



REPUBLIC OF KENYA



**M’Uthari & 3 others v Baibulu (Civil Appeal E103 of 2021)
[2024] KEELC 7382 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
CIVIL APPEAL E103 OF 2021
CK YANO, J
NOVEMBER 8, 2024**

BETWEEN

**NTONGAI M’UTHARI 1ST APPELLANT
ITHANYA M’UTHARI 2ND APPELLANT
KALUNGE M’UTHARI 3RD APPELLANT
KABUARI M’UTHARI 4TH APPELLANT**

AND

KAREMA PIZARRO BAIBULU RESPONDENT

RULING

1. Before me is a notice of motion dated 4th March 2024 brought under Section 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 42 Rule 27, 28 and 29, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Article 159(2) (d) of the [Constitution](#) of Kenya. The appellants/applicants are seeking leave to amend their record of Appeal dated 15th March 2023 by filing a supplementary record of appeal to include and to be allowed to adduce evidence in the form of the following documents;
 - i. Witness statement for Stephen Ntongai Uthari and Peter Kagwari M’Uthari dated 8th July, 2019.
 - ii. Letter from Ministry of Lands and Physical Planning dated 30th June 2021.
 - iii. Application dated 11th September, 2018 and replying affidavit dated 17th September, 2018.
 - iv. Letter from KNCHR dated 16th June 2016
 - v. Letter from KNCHR dated 30th August, 2016
 - vi. Letter from Kenya Anti-Corruption Commission dated 23rd February, 2006.



- vii. A certified copy of AR objection proceedings dated 6th February, 2019
 - viii. A certified copy of objection proceedings dated 31st January, 2019.
 - ix. Damage assessment report dated 13th June 1994
 - x. Medical report dated 22nd March, 2022.
 - xi. Burial permit dated 26th May 2022
2. The application is supported by the affidavit of Ithanya M’Uthari, the 2nd applicant sworn on 4th March 2024 and is premised on the following grounds.
1. That the amendments are necessary for the real issue in controversy between the parties herein to be determined by this court.
 2. That the appellant needs to canvass other grounds of appeal and prayers which are not in the memorandum of appeal.
 3. That the documents referred to hereinabove were inadvertently not included in the record of appeal despite being in the court file while others were mysteriously missing in the court file.
 4. That some of the documents have been discovered after judgment was passed and could not have been produced during the hearing despite reasonable steps being taken to retrieve them.
 5. That the additional evidence is directly relevant to issues for determination in the appeal that the same is credible and if admitted it shall have significant impact on the determination of the appeal.
 6. That the application has been brought in a timely manner and the respondent will not suffer any prejudice as the additional evidence is already within his knowledge.
 7. That the instant application has been necessitated by the thorough analysis of the issues at hand and in the interests of justice.
 8. That the additional evidence was either mentioned in the proceedings or produced in court by persons summoned by the court but was erroneously omitted in the record of appeal.
 9. That the additional evidence is credible as it consists of official documents written and received in the course of public duty and the documents originate from a public office having proper custody thereof.
 10. That the documents are not voluminous.
 11. That no party will suffer prejudice if this application is allowed in the interest of justice
3. In the supporting affidavit, the 2nd applicant has deponed that some harassments and threats were reported to KNCHR which wrote a comprehensive letter to the OCS Mutuati asking them to intervene in the matter. That the letters dated 23rd February, 2006, 26th November, 2011 and 16th June 2016 were discovered recently in some clothes of the deponent’s deceased brother after the death of the deceased who he stated was suffering from mental disorder and after the applicants were evicted from the suit land. That arising from the said forceful evictions and constant harassment from the respondent in 2011, the deponent came across water receipts dated 10th August 2005, 28th July, 2015 and a water bill dated 30th July, 2013 all for the suit land. The said letters, receipts and bill have been annexed and marked “J11A”, “J1B”, “J1C”, “J1C”, “J2A”, “J2B” and ‘J2C” respectively.



