REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.39 OF 2017

(FORMERLY NKR.HCCA.92/2006)

(Appeal Originating from Nyahururu CM's Court Civ.No.179 of 2004 by: Hon. Mmasi– S,R.M.)

JOHN KAWAI KABUCHO.....APPLICANT/APPELLANT

V E R S U S

JOHNSON NJUGUNA GATHIONGO.....RESPONDENT

R U L I N G

The Notice of Motion dated 7/3/2019 was brought by **John Kawai Kabucho**, the appellant/applicant, who seeks an order of stay of this appeal and especially the hearing coming up on 19/3/2019 pending the hearing and determination of this application interpartes; that the court do grant leave to the applicant/appellant to introduce new documents in his appeal in terms of the supplementary record of appeal.

The grounds upon which the application is brought are that the proposed documents sought to be introduced relate to developments that have taken place subsequent to the delivery of the judgment, on 7/6/2006, the subject of the appeal; that the documents to be introduced include certificate of lease, reports and other documents from the District Land Surveyor and the Land Registrar that put the question of ownership of the suit land to rest; that the said evidence could not have been obtained for use at the trial stage despite exercise of due diligence by the applicant; that had the evidence been available to the trial court, it would have had important influence on the outcome of the case; that the introduction of the new documents is critical in assisting the court make a final determination on the matters arising in the appeal; that the evidence sought to be introduced is credible, relevant and verifiable; that the applicant has a Constitutional right to a fair hearing and Rules of Natural Justice dictate that the applicant be given a fair chance to present the evidence for a just outcome of the matter; that it is in the interest of justice that a person be heard to enable the court effectively and completely adjudicate and settle all issues in the suit.

The application is also supported by the applicant's affidavit in which he depones that he is the absolute and registered owner of land parcel ***Nyahururu Municipality Block 6/857*** previously known as unsurveyed residential plot 'A' Nyahururu Municipality and allocated to him by the Government on 27/7/1999 as per the allotment letter from the Department of Lands JKKI; that the appellant sought to buy the land and entered a Sale Agreement with the respondent on 5/11/2002, whereby the respondent agreed to sell the suit land at a price of Kshs.260,000/= (JKK.3); that before the respondent completed payment of the price, he reneged on the said agreement alleging that the said parcel of land was owned by 3rd parties, that is, one Zachary Maina Muraya and Grace Wanjiru Maina; that the respondent filed suit P.M.C.C. 171/2004 claiming refund of the purchase price and breach of contract for reasons that the applicant did not possess a title; that there being only an allotment letter and no title, the trial court rendered its Judgment on 7/6/2006 in favour of the respondent and directed that the purchase price be refunded to the respondent with interest; that he has since obtained the certificate of lease which indicates that he has always been the legitimate owner of the Land JKK.3; that the District Land Surveyor has written a report to the effect that Zachary and Grace Wairimu have never been the owners of the plot; (JKK.4a & b); that the documents sought to be introduced became available in 2014 and 2015 and would not have been availed at the trial despite due diligence; that the documents will assist the court in the appeal as a lease is prima facie credible evidence; that no prejudice will be suffered by the respondent.

The application is brought pursuant to Order 42 Rule 27, Order 51(1) CPR Section 78(1)1A, 1B and 3A Civil Procedure Act and Article 158 of the Constitution.

The application was opposed and the respondent swore a replying affidavit dated 15/3/2019 in which he states that the applicant was not the real owner of the plot he was selling and had a duty to avail the all documents necessary for the sale; that the applicant sold what he did not possess and was not even sure of the locality; that the applicant sold the plot in 2002 and is producing the certificate issued on 11/11/2015, 13 years later; that the respondent is not contesting ownership but claims a refund of the consideration; that the appellant is estopped from proving ownership 17 years later; that the application is not brought in good faith and the respondent will not have an opportunity to question the originality of the documents; that the application is meant to delay the hearing of the appeal. He prays for dismissal of the application because he has suffered loss since 2002.

