</sup> October 2007, the court upheld the Preliminary Objection. (The Court was referred to pages 203-207 of the Record of Appeal). It was the said ruling that is subject of this appeal.
  27. By a Notice of Motion application dated 11<sup>th</sup> February 2011, the appellant filed the instant application seeking an order that the affidavits of G.K Meenye and Peter Kinyua Muchendu be admitted as evidence in this appeal. the 1<sup>st</sup> Respondent opposed the application vide Grounds of Opposition dated 9<sup>th</sup> November 2011 and a Replying Affidavit sworn on 16<sup>th</sup> November by Amrital Purshottam Bhimij Devani.
  28. On the issues for determination, the Learned Counsel submitted that the only issue for determination by this court is whether the affidavits of G.K Meenye and Peter Kinyua Muchendu should be admitted as evidence at this appellate stage.
  29. According to the Learned Counsel, the analysis and submission of the 1<sup>st</sup> Respondent was that as stated in the 1<sup>st</sup> Respondent's Replying Affidavit sworn by Amrital Purshottam Bhimij Devani on 16<sup>th</sup> November 2011 at paragraphs 4 - 8 thereof, the subject affidavits were at the instance of the then Resident Judge in Mombasa. The inquiry was into whether any offence was disclosed against Mr. Meenye Advocate in relation to monies belonging to the 2<sup>nd</sup> Respondent, for whom he had been acting in the sale of the suit property. It was therefore clear that the inquiry did not whatsoever relate to the auction or transfer of the suit property. At paragraph 12 of the Replying Affidavit, the deponent confirms that the learned Judge expressly stated that the inquiries were not part of this appeal.
  30. According to the Learned Counsel they were guided by the case of "Nayan Mansukhlal Salva (Supra)" where the court stated as follows:
    6. The said Court further held that generally,
 

“appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in TARMOHAMED & ANOTHER - Versus - LAKHANI & CO (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in LADD – Versus - MARSHALL (1954) 1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:

“except in cases where the application for additional evidence is based on fraud or surprise:

“to justify 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 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. [Emphasis theirs]

31. In the instant application, according to the Learned Counsel had not met the above threshold. This was because the Appellant has not demonstrated to this court how the additional evidence will influence the outcome of this appeal. This appeal emanated from the ruling on the application dated 22<sup>nd</sup> June 2007 which had sought orders inter alia that the court Bailiff be ordered to restore possession of the suit property comprised in the Title register at the Land Titles Registry. The application was premised on the grounds, inter alia, that the trial court lacked jurisdiction to hear and enter judgment as it did on 20<sup>th</sup> July 2006. From the reading of the affidavits sought to be introduced as evidence, it is clear that the said affidavits do not in any way touch on the jurisdiction of the trial court or any other matter raised in the application dated 22<sup>nd</sup> June 2007. It was therefore their humble submission that the affidavits intended to be introduced as evidence were not relevant for purposes of this appeal. In any event, the ruling forming the subject of the appeal was delivered on a preliminary objection which does not require adduction of evidence.
32. The Learned Counsel submitted that further in the case of “Nayan Mansukhlal Salva (supra)” the court stated as follows:

“The Court of Appeal further said in the case referred to above that

“In Walter Joe Mburu - Versus - Abdul Shakoor Sheikh & 3 Others Civil Appeal No. 195 OF 2002 [2015] EKLR it was stated:

Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice.....

.....that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.” (Emphasis added).”
33. According to the Learned Counsel, the affidavits sought to be introduced as evidence do not relate to this appeal. The instant application is a way to prolong disposal of this appeal and aimed at strengthening the appeal to the detriment of the 1<sup>st</sup> Respondent. It was also important for the court to take cognizance of the delay by the Appellant to file his submission on the instant application. Since 26<sup>th</sup> April 2023, the Appellant has been granted 3 opportunities to file and serve submissions. The 1<sup>st</sup> Respondent vide a letter dated 7<sup>th</sup> March 2024 requested to be served with the Appellant’s submissions so that the 1<sup>st</sup> Respondent could also file and serve its submissions. This showed how far the Appellant was willing to go to frustrate the expeditious disposal of this appeal. It also showed that the Appellant was not keen to prosecute this Appeal.
34. In conclusion, the Learned Counsel submitted that from the analysis there were no exceptional circumstances that have been demonstrated by the Appellant to warrant this court to allow the admission of the affidavits at this stage. Further, it was clear that the instant application is an attempt to strengthen the appeal and frustrate the expeditious disposal of the appeal. From the foregoing, they prayed that the instant application be dismissed with costs to the 1<sup>st</sup> Respondent.



## VI. Analysis and Determination

35. I have carefully read and considered the pleadings herein, both the oral and written submissions and the myriad of cited authorities by the Learned Counsels, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. In order to arrive at an informed, reasonable, equitable and fair decision, the Honorable Court has three (3) framed the following issues for determination.
- a. Whether the Notice of Motion application dated 11<sup>th</sup> February, 2011 by the Appellant/Applicant herein has any merit whatsoever.
  - b. Whether the parties herein are entitled to the reliefs sought from the filed pleadings.
  - c. Who will bear the Costs of Notice of Motion application 11<sup>th</sup> February, 2011.