4. The applicants aver that the documents that are in the court file but which were erroneously left out in the record of appeal are an application dated 14th September, 2018, letter dated 22nd August 2016 and received on 5th August 2018, letter from the Ministry of Lands and Physical Planning dated 30th June, 2021, court Administrator's report dated 13th January, 2022, application dated 11th September, 2018 and medical report dated 22nd March 2022.
5. The applicants contend that the displacements and acts of violence meted on them in 2006 by the respondent and his agents destroyed most of the documents and that from the ruins they came across a damaged assessment report dated 13th June 1994. A copy of the same is annexed and marked "J1F."
6. The applicants state that they need to amend the memorandum of appeal to capture the grounds that they need to canvass together with the earlier ones in the initial memorandum dated 21st September, 2021.
7. The applicants aver that during the hearing and before the Land Adjudication and Settlement Officer had been summoned to court, they handed over copies of proceedings to their advocate showing that objections were still pending before the Adjudication Officer but the same was not filed in court. The applicants have annexed copies of AR objection proceedings dated 6th February, 2019 and 31st January, 2019 marked 'J15 A" and J15B"
8. The applicants state that most of the documents have been discovered after the death of their brother who was still residing on the suit land after most of them were evicted as at 13th January, 2022. A copy of the burial permit marked "J16" has been annexed.
9. The applicants aver that for the court to effectively adjudicate on the matter, leave for amendment must be sought since the directions have already been given. That the decision by the trial court was arrived at in the absence of crucial witness statements which were adopted in court but miraculously disappeared as the trial proceeded. Relying on legal advice, the applicants state that the additional documents are aimed at removing any vagueness or doubt over the position of the suit property and that the documents have a direct bearing on the main issue in the appeal herein. That it is only prudent and apt that the court allows the application in furtherance of the right to access to justice as enshrined under Article 48 of the Constitution of Kenya, 2010. It is the applicant's contention that the application has been brought without inordinate delay.
10. The application is opposed by the respondent who filed his replying affidavit dated 18th March 2024 wherein he depones that the application is frivolous and an abuse of the court process as the appellants are using the said application to steal a match by introducing documents to patch up their case, as they have realized that their case is weak.
11. The respondent states that the documents the appellants intend to introduce were never filed in the primary suit and were never subjected to any trial. He invited the court to peruse the lower court proceedings on the point, adding that there are no such documents on record. The respondent contends that the only documents that the applicants sought to rely on in the trial court was a bundle of photos that were filed on 10th July, 2019 and the same was clearly captured in the proceedings. He referred the court to page 88 of the record of appeal.
12. The respondent states that the applicants have not shown that the documents could not have been obtained in reasonable diligence for use at the trial, was not within their knowledge, or could not have been produced at the time of the suit. The respondent states that the appellants are now amending the trial. That the documents sought to be admitted on appeal were not filed or expunged at the trial stage, that there was no effort made by the applicants to file those documents and that they were never



- denied an opportunity of producing the document's at the trial stage nor did they even seek to have the case re-opened to have the document's adduced in evidence.
13. The respondent states that the appellants have not adduced any good reason for the introduction of additional evidence at this stage and that the instant application is a means of delaying the disposal and determination of the appeal and that it is obvious that he will be disadvantaged.
 14. The respondent noted that most of the documents annexed to the supporting affidavit are of dates before the hearing of the case and there is no explanation offered as to why they were not produced during the trial. That it is wrong for the appellants to make their case at the appeal stage noting that makers of such several documents will not be called. The respondent states that to allow the documents to be introduced as evidence at the appeal stage would be prejudicial to him and would occasion a lot of injustice to him. That it is clear that the applicant knew of the existence of the documents they seek to be admitted from the time the matter was before the trial court but have not shown why they failed to produce them during the trial.
 15. The respondent contends that the applicants have not disclosed how the production of the said documents would change or would have the appeal herein determined and the same is akin to having an evidence hearing at the appeal stage.
 16. The respondent states that it is only proper that the court dismisses the application and allow issues only in the lower court judgment to be determined and disallow the applicants' application which has the effect of abusing the process of the court and leading to unfair trial.
 17. The applicants relied on their supporting affidavit while the respondent filed his submissions dated 22nd September, 2024.
 18. The respondent submission mirrors their replying affidavit and there is no need to regurgitate. However, the respondent relied on *Mzee Wanje & 93 others Vs A.K Saikwa (1982-88) 1kar 463, C.A 93 of 2016 (Court of Appeal at Mombasa between Tana and Athi River Development Authority Versus County Government of Tana River (2018) eKLR, Raila Odinga and 5 others V IEBC and 3 others (2013) eKLR and Mohamed Abdi Mohamed Vs Ahmed Abdullahi Mohamed and 3 others (2018) eKLR, and cited Rule 29 of the Court of Appeal Rules which he submitted is similar to Section 78 of the Civil Procedure Act. It is the respondent's submission that allowing the documents to be introduced as evidence at this appellate stage would be prejudicial to him and would cause him a lot of injustice.*
 19. I have considered the application, the response and the submissions filed. The issue for determination is whether the applicants should be granted leave to file a supplementary record of appeal with a view to adducing additional evidence.
 20. In the case of *Mzee Wanje and 93 others Vs A K Saikwa (Supra)* the Court of Appeal while referring to Rule 29 of the Court of Appeal Rules which is similar to Section 78 of the Civil Procedure Act stated-;