The applicant urged this court under Article 159(2)(a)1 of the Constitution and Section 1A & B of the Civil Procedure Act to dispense justice

without undue regard to technicalities.

I have now considered the application, the affidavits filed by both parties and submissions of counsel. The application is purportedly brought under Article 158 of the Constitution. However, Article 158 is not relevant to such an application as it relates to the office of the Directorate of Public Prosecution. The applicant must have intended to invoke Article 159 in which the people confer on the court judicial authority and Article 159(2) sets out the principles that the courts will be guided by when exercising the said authority. Under Article 159 (2)(d), the courts are enjoined to administer justice without undue regard to procedural technicalities.

Section 78(1) of the Civil Procedure Act provides as follows:

> ***"Subject to the conditions and limitations as may be prescribed, appellate courts have power:***
>
> ***(a) To determine the case finally;***
>
> ***(b) To remand a case;***
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> ***(c) To frame issues and refer them to trial;***
>
> ***(d) To take additional evidence or to require evidence to be taken.***
>
> ***(e) To order a new trial."***

The enabling legislation to Section 78 is Order 42 Rule 27 of the Civil Procedure Rules which provides as follows:

> ***"(1) 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 documents 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."***

In ***C.A.325/2013 Kenya Anti-Corruption v Willesdon Investments Ltd and 7 others*** the Court of Appeal held that the appellate court has discretion to determine whether additional evidence should be admitted and the exercise of the discretion shall be guided by the principles that were set down in the case of ***Ladd v Marshall (1954)I WLR 1489(at pg.1491)*** which are as follows:

> ***"(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;***
>
> ***(b) 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;***
>
> ***(c) The evidence must be such as is presumably to be believed, or be believed, or in other words, it must be a plenty credible, though it need not be incontrovertible."***

The same principles were applied in ***Mzee Wanje and 93 others v Saikwa & others (1982-88)1 KAR 462.***

The court commented on Rule 29 of the Court of Appeal Rules when disallowing new evidence 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 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."***

In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mahamed & 3 others (2018) eKLR***, the Supreme Court laid the following guidelines of additional evidence before appellate courts in Kenya. They are 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 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;

(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 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 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."

The court went on to caution that even with application of the above principles, the court will only allow additional evidence on a case to case basis and even then, it must be allowed sparingly with abundant caution.

The issue before the trial court was one of breach of contract of sale of land whereby the applicant was the seller and respondent was the purchaser. The issue at hand was whether the seller (applicant) was in breach of the sale agreement because the purchaser (respondent) in trying to take possession of the land, found that it was claimed by third parties. The date of completion of the contract was 15/12/2002 when the ownership documents were to be handed over to the purchaser upon payment of the balance of the sale price but the applicant did not do that.

The plaint was filed in June, 2004, over one year from the date when the documents should have been handed over to the purchaser. The documents are, the certificate of lease, now sought to be produced was obtained on 11/11/2015; the letter dated 9/11/2011 from Director of Surveys amending the map, a letter from the Sub-County Administrator dated 8/8/2014 confirming that the land did not belong to the other claimants; In my view, even if the evidence to be admitted may be credible, considering its source and even though it may have influenced the decision that the court arrived at, yet it is coming over 10 years later. The applicant was not capable of completing the sale agreement. The respondent has not benefited from the said land for all those years and, in my view, the evidence is tending to fill in the gaps in the applicant's case because at that time in 2004, the evidence was not in existence and it means due diligence was not applied enough to procure the documents.

In addition, because of the time taken, over 15 years, the admission of the new evidence would be highly prejudicial to the respondent.

For the above reasons, I decline to grant the application and it is hereby dismissed.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***30th*** day of ***October,*** 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Maina Kairu for appellant/applicant

F.K. Wanyoike – respondent - absent

Nyagah – court assistant