### **Issue No. a). Whether the Notice of Motion application dated 11<sup>th</sup> February, 2011 by the Appellant/Applicant herein has any merit whatsoever.**

36. Under this Sub – heading, the Honourable Court deciphers the main substratum of this application is singular - whether the affidavits of G.K Meenye and Peter Kinyua Muchendu should be admitted as evidence at this appellate stage. In order to do justice to the pith and substance of the question in issue, I have critically considered the Affidavits filed herein of G.K Meenye and Peter Kinyua Muchendu and the provision of the law on additional evidence at the appellate stage as graphically and elaborately cited by both the Learned Counsels for the Appellate and the 1<sup>st</sup> Respondent herein. In the case of “*Fibre Link Limited – Versus – Star Television Production Limited [2015] eKLR (CA 172 of 2012)*”, the court held as follows on admission of evidence at appeal stage:-

“The applicable law as regards the admission of additional evidence by an appellate court is Section 78 of the *Civil Procedure Act* which provides that: -

- “(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –
- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

The procedural Rules that are hand maidens to Section 78 of the Civil Procedure above provide under Order 42 Rule 27 of the Civil Procedure Rules that:-

- “(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –



- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
  - (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.
- (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.”

37. The said Court further held that generally:-

“appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in Tarmohamed & another – Versus - Lakhani & Co (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in Ladd - Versus - Marshall (1954) 1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:

“except in cases where the application for additional evidence is based on fraud or surprise: “to justify 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 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.”

38. The Learned Counsel for the Appellant has argued and indeed its rightfully on record that he filed this appeal against the ruling of the trial Court – Honourable M.K. Mwangi dated 4<sup>th</sup> October 2007 on grounds that the Learned Resident Magistrate erred in law in allowing a preliminary objection when the Defendants Application dated 22<sup>nd</sup> June 2007 was partly argued. The main gist of the Appellant's Application of 22<sup>nd</sup> June 2007 in summary was to set aside the ex -Parte Judgment entered against the Defendant on 20<sup>th</sup> July 2006 upon which all subsequent prayers were premised. Further, if the Ex -Parte Judgment against the judgment was a nullity all consequential orders including the sale of the Defendant's property in execution of the purported judgment would be a nullity.

39. The Affidavits filed by Mr. Kinyua, an Auctioneer and Mr. Meenye, an Advocate of the High Court and then acting for the Municipal Council of Mombasa (apparently who are not part of this proceedings) raise great concern on how instructions and the sale of the property were carried out. He asserted that the provision under Section 78 of the *Civil Procedure Act*, Cap. 21 discretion is given to the Appellate Court to take additional evidence or to require evidence to be taken. It said provisions state that:

- “(1) Subject to conditions and limitations as may be prescribed, an appellate court shall have power:
- (a) To determine a case finally
  - (b) To remand a case



- (c) To frame issues and refer them for trial
- (d) To take additional evidence or to require the evidence to be taken;
- (e) To order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits.”

40. The 1<sup>st</sup> Respondent on the other hand contended that as stated in the 1<sup>st</sup> Respondent’s Replying Affidavit sworn by Amrital Purshottam Bhimij Devani on 16<sup>th</sup> November 2011 on averments made out at Paragraphs 4 - 8 thereof, the subject affidavits were at the instance of the then Resident Judge in Mombasa. The inquiry was into whether any offence was disclosed against Mr. Meenye Advocate in relation to monies belonging to the 2<sup>nd</sup> Respondent, for whom he had been acting in the sale of the suit property. It was therefore clear that the inquiry did not whatsoever relate to the auction or transfer of the suit property. At paragraph 12 of the Replying Affidavit, the deponent confirmed that the Learned Judge expressly stated that the inquiries were not part of this appeal.
41. This appeal emanated from the ruling on the application dated 22<sup>nd</sup> June 2007 which had sought orders inter alia that the court Bailiff be ordered to restore possession of the suit property comprised in the Title register at the Land Titles Registry. The application was premised on the grounds, inter alia, that the trial court lacked jurisdiction to hear and enter Judgment as it did on 20<sup>th</sup> July 2006. From the reading of the affidavits sought to be introduced as evidence, it is clear that the said affidavits do not in any way touch on the jurisdiction of the trial court or any other matter raised in the application dated 22<sup>nd</sup> June 2007. It was therefore their humble submission that the affidavits intended to be introduced as evidence were not relevant for purposes of this appeal. In any event, the ruling forming the subject of the appeal was delivered on a preliminary objection which does not require adduction of evidence.
42. According to the 1<sup>st</sup> Respondent the affidavits sought to be introduced as evidence do not relate to this appeal. The instant application is a way to prolong disposal of this appeal and aimed at strengthening the appeal to the detriment of the 1<sup>st</sup> Respondent. It was also important for the court to take cognizance of the delay by the Appellant to file his submission on the instant application. Since 26<sup>th</sup> April 2023, the Appellant has been granted 3 opportunities to file and serve submissions. The 1<sup>st</sup> Respondent vide a letter dated 7<sup>th</sup> March 2024 requested to be served with the Appellant’s submissions so that the 1<sup>st</sup> Respondent could also file and serve its submissions. This showed how far the Appellant was willing to go to frustrate the expeditious disposal of this appeal. It also showed that the Appellant was not keen to prosecute this Appeal.
43. My understanding of the law – based on statutes, precedent and even upon indepth consideration to the submissions made herein. Leave to adduce additional evidence is at the discretion of the Court. For the principles applicable in the exercise of the Court’s discretion under Rule 29 of the *Appellate Jurisdiction Act*, I seek refuge from the Court of Appeal decision of “Mzee Wanjie & 93 others – Versus – A. K Sakwa & others (1984) KLR 275” where the principles were summarized by Chesoni, Ag. JA (as he then was) it was held that the principle rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. Chesoni JA observed at page 280:

