Keli v Matiku (Environment and Land Appeal E022 of 2022)
[2025] KEELC 2904 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2904 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL E022 OF 2022

EO OBAGA, J

MARCH 27, 2025

BETWEEN

TELESIA MUNEE KELI ..... APPELLANT

AND

BERNARD MUTUKU MATIKU ..... RESPONDENT

RULING

1. Before this Court for determination is the Applicant's Notice of Motion dated 23rd September, 2024 brought under the provisions of Sections 1A, 1B, 3 and 78 of the *Civil Procedure Act* in addition to Order 42 Rule 27, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. The Applicant seeks issuance of the following orders: -

    1. That the court be pleased to grant to the Appellant leave to adduce additional evidence.

    2. That the honourable court be pleased to order stay of the judgment dated 24th of October, 2022 until determination of the Appeal.

    3. That costs of this application be provided for.

3. The application is premised on the grounds appearing on its face. It is also supported by the affidavit of Telesia Munee Keli sworn on even date. The deponent averred that the dispute herein relates to Land Parcel No. 1421 of which the Respondent is an owner in part. She further averred that a replotting exercise of the entire Kaunguni Scheme had changed the boundary and areas of the land and the same was done while the suit was pending at the trial court and it was concluded after judgment had been entered.

4. The Applicant contended that neither her nor the Respondent knew the nature of the effect the replotting exercise had occasioned until her advocate wrote to inquire on the new area maps. She stated that the new map shows the change of boundaries and area of the suit premises as per the annexed

Exhibit "TMK1". The Applicant insisted that the additional evidence is relevant to the dispute and that it is in the interest of both parties.

5. She averred that the new evidence could not be procured by either party even with the exercise reasonable diligence as replotting had not been finalized until after judgment was entered. She lamented that the replotting amounted to change of boundaries and that it is important that the court considers the aftermath on the dispute herein. She further averred that the case exhibits exceptional circumstances that warrant the production of additional evidence for the interest of both parties who would suffer irreparable loss unless the orders sought are granted.

6. Opposing the application, the Respondent swore a replying affidavit on 27th October, 2024. He averred that the evidence which the Applicant seeks to introduce is to the effect that Plot No. 1421 Kaunguni Settlement Scheme has changed to Plot No. 1562 Kaunguni Settlement Scheme. Moreover, Plot No. 1799 Kaunguni Settlement Scheme had changed to Plot No. 1386 Kaunguni Settlement Scheme.

7. The Respondent contended that the additional evidence sought to be adduced is not useful because the replotting exercise had not changed the ownership of the land. He insisted that the application is a waste of time.

8. Directions were issued for disposal of the matter by way of written submissions. The Applicant had not filed her submissions by the time of writing this ruling on 21st March, 2025.

9. In the Respondent's submissions dated 20th January, 2025, Counsel argued that the case in the lower court was for the recovery of Plot No. 1421 and that evidence was adduced as to the position of the said plot. Counsel argued that other than the renaming into Plot No. 1562, nothing else had changed.

10. It was further argued that the allegation that there was a change of boundaries is not apparent from the said documents. Counsel argued that there was no counterclaim in the pleadings before the trial court for any portion of Plot No. 1421 and that the Applicant is at liberty to file a fresh case on the basis of change of boundaries. It was submitted that the Applicant is attempting to bring another suit on top of the appeal herein.

11. Counsel opined that the Applicant should concentrate her efforts on convincing this court that the Respondent should have lost his case at the lower court and not bring in evidence that the Respondent was not entitled to Plot No. 1421 or 1562 as the case may be. Counsel contended that the additional evidence is irrelevant and that the application is a waste of time. It was submitted that if the application is allowed, it would change the character of the suit at the lower court. He urged the court to dismiss the application accordingly.

12. The sole issue for determination is whether the Applicant has demonstrated merit in the application for production of additional evidence.

13. The governing provisions of the law when it comes to the production of additional evidence in an appellate court are outlined under Order 42 Rule 27 which provides as follows: -

    (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 reason for its admission

14. In Attorney General v Zinj Limited [2021] eKLR, the Supreme Court reasserted some of the considerations to be made when granting an application for leave to adduce additional evidence as follows: -

> " i) Direct relevance of the additional evidence must be shown to the matter before the court and the interest of justice;
>
> ii) If given, the additional evidence would influence or impact upon the result of the verdict, although it need not be decisive;
>
> iii) The additional evidence could not have been obtained with reasonable diligence for use at the trial or it 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;
>
> iv) 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;
>
> v) The evidence must be credible in the sense that it is capable of belief;
>
> vi) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively; ..."

15. In the plaint before the lower court dated 11th April, 2013, the following orders had been sought by the Respondent herein: -

a. A permanent injunction restraining the Defendant whether by herself or through her agents and/or employees or any other person whomsoever claiming under her from remaining on and trespassing on parcel land No. 1421 Kaunguni Settlement Scheme and from doing any other prejudicial act.

b. Mesne profits for trespass.

c. Costs of this suit plus interest at court rates.

16. The Appellant did not file a counterclaim in the suit.

17. The evidence that the Applicant has sought to adduce show that the Plot No. 1421 subject of the proceedings in the lower court was renamed by the Ministry of Lands Survey Office in Kibwezi to Plot No. 1562. Exhibit "TMK1" also reflects the changes in plot numbers as per the new map that was published following the determination of the replotting exercise.

18. There is no evidence to support the Applicant's assertion that the replotting exercise affected the boundaries or the size of the suit property. At any rate, the Applicant did not present a counterclaim demonstrating that she had any ownership claim to the suit property. If at all the replotting exercise had affected the ownership rights and interests of any of the parties, it ought to have been the Respondent who presented his claim vide the plaint at the lower court.

19. In Fibre Link Limited v Star Television Production Limited [2015] eKLR

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 V Lakhani & Co (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in Ladd v 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."

20. In Wanjie & others v Sakwa & others [1984] KLR 275, the Court of Appeal considered at length the rationale for the obvious restriction of adduction of additional evidence in Rule 29 of the Court of Appeal Rules. Chesoni JA observed at page 280 as follows: -

> " 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."

21. The Applicant has not demonstrated any relevance of the new evidence she has sought to adduce. She has not demonstrated what influence the said evidence would have had in her case had she had the opportunity to present it before the subordinate court.

22. In the end, I find that the application herein is devoid of merit and is hereby dismissed with costs.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF MARCH, 2025.

In the Presence of:

Mr. Muli for Mr. Mutuku for Respondent.

Court assistant - Steve Musyoki