



Kanake v Karambu (Suing on Behalf of the Estate of James Meeme - Deceased) (Environment and Land Appeal 113 of 2021) [2023] KEELC 352 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 113 OF 2021
CK NZILI, J
JANUARY 25, 2023**

BETWEEN

REUBEN KINOTI KANAKE APPELLANT

AND

**EUNICE KARAMBU (SUING ON BEHALF OF THE ESTATE OF JAMES MEEME
- DECEASED) RESPONDENT**

RULING

1. The court is asked to allow the appellant to adduce additional evidence by calling evidence at the appellate stage. The grounds are contained on the face of the application and the supporting affidavit of Reuben Kinoti sworn on May 9, 2022. The reasons are that: - the appellant is the registered owner of LR No Igembe/Ndoleli/Athiru Ruujine/3924 whereas the respondent's husband is the registered owner of LR No Igembe Ndoleli/Athiru Ruujine/3925. That the two parcels underwent the land adjudication process. That after the judgment in the trial court, the appellant established that the registry index map presented before court by the land surveyor had been altered and was materially different from both the demarcation book and the register which changes were not within his knowledge till February 16, 2022, when the District Land Adjudication & Settlement Officer (DLASO) wrote confirming the same. That the said new evidence is directly relevant, credible, shall influence the results of the appeal and in the interest of justice, it should be availed before court.
2. The application is opposed through a replying affidavit by Eunice Karambu sworn on June 3, 2022 on the basis that the trial court on top of the land surveyor's evidence took into consideration other evidence; she has been in occupation of the land since 2007; no two versions of maps were alluded to; the report and maps were never challenged at the lower court; the intended evidence will confuse the issues and cause injustice and the intended evidence is inapplicable or irrelevant since the suit parcels are currently governed by the [Land Registration Act](#) and not either the [Land Consolidation Act](#) (Cap 283) or [Land Adjudication Act](#) (Cap 284).



3. In a supplementary affidavit, it is averred that the county land surveyor at page 65 of the record of appeal talked of two existing maps and hence the adjudication record had the true map. Lastly the appellant averred that the record of appeal lacked a caption of the scene visit by the trial court.
4. With leave of court parties filed written submissions dated October 18, 2022 and November 2, 2022 respectively.
5. The appellant submitted that the principles to guide the court were discussed in *Mohamed Abdi Muhamud vs Ahmed Abdullahi Mohamad & 3 others* (2018) eKLR *inter alia* that the evidence must be directly relevant; it should in the interest of justice be likely to influence or impact the result of the verdict; was incapable of being obtained with reasonable diligence; was unknown; is capable of removing vagueness or doubt over the case; has direct bearing on the main issue; must be credible; must not be voluminous; is needful; is not aimed at making a fresh case and lastly, the court must consider the proportionality test and prejudice to the opposite party.
6. To this end, the appellant submitted that the application before court satisfies the foregoing guidelines by the Supreme Court of Kenya since during an adjudication process, a party is recorded and demarcated where that person is occupying and under Cap 284, land is not moved unlike under Cap 283, where there is consolidation meaning people are moved around.
7. Therefore, the appellant submitted that since Parcel No's 3924 and 3925 were recorded and demarcated under Cap 284, their ground position can never change and it is this new evidence annexed as RKK "5" which will clear the lacunae as it is the correct map which the DLASO forwarded as the final adjudication record and register to the Director of Adjudication for purposes of issuance of title deeds and which is the authority on the ground position of land under Cap 284.
8. Lastly the appellant submitted that the court should also consider that she was unrepresented during the trial and could not know that annexure marked RKK "5" was necessary to prove her defence which in any event are official and public documents. Reliance was also placed on *EO vs C.O.O* (2020) eKLR, and *Sharon Mwende Ndol vs Rahab Nyangima John & another* (2022) eKLR.
9. The respondent submitted that the applicable law is Section 78 of the *Civil Procedure Act* and not Order 42 Rule 27 of the *Civil Procedure Rules*. The respondent submitted that whereas the court may allow for adduction of additional evidence this must only be done in exceptional circumstances and with sufficient reasons as held in *Wanjie & others vs Sakwa & others* (1984) KLR 275 that the power should be exercised sparingly and with great caution otherwise there would be no end to litigation.
10. Similarly, relying on Mohamed Abdi Mahamud (*supra*) the respondent submitted the guidelines set therein have not been met since there was even a scene visit, the interview of neighbors and production of a government land surveyor's report which was never objected to by the appellant.
11. Relying on *Mount Elgon Beach Properties Ltd vs Harrison Shikaru Mwanongo & another* (2019) eKLR, the respondent urged the court to dismiss the application as falling short of the threshold circumscribed by the law. Further reliance was also placed on *Mburu Murithi & others vs Kuria Kamau* (2005) eKLR for lack of basis or justification to admit new evidence.
12. The foundational basis of the power to allow or dis allow adduction of additional or new evidence by a High Court is governed by Section 78, (1) (d) of the *Civil Procedure Act*, Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules* and the *Evidence Act*.
13. The arena and the principles to apply were expounded by the Supreme Court of Kenya in *Mohamed Abdi Mahamed vs Ahmed Abdullahi Mohamed and 3 others* (*supra*), *Mzee Wanjie & 93 others vs A.K Saikwa & 2 others* (1982-88) IAR 462. *Raila Odinga & others v IEBC & others* (2013) eKLR