“ 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 the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

44. The court further said that

“Hancox JA as he then was in the same case above stated that the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.”

45. On the other hand, courts have been urged to administer justice by exercising a delicate balance and in exceptional circumstances, new evidence should be allowed after weighing the two interests, that of doing justice and that of avoiding being mired by endless litigation which would occur if parties were allowed to adduce fresh evidence at any time during and after the trial without any restrictions. (see “General Parts (U) Limited – Versus - Kunnal Pradit Kariaca No 26 OF 2013 UCA”.

46. In the “Wanjie – Versus - Sakwa (supra) case”, the court dismissed an application for additional evidence because most of the evidence sought to be admitted was not new, having been used before the trial court and because the applicants were merely trying to have a second bite at the Cherry. Courts have also disallowed such applications where the evidence sought to be admitted was in possession of the applicant at the time of the hearing before the trial court.

47. Furthermore, in the Supreme Court case of:- “Mohamed Abdi Mahamud (Supra) cited herein extensively by the learned Counsel for the Appellant stressed that additional evidence at the appellate level should be allowed on a case – by case basis and even then sparingly with abundant caution. Thus, from the surrounding facts and inferences herein, the Honourable Court has considered the above stated authorities and the submissions filed herein and my strong findings are based on the following reasoning:

- i. The Evidence the Appellant/ Applicant is seeking to adduce was in form of Affidavits sworn by Mr. Meenye Advocate and Mr. Kinyua the auctioneer pursuant to an investigation undertaken by the Criminal Investigation Division (CID) of the alleged misappropriation of the funds obtained from the sale of the suit property. In all fairness, I see no probative value added to this appeal whatsoever from this criminal proceedings.
- ii. The main pith and substance of the appeal is on the legality of the sale of the suit property belonging to the Appellant and not on the impropriety of the proceeds from the sale of the property through a public auction allegedly for failure to remit outstanding rates to and/or owed to the Municipal Council of Mombasa (now defunct).
- iii. Besides, it instructive to note that this evidence is not new at all as it had always been in the possession of the Appellant at the time of the hearing of this case. Indeed, as clear proof to this fact, from the pleadings the Appellant prays for the following:-

“The Affidavits of G.K. Meenye and Peter Kinyua Muchendu filed herein on 12<sup>th</sup> January 2011 and 1<sup>st</sup> February 2011 respectively be admitted in evidence in this Appeal (Emphasis is Mine)”.



- iv. There are no exceptional circumstances to warrant this court to allow the admission of the same at the appeal stage.
  - v. In conclusion, I find that this is an attempt to strengthen the appeal.
48. Based on surrounding facts and inferences herein, and for the forgoing reasons, this Honourable Court finds that the application dated 11<sup>th</sup> February, 2011 lacks merit and is hereby dismissed as it does agree with the 1<sup>st</sup> Respondent that the appeal is on the Preliminary objection and the affidavits do not shade any light into the substratum of the Memorandum of Appeal. Arising from the age of the pending appeal, the interest of natural Justice and for expeditious sake, it should be disposed off within the next One Hundred and Eighty days from the date of the delivery of this Ruling.

**Issue No. c). Who will bear the Costs of Notice of motion application dated 11<sup>th</sup> February, 2011**

49. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects not to award any costs.

**VII. Conclusion & Disposition**

50. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and the balance of convenience. Having said, I proceed to order as follows:-
- a. That the Notice of Motion application dated 11<sup>th</sup> February, 2011 by the Appellant be and is hereby found to lack merit, thus dismissed with no orders as to costs.
  - b. That for expediency sake, the pending appeal should be heard on 11<sup>th</sup> December, 2024. There be a mention on 17<sup>th</sup> October, 2024 for purposes of taking direction on the disposal of the entire appeal pursuant to the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.
  - c. That all facts remaining constant, the Honourable Court to render its Judgement on 30<sup>th</sup> January, 2025.
  - d. That there shall be no orders as to cost.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JULY 2024.**

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**HON. MR. JUSTICE L. L. NAIKUNI,**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Ondego Advocate holding brief for Mr. Sanjiv Khagram Advocate for the Appellant/Applicant.
- c. M/s. Machogu Advocate holding brief for Mr. Oluga Advocates for the 1<sup>st</sup> Respondent.
- d. No appearance for the 2<sup>nd</sup> Respondent.

