



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 12 OF 2017

JOSEPH KINGENO KIRUI.....1ST PLAINTIFF/APPLICANT

LIZA CHEBET CHUMO.....2ND PLAINTIFF/APPLICANT

VERSUS

FAULU MICROFINANCE BANK LTD.....1ST DEFENDANT

ROBERT WAWERU MAINA

T/A ANTIQUE AUCTIONS AGENCIES.....2ND DEFENDANT

RULING

1. In this appeal the appellants have filed an application, a **Notice of Motion**, dated **5th March 2019**. The appellants seek the order for leave to be granted to them to produce additional documentary evidence in the appeal.
2. The appellants filed, before the Chief Magistrate's Court, Milimani, a suit whereby they sought permanent injunction to restrain the defendants from advertising for sale or selling the property known as **L.R. No. Nairobi/Block/III/666** (the property). They also sought a prayer for declaration that the charge created over that property was invalid, null and void. They further sought for an order for the 1st defendant (Faulu Microfinance Bank Ltd), herein after Faulu, to return to them the certificate of title of the said property.
3. The appellants had filed, before the chief magistrate's court an application for interlocutory injunction to restrain the defendants, pending the hearing and determination of the suit.
4. The Ruling of that interlocutory application was delivered, before the Chief Magistrate's Court on 11th September, 2017. By that Ruling the court declined to grant the appellants interlocutory injunction. This appeal is against that Ruling. The appellants now seek by their application that leave be granted to produce additional documentary evidence in this appeal.
5. The appellant's case before the Chief Magistrate's Court is that the 1st plaintiff, Joseph Kingeno Kirui, agreed to have his property (the property) charged to guarantee a loan granted to Robert Simiyu Khanuli, (Simiyu). That the 1st plaintiff signed documents inside the vehicle of Simiyu and after that he did not hear again from Simiyu. In April 2016 1st plaintiff was informed by Faulu that Simiyu had defaulted in repayment of the loan. Faulu's case is that it served the appellants with statutory notices of sale of the charged property.
6. The appellants by their application before the Chief Magistrate relied on the grounds that the 1st appellant did not sign the charge before an advocate; that Faulu did not serve the statutory notices of sale; and that the spousal consent of the charge of the property was not executed by the 2nd appellant who is the wife of the 1st appellant but that it was executed by someone else called Jane Kaptichi, who is not the wife of the 1st appellant.

ANALYSIS

7. The court to which an appeal is preferred may, guided by Order 42 Rule 27 of the Civil Procedure Rules, allow additional evidence to be produced. This is what that Rule 27 provides:

27.Production of additional evidence in appellate court [Order 42, rule 27.]

(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.

8. The appellants seek to adduce additional evidence in this appeal on account that they did not have the documents at the time of filing their case before the Chief Magistrate’s Court. The 1st appellant deponed that when he and his co-appellant filed their case in that court they only were in possession of their identity cards, a letter dated 11th April 2016 and copy of the search and title of the property. That it was not until Faulu filed its affidavits that the appellants saw the purported spousal consent to the charge. It was then that the appellants filed a complaint with the police complaining of impersonation by Jane Kaptich. The 1st appellant deponed that the police refused to release to him copies of the statements obtained while investigating the complaint. That it was only later that the police released those statements and they are the documents the appellants seek to produce in this appeal. It is important to note the appellants do not specify when the documents were released by police to them.

9. The application is opposed by Faulu. Through the affidavit of its legal manager it was deponed that the 1st appellant took Jane Kaptich to give spousal consent. The deponent further stated that there is nothing, presented by the appellant, in court to show that they filed a complaint at the police. Faulu further deponed that the appellants did not bring it to the attention of the trial court that they wished to produce other documentary evidence.

10. I have considered the parties affidavit evidence, submissions and authority. The authorities cited by the parties show that the court’s power to call additional evidence on appeal is discretionary. It is a power that must be exercised sparingly and with great caution. It is not intended that production of additional evidence would be used to assist an unsuccessful party who would wish to patch up a weak case. See **GOVERNORS BALLON SAFARIS LIMITED V ZACHARIA W. BARAZA t/a STUMA AUCTIONEERS (2016) eKLR**

11. The Supreme Court has had occasion to give guidance on the reception of additional evidence of appeal. That guidance was considered by the Court of Appeal in the case **Attorney General v Torino Enterprises Limited [2019] eKLR** thus:

*“In **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**, the Supreme Court laid guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:*

“[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in 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 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) 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.

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

23. In this matter, we have considered the items of additional evidence sought to be adduced by the applicant and evaluated each of them against the guidelines and criteria laid down by the Supreme Court in Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR. We observe that the guidelines given by the Supreme Court are not necessarily conjunctive but an applicant must substantially comply with the guidelines. Whether the additional evidence will impact the result of the case is a matter to be determined on merit upon evaluation of the additional evidence with all other evidence on record.”

12. Considering those guidelines it should be noted that the appellants did not request the trial court to allow them produce the documents they now request. The appellants filed their case before the Chief Magistrate in May 2017. By mid May 2017 when Faulu filed a replying affidavit, the appellant knew that Faulu was of the view that Jane Kaptich had given her spousal consent to the charge of the property.

13. The appellant wish to produce before this court a photo copy of an investigation diary which is entitled forgery report. If that investigation diary attached to the 1st appellant’s affidavit is the one to be produced in the appeal then my response is that it is of no value in this appeal. This is because it is illegible to the most part. Apart from the first four words of that document the others are illegible. The next document is a letter written, supposedly, by the family of Jane Chepkurui Kaptich. It is dated 1st October 2017. There is no reason given why this letter was not produced before the Chief Magistrates Court. It was after all not written by the police so there would be no reason for the appellants to allege that it was one of the documents to be obtained from the police. The other document is a statement, presumably made to the police, by the 1st appellant. Again there is no explanation why this was not availed to the Chief Magistrate’s Court. Further and of concern is that it is illegible because it is poorly copied. The other following documents are statements made by Jane Chepkurui Kaptich and by Robert Simiyu. The appellants fails to explain why these two persons could not prepare affidavits to support the contention of the appellants that spousal consent was not given.

14. The appellant failed in one but important principle of permitting evidence to be adduced at appeal, they failed to prove that they could not with reasonable diligence, obtain that additional evidence when the injunction application was before the trial court. I also do find that the additional evidence is probably being used by the appellants to fill-in-gaps in their case. To allow the additional evidence, at this stage, will undoubtedly prejudice the respondent.

CONCLUSION

15. The application is unmeritorious and is therefore for dismissal.

16. In the end the Notice of Motion application dated 5th March 2019 is dismissed with costs to the respondents. Further at the reading of this Ruling this matter will be fixed for directions before the Deputy Registrar who shall ensure that the lower court file is availed to enable this court deal with this appeal.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFFS

..... FOR THE DEFENDANTS