14. In *Archer & another vs Archer & 3 others* (civil application E055 of 2021) (2022) KECA 9 (KLR) (21 January (2022) (Ruling) the Court of Appeal looked at the relevance of the documents sought to be adduced as additional evidence as relating to the current status and title of the suit properties and made a finding that the same were seeking to introduce clarity and propriety in any orders the court was likely to make.
15. The court also considered the explanation given by the respondents on what happened to the suit land during the pendency of the case leading to unavailability of the documents to the applicant. The court found no prejudice to the opposite party since the documents were official documents from the relevant land registry which were credible. The court directed the same to be introduced by way of a supplementary record of appeal.
16. Similarly, in *Mwangi vs Karanja* (Civil Appeal 05 of 2018) (2022) KEHC 454 (KLR) 10 May (2022) (Ruling) the court cited with approval *Safe Cargo Ltd vs Embakasi Properties Limited & 2 others* (2019) eKLR where a bench of five held that the discretion to admit new evidence should be exercised sparingly and only where it was shown that the evidence, was fresh and would make a significant impact in the outcome of the appeal. The court considered the dates of the new evidence as relevant to the exercise of its discretion. As to what is new or unknown evidence the court in *James Macharia Anumbi vs Republic* (2017) eKLR identified the key considerations in determining new and compelling evidence as newly discovered, unknown before or prior to or during trial. The court held that it must be material and not cumulative and that failure not to know about it was not because of lack of diligence and that it was significant enough that it would likely result in a different outcome.
17. In *Mount Elgon Beach properties* (*supra*) the Court of Appeal held that leave to adduce additional evidence was at the discretion of the court, exercisable within specific parameters or guidelines. The court went on to say that Articles 159 (2) (d) & 259 of the *Constitution* should be bandied around with abandon since there were clear unequivocal rules applying to specific situations hence there was no need to invoke the provisions of the *Constitution* unnecessarily. Further, the court stated that facts of each case must fit to the principles while deciding as to whether the application before the court passes the muster. See *Mburu Murithi* (*supra*). In doing so, the court asked itself whether the maps and the report could have been obtained during the trial with due diligence as the first test. The court also refrained from addressing the issue of the site visit since it was one of the grounds of the appeal.
18. In *EO vs COO* (*supra*) the court cited with approval *AG vs Jorino Enterprises Ltd* (2019) eKLR and *Dorothy Nelima Wafula vs Helen Nekesa Nilesen & another* (2017) eKLR where the court held that there must be sufficient reasons to the satisfaction of the court why the additional evidence was not brought before court at the trial stage and why it was now necessary to be brought on board. In addition, the court cited with approval *IEBC vs Robert K Nyengi* (2015) eKLR where the Supreme Court of Kenya held that it was essential for a court in exercising its discretion to admit additional evidence to ensure that no prejudice would be occasioned to a party if the evidence was admitted but still the same applied on case to case basis as per *Mohamed Abdi Mahamud* case (*supra*) which principles must also be substantively complied with.
19. Similarly, the court took cognizant of the fact that the applicant was unrepresented at the trial court and being a layman, he could not have been expected to appreciate what kind of evidence was necessary to back up his claims. The court also warned itself that though ignorance of the law was no defence and held that no person should be disadvantaged in his case simply because he was illiterate or legally impaired in legal knowledge.
20. Applying the foregoing caselaw to the present facts, at issue is whether the positioning of the two parcels of land belonging to the parties agrees with the registry index map produced by the land



surveyor at the trial or whether it was altered and or markedly varies from the primary documents which were used to make it namely the demarcation register and the demarcation book.

21. The appellant has averred and eloquently submitted that she was not aware of the altered registry index map until February 16, 2022 when the DLASO Igembe North/South Centrol wrote a letter dated February 16, 2022 attaching RKK “5”. On the other hand, the respondent is of the contrary view since there was a county surveyor’s report produced at the trial court, and a scene visit which were not objected to by the applicant. Therefore, the appellant is merely out to confuse issues and cause injustice since the veracity and correctness of the intended evidence will not be tested in cross examination. Further, the respondent submitted that the applicant appears to have boought his land from a third party and was not even sure of its locality on the ground.
22. The court has carefully gone through the record of appeal, the evidence tendered, the documents relied upon as well as the grounds of appeal. What clearly comes out from the pleadings, the judgment appealed against and the grounds of appeal is that the two suit subject parcels of land at the time of filing the suit were falling under registered land. The bone of contention was over an alleged encroachment. The trial court had directed on June 18, 2020 for the county surveyor to visit the suit lands to ascertain who was on the ground, if the two parcels were separate or referring to the same land and the locality of each of them.
23. At page 70 of the record of appeal, the county surveyor filed a report dated August 26, 2020 and stated that the Registry Index Map Sheet No 109/1/22/8 indicated the two parcels but his previous letter had cited provisional unpublished maps and was based on an original image. The report attached copies of provisional registry index map and an original image. The makers of those maps and image were not indicted. To my mind, the makers of the documents never testified and or authenticated the said documents before the trial court, yet the two formed the basis of the dispute.
24. Going by the parameters set by the Supreme Court of Kenya in Mohamed Abdi Mohamud (*supra*), the proposed additional evidence appears direct, relevant and capable of influencing the outcome of this appeal. Since it was not availed at the hearing it would go along way to remove any doubt as to locality of the two parcels. It also appears credible since these are public documents held by land officers and that they do not appear voluminous.
25. Therefore, and in fairness to parties as well as following the due process of the law I find the application with merits. The same is allowed. The appellant is granted leave to file and serve a supplementary record of appeal within 14 days from the date hereof including only the indicated RKK “5”. The makers of the two documents shall avail themselves for taking of their evidence and cross examination during the hearing of the appeal.
26. Costs of this application shall abide by the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY OF JANUARY, 2023.

In presence of:

C/A: Kananu

Koech for Mwirigi for appellants

Miss Asumwah for Respondents

HON. C.K. NZILI



ELC JUDGE

