



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 37 OF 2016**

**MICHAEL MUKUNDI NGUGI.....APPELLANT**

**VERSUS**

**JOSEPH KAIRU KURIA.....RESPONDENT**

**RULING**

What is for determination is the Appellant's application dated 15/02/2019 in which he seeks to have the court take additional evidence specified in his supporting affidavit or for the court to direct that additional evidence be taken by the trial court or by the Registrar in such manner and subject to such conditions as the court may deem appropriate to achieve the ends of justice.

The application was made on the basis that one of the grounds for the appeal is that in arriving at its finding the trial court ignored the Respondent's fraudulent acquisition of land reference number Juja/Juja East Block 1/1159 and that additional evidence will help the court to reach a just and fair determination of the issues on appeal for that issue will have a significant influence in determining whether the Respondent acquired the suit land fraudulently or not.

The application was supported by the Appellant's supporting affidavit sworn on 19/02/2019 in which he deponed that he was the Defendant in **Thika Chief Magistrate's Court Civil Case No. 895 of 2011** and that in the course of the trial, the court issued orders on 13/02/2012 requiring the Criminal Investigation Department (CID) to verify whose fingerprint impressions were on the vendor's section of the sale agreement dated 18/12/2008. He further deponed that the National Registration Bureau (NRB) found that the fingerprint impressions on the vendor's section of the acknowledgement of receipt were not identical to those of the vendor, Mary Wambui Mungai who is dead. He annexed copies of the order dated 13/02/2012 and letter dated 09/03/2012 from the NRB. He deponed that he later sent another request to the NRB to verify the fingerprint impressions on the Land Control Board (LCB) form 1 and NRB found that the fingerprint impressions were not suitable for comparison. He deponed that he had since obtained additional evidence from the NRB which he seeks to adduce which shows that the Respondent impersonated the vendor the late Mary Wambui Mungai as the left thumb fingerprint impression on the vendor's section of the acknowledgement receipt purported to have been appended by the vendor is the Respondent's left thumb print and that the right hand fingerprint impression on the transferee's section of the transfer of land form RL1 purported to be imprinted by the vendor is the Respondent's right hand thumb print impression. He annexed reports dated 27/04/2016 from NRB together with copies of the acknowledgement receipt and the RL1 transfer forms which were analysed.

The Respondent opposed the application through the replying affidavit of Naomi Mwhiki Kairu sworn on 12/11/2019. Ms. Kairu deponed that the application lacked merit since all the documents intended to be introduced were tendered in evidence and considered by the trial court and are even contained in the record of appeal. She further deponed that the reports dated 27/04/2016 that the Appellant seeks to introduce cannot be termed as new evidence as it is still fingerprint results requested by a different advocate and would yield the same results that were already considered by the trial court. She also deponed that her advocate cross-examined the makers of those reports at the trial hence the court reached a fair finding. She added that the orders sought were discretionary and that the Appellant had not shown that what he seeks to add was not within his knowledge and the effect it would have on the appeal. She also deponed that the Appellant did not purchase the Suit Property from its registered owner but from the owner's son who had no capacity to enter into such sale as he had no letters of administration at the time of the sale.

Parties filed written submissions which the court has considered. The Appellant submitted that he had met the criteria to be met before additional evidence can be admitted in appellate courts in Kenya as set out by the Supreme Court in **Mohamed Abdi Mahmud v Ahmed Abdullahi Mohamed & 3 others [2018] eKLR**. He also submitted that the additional documents sought to be adduced touch on fraud and that in such cases, the court is empowered to take in additional evidence.

The Respondent submitted that the Appellant seeks to produce documents from the NRB that purport to denote forgery on the Respondent's part in respect of documents served on him in 2011. He called on the court to interpret that to mean that the Appellant failed to conduct due diligence during the pendency of the matter at the trial court for five years and therefore he should not be allowed to patch up evidence after judgement since litigation must come to an end. He submitted that the Appellant is required to show that the proposed new evidence could

not have been obtained with reasonable diligence for use at the trial, and urged that the Appellant had failed to demonstrate this.

The issue for determination is whether the Appellant's proposed additional evidence should be admitted in this appeal. Although the law allows courts the discretion to admit further evidence sparingly, the Supreme Court laid down the governing principles on allowing additional evidence in appellate courts in Kenya in **Mohamed Abdi Mahmud v Ahmed Abdullahi Mohamed & 3 others [2018] eKLR**. The germane principles are whether the proposed additional evidence is necessary and whether it would impact upon the verdict. The appeal touches on the trial court's finding on issues of fraud. The Appellant deposed in his affidavit sworn on 19/02/2019 that the trial court had taken evidence from the NRB in the form of a report that is contained in the record of appeal. Further, it was an analysis of the documents and that the Appellant is seeking to introduce a fresh analysis from the same NRB. The documents are the sale agreement dated 18/12/2008, acknowledgement of receipt dated 02/04/2009 and the transfer form RL 1 registered on 14/09/1989 relating to the sale of the suit land.

Without going into the merits of the evidence produced at the trial and the proposed evidence which is still an analysis of the same documents, this court finds that the intended evidence is not necessary. Its main impact would be to fill the gaps and omissions of the first report and basically patch up evidence in a bid to boost the Appellant's case, which is not permissible in our adversarial court system. A party must conduct due diligence and present his evidence in totality at the trial, otherwise there would be no end to litigation if parties were allowed to introduce new evidence after the trial is concluded which if they had been diligent enough they would have presented that evidence before the trial court.

The court declines to exercise its discretion in favour of the Appellant by allowing him to adduce the proposed additional evidence. The application dated 15/02/2019 is dismissed and the costs of that application shall be borne by the Appellant.

**Delivered virtually at Nairobi this 1<sup>st</sup> day of February 2021.**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. E. Wepoh holding brief for Mr. W. Echesa for the Appellant

Mr. Kanyi Kiruchi for the Respondent

Mr. V. Owuor- Court Assistant