



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appli. 69 of 2004**

**CHENGO & 21 OTHERS .....PLAINTIFF**

**VERSUS**

**MOHAMED ALI BAJABER.....DEFENDANT**

**R U L I N G**

By a Notice of Motion dated 15<sup>th</sup> March 2006, taken out pursuant to the provisions of Order XLI rules 22,23 and 24 of the Civil Procedure rules, the defendants/appellant sought, for leave to adduce additional evidence with regard to their relationship between them and plot numbers MN/V/1698 Grant No. CR.26734 and plot No. 395/V/MN (Original No. 259/V/MN CR.No. 1969/2). The motion is supported by the affidavit of Joseph Kamau Mwangi sworn on 15<sup>th</sup> March 2006. The motion is also supported by the further affidavit sworn by the same deponent.

When served with the motion plaintiff/Respondent opposed the same by filing the replying affidavit of Mohamed Ali Bajaber sworn on 20<sup>th</sup> September 2006. Both the appellants and the Respondent filed written submissions which they relied on when the motion came up for inter partes hearing.

It is the submission of Mr. Nyabena, learned advocate for the defendants/Appellants that the application should be allowed to enable the defendant/appellant adduce additional evidence to help this court justly and fairly adjudicate the dispute. It is argued that the additional evidence sought to be adduced was not obtained despite reasonable diligence on the part of the appellants. It is also submitted that if the additional evidence is adduced and made available to the court it will affect the result of the suit. The appellants aver that they made previous attempts to search the suit premises on L.R. No. 395/V/M.N. in vain as the L.R. No. 395/V/M.N. is registered as L.R. No. 259/V/M.N. It is further argued that according to sheet no. D.62 produced as the Respondent's exhibit No. 7, it is indicated that Plot No. 1698 was initially plot No. 395/V/MN hence it is necessary to adduce further evidence in view of the material contradiction.

The motion is opposed by the Respondent who stated that there was no proof that the additional evidence could not have been obtained with due diligence on the appellants' part. It is said that the evidence now sought to be produced were always available even at the time of trial. It is also argued that the evidence adduced would not influence the outcome of the decision. It is also stated that if the appellants' application is allowed more confusion would be created.

I have considered the submissions of learned counsels from both sides. The history leading to the filing of the appeal started when the plaintiff/Respondent filed the plaint dated 8<sup>th</sup> October 1999 wherein

he sought vacant for possession against the defendants/appellants over plot No. 1698/V/M.N. In his evidence before the trial court, the plaintiff produced the title deed and the deed plan. The title is a grant from the Government for a term of 99 years from 1<sup>st</sup> November 1992 granted to one Loo Mohamed Sindy who in turn sold the property to the plaintiff at a consideration of Kshs.3 million. The defendant/Appellant learned Advocate has urged this court to critically analyses the evidence tendered before the trial court. It is pointed out that the deed plan of the subdivision which creates plot numbers 1698 and 1699 is silent on the plot number which is being subdivided. It is also stated that plot No. 1698 and in brackets 395 R is shown in the area map produced before the trial court whereas plot no. 1699 is along the Nairobi-Mombasa Road so is plot No. 1668. It is said that the deed plan does not mention the original plan number which gave rise to plot numbers 1698 and 1699. The defendants/appellants claimed that this is the reason which made it very difficult to obtain by way of search the history of the plot. It is the submission of the appellants that after the judgment of the trial court further investigations were carried out which revealed that L.R. No. MN/V/395 R is registered as MN/V/259 which is the same as Plot No. 1698/V/MN. It is the submission of the appellants that title to the aforesaid land i.e. L.R. No. MN/V/259 was issued to Firoz d/o Mohamed Ali Ladha Karim on 30<sup>th</sup> August. 1922 as a freehold as opposed to the Respondent's leasehold. It is further the argument of Mr. Nyabena that if these facts are confirmed to be true then the trial court's decision will have to be set aside as it will turn out that the Respondent had no locus standi to sue the defendants/appellants. The recorded evidence shows that the trial court was prompted to order the parties to appoint a surveyor who testified and indicated that the Respondent's parcel of land was plot no. 1698 where the appellants resided.

Having given a brief analysis of the facts leading to the filing of the appeal and the motion, let me address myself to the law touching on additional evidence on appeal. It suffices to reproduce the provisions of order XLI rule 22(1) of the Civil Procedure as follows:

“22. (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) Where 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”.

It is clear that an appellate court can only allow an application to adduce additional evidence on the following conditions:

First, if it is shown that the court appealed from refused to admit evidence which ought to have been admitted.

Two, if the court hearing the appeal requires evidence, to enable it pronounce judgment or for any other substantial cause. It is apparent that the discretion of the court to grant leave to adduce additional evidence is very limited. It has to be exercised judiciously and sparingly otherwise parties will use it as a fishing expedition. The appellants are not saying that the trial court refused them to adduce the evidence they have just discovered. The appellants are claiming that the evidence came after the subordinate court had pronounced its judgment.

The second condition appears to have given the court the sole discretion to call for further evidence to enable it write the judgment. In this case the appeal is yet to be heard and if need be the court will exercise such a discretion after commencing the hearing of the appeal itself. After carefully considering the submissions and the material placed before me I am convinced that the application should be dismissed. If well advised the remedy for the defendants/appellants lie elsewhere and not through these

proceedings as the law has not shut all the doors for such issues to be addressed.

Consequently the motion is dismissed with costs to the Respondents.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of June 2008.**

**J. K. SERGON**

**J U D G E**

In open court in the presence of the Respondent

N/a Nyambene for the Applicant