KENYA INDUSTRIAL ESTATE.....PLAINTIFF

VERSUS

ROSE AKINYI .....DEFENDANT

RULING

The appellant's application dated 28th April 2009 is made under Order 41 Rules (22) and (23) of the Civil Procedure Rules, Order 50 Rule (1) of the Civil Procedure Rules and Section 3A of the Civil procedure Act.

The application basically seeks an order that the applicant be allowed to produce additional evidence in this court or any subordinate court as may be directed.

The supporting grounds are that:-

(a) The applicant has obtained new evidence that was not available at the time of the hearing of the case in the Chief magistrate's Court.

(b) It is equitable and just that the appellant herein be allowed to introduce new evidence as it has the effect of proving that the judgment for specific performance issued by the court is incapable of being obeyed by the appellant or being implemented by the respondent.

(c) The new evidence shall prove that by the time that the judgment appealed herein had been issued, the appellant had already discharged land parcel No. Kisumu / Pandpieri/2089 to Jacob Ojwang Donji who was the original charger.

(d) Having discharged the property the appellant is not in possession of the said land No. Kisumu / Pandpieri / 2089 and therefore cannot specifically transfer the same to the respondent as ordered by the court.

The respondent, Rose Akinyi Odeny, was the plaintiff in the case before the lower court. She opposes the application on the basis of the facts contained in her replying affidavit dated 16th June 2009.

The applicant's grounds in support of the application are enhanced by the facts contained in the supporting affidavit dated 28th April 2009 deponed by the applicant's Senior Branch Manager, Joseph Ayieko.

All the supporting grounds and those in opposition have duly been considered by this court in the light of the arguments advanced at the hearing by both counsels for the applicant and the respondent. The main issue arising for determination is whether the applicant is justly and lawfully entitled to the order sought.

Under Rule 22 (1) of Order 41 of the Civil procedure Rules, a party is not allowed or entitled to produce additional evidence whether oral or documentary unless of course there is substantial reason to do so.

An applicant is therefore required to meet certain threshold for the court to exercise discretion in his favour.

Order 41 Rule 22 (1) provides that:-

"**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"

The guidelines for the exercise of the discretion under the foregoing provision were provided in the cited case of **WANJE =vs= SAIKWA (1984) 275** in which the Court of Appeal rules providing for the power to take additional evidence was dealt with.

It was therein observed that:-

"**The principle upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning L. J., as he then was, in the case of Ladd =vs= Marshall (1945) 1 WLR 1489 at page 1491 and those principles are:-**

(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 in other words, it must be apparently credible, though it need not be incontrovertible".

It was also observed that:-

"**The 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 omission 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 that case by calling further evidence. It follows that the power given by the rule should be exercised sparingly and great caution should be exercised in admitting fresh evidence".**

The same principles /rules hereinabove would even apply to this case. They actually provide the threshold to be met by the applicant if discretion were to be exercised in its favour by this court sitting on its appellate jurisdiction. The same principles were mentioned in an earlier case i.e. **CMC AVIATION LTD =vs= CRUISAIR LTD [NO.1] (1978) KLR 103.**

In the case of **GEORGE LOCH MBUYA OGOLA =vs= ELISH OKEA & TOWN COUNCIL OF MIGORI CIVIL APPEAL NO. 199 OF 2001 (KSM),** the Court of Appeal stated that:-

"**The parties to an appeal in the superior court have no general licence to produce additional evidence. The circumstances under which the High Court sitting as an appellate court can allow the production of additional evidence and the procedure for taking additional evidence are circumscribed by Order XLI Rule 22, 23 and 24 Civil Procedure Rules".**

Herein, the new and/or additional evidence sought to be produced is intended to show that at the time the judgment/ order of the trial court was made, the applicant had already discharged the material parcel of land to the chargor said to be Jacob Ojwang Donji.

Consequently, the applicant was not in a position to transfer the land to the respondent as ordered by the court.

The applicant contended that the new evidence was not available at the time of the hearing in the trial court.