“ 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.”
 21. In the case of *Raila Odinga and 5 others VS IEBC and 3 others (supra)*, the Supreme Court added its voice on reception of additional evidence, though in the context of presidential election, and stated as follows-;

“ the other issue the court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and



relied upon. If it is small and limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of evidence...”

22. In *Mohammed Abid Mohamed vs Ahmed Abdullahi Mohamed and 3 others* (supra), the Supreme Court further laid out guidelines on admission of additional evidence before 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 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 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) Whether 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 filing gaps in evidence;
- (j) The court must find the further evidence needful,
- (k) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the omissions or patch up the weak points in his/her case,
- (l) 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 and the one hand and the need for swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

[80] We must stress here that this court even with the application of the above principles will only allow additional evidence on a case by case basis and even then sparingly, with abundant caution.”



23. The gist of the applicants' application is that some of the documents they wish to introduce were inadvertently not included in the record of appeal despite the same being in the court file. That others are mysteriously missing from the court file. The applicants listed those documents as an application dated 14th September, 2018, a letter dated 22nd August 2016, a letter dated 30th June 2021, a report dated 13th January, 2018 and a medical report dated 22nd March 2022. I note, however, that the only document listed by the applicants herein in their list of documents dated 8th July, 2019 are a variety of photographs showing their houses and settlements (on the suit land). That was clearly captured by the trial court in the judgment. There were no other documents filed by the applicants. Moreover, some of the documents the applicants allege were in the court file but were left out in the record of appeal are dated 2022 which was after the judgment in the lower court was delivered on 13th September 2021. These include the Court Administrator's report dated 13th June 2022 and medical report dated 22nd March 2022. The applicants are therefore not being candid when they allege that those documents were in the court file but left out when the said documents are dated post the judgment of the trial court.
24. The applicants also allege that some of the documents sought to be introduced were discovered after judgment was passed and could not have been produced during the hearing despite reasonable steps having been taken to retrieve them. Having not been candid on the documents that were said to have been in the court file but left out, which turned out to be not true how can the court believe the applicants on these other set of documents? The explanation given by the applicants that the documents could not have been obtained after due diligence before and during the hearing is not convincing at all. In the scheme of our law and procedure, parties are expected to present their evidence before the trial court. I however recognize that Section 78 of the *Civil Procedure Act* permits the court to allow a party to introduce new evidence at an appeal stage. However, the discretion of the court can only be exercised in the applicant's favour where sufficient reason has been given. In this case, I am not persuaded that the applicants have given sufficient reason to be allowed to introduce new evidence at the appeal stage. Not only have the applicants misled the court that some documents were in the court file but left out, but I also believe the other documents could have been obtained by reasonable due diligence before or during the hearing if at all they existed then. The procedure under Section 78 of the *Civil Procedure Act* was never intended to be used to patch up or fill in gaps in a party's case or to make out a fresh case at this stage after hearing evidence of both parties by the trial court. It was intended for truly genuine cases where the additional evidence sought to be introduced could not be availed at the trial even with reasonable diligence. I am afraid, this is not the case in the present case. It is my finding and I so hold that the threshold for the grant of leave to present additional evidence has not been reached.
25. In the result, I find that the notice of motion application dated 4th March 2024 is devoid of merit and the same is dismissed with costs to the respondent.
26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF NOVEMBER, 2024.

In the Presence of

Court Assistant – Tupet

Ms Asuma holding brief for Mutembei for respondent

No appearance for appellants.

C.K YANO



ELC JUDGE