The applicant's Senior Branch Manager (Joseph Ayieko) avers in his supporting affidavit that at the time of the issuance of the court order, the charge respecting the property had already been discharged upon payment of the debt in the sum of Kshs. 500,000/=. He exhibited a copy of the Discharge of charge (marked "JA3") and an acknowledgement of the receipt of the title by the chargor (marked "JA2").

Both documents are dated 11th October 2006 meaning that they were in existence when the court ruling was made on 8th July 2007 and when the application giving rise to the order was heard on the 19th February 2007.

The aforementioned Branch Manager stated that the documents were not availed to their advocate because their legal officer, one Mr. Omwoyo, was retiring and busy making arrangement for his dues.

There was however no affidavit from the said Mr. Omwoyo to confirm the fact.

The Branch Manager also alleges that due to an oversight on the part of the applicant's legal department there was failure to include the material documents in the bundle of documents forwarded to its advocate.

It was contended by Mr. Mwamu for the applicant that the new evidence would influence the outcome of the case if it were to be admitted and since the court had ordered that the property's purchase price be deposited in a fixed deposit account, the money was well secured. He urged this court to exercise discretion to ensure that a proper thing is done since there would be no prejudice occasioned to the respondent.

On behalf of the respondent, Mr. Onyango, contended that the application does not meet the grounds for admission of new evidence at this stage. He pointed out that the defence filed by the applicant was basically a complaint that the property was sold at a lower price and that there was no mention of the property having been discharged. He further contended that the proposed additional evidence is not credible considering that paragraph four (4) of the supporting affidavit shows that the property was discharged to Jacob Ojwang Donji who was not the chargor but one Daniel Ochieng.

Applying the guiding principles set out hereinabove, this court is very much inclined to uphold the respondent's opposition to the application.

The pleadings filed in the lower court show that the issue pertaining to the discharge of the property was never raised at all in the trial court. If indeed there was a mix up in the applicant's legal department which prevented the production of the relevant documents in the trial court, the aspect of the discharge of the property would have been brought to the attention of the court at least during the hearing of the application leading to the disputed order or much earlier. Or, there would have been a mention of the fact that the property was in the process of being discharged. The application giving rise to the disputed order is dated 6th November 2006 and was filed in court on the 8th November 2006 after the alleged discharge of the property. There was ample time for the applicant to bring the fact to the attention of the court if

indeed the discharge was effected in October 2006. The discharge exhibited herein (Annexture marked "JA3") is not fully executed to give an aura of validity and hence credibility.

The application of the 6th November 2006 was for striking out the applicant's defence and entry of judgment in favour of the respondent.

It is instructive to note that in opposing the application, the applicant filed a replying affidavit which did not whatsoever mention the discharge or the intention to discharge the property. Instead, the applicant complained about the conduct of the auctioneer while discharging his function of selling the property by public auction. The applicant lamented about the inadequacy of the purchase price and nothing about the discharge of the property to the alleged chargor.

Having granted the respondent its application, the trial court had the discretion to enter judgment as prayed in the plaint. Among the prayers were an order for specific performance.

The suggestion made herein by the applicant is that specific performance should not have been ordered without a formal proof or proper trial.

On this aspect, the court may not comment as there is an appeal pending.

We are here concerned with whether the applicant should be allowed to produce new additional evidence at this stage.

From what has been stated hereinabove, it is apparent that the discretion of this court may not be exercised in favour of the applicant as doing so would be going against the guiding principles set out hereinabove and would be to allow the applicant to import fresh evidence, patch up the weak points in its case and fill up its omission in this appeal. It would be enabling the applicant make a fresh case on appeal.

Perhaps, if there was an earlier hint prior to the disputed order that the material property had already been discharged the application may have been merited since it would have been reasonably credible and undoubtedly influenced the outcome of the case. For now, the application is just but an afterthought.

Consequently, the applicant is not entitled to the orders sought.

The application is thus dismissed with costs.

Dated, signed and delivered at Kisumu this 27th day of October 2009.

J. R. KARANJA

JUDGE

JRK/aao