



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL APPEAL NO. 21 OF 2017

ISAAC MWANGI.....1ST APPELLANT/ APPLICANT

ANNE NJERI MWANGI.....2ND APPELLANT/APPLICANT

VERSUS

MOLYN CREDIT LIMITED.....1ST RESPONDENT

BENSURE AUCTIONEERS.....2ND RESPONDENT

SWALEH SAKWA MOHAMED.....3RD RESPONDENT

DISTRICT LAND REGISTRAR.....4TH RESPONDENT

(Being an Appeal from the Order in the Ruling of Honourable G. Omodho, Senior Resident Magistrate sitting at Thika Law Courts dated 29th November 2017)

IN

IN THE CHIEF MAGISTRATE’S COURT AT THIKA

CIVIL CASE NO. 820 OF 2013

ISAAC MWANGI.....PLAINTIFF

VERSUS

MOLYN CREDIT LIMITED.....DEFENDANT/RESPONDENT

BENSURE AUCTIONEERS.....1ST INTENDED INTERESTED PARTY

SWALEH SAKWA MOHAMED.....2ND INTENDED INTERESTED PARTY

DISTRICT LAND REGISTRAR.....3RD INTENDED INTERESTED PARTY

ANNE NJERI MWANGI.....4TH INTENDED INTERESTED PARTY

RULING

The Appellant/ Applicants filed the Notice of Motion Application dated 5th February 2020, seeking leave to serve the 3rd Respondent by way of substituted service and also leave to file and adduce additional evidence. Before the Court could determine the matter, the Appellant/ Applicant through a Notice of Motion Application dated 3rd July 2020, sought for leave to amend the Notice of Motion Application dated 5th February 2020.

The Court ordered that it would consider the Application which is seeking leave to amend the Application dated 5th February 2020 as it is making its ruling.

In the Application dated 3rd July 2020, the Appellant's/ Applicants sought for orders that;

1. That this Honourable Court be pleased to grant the Appellants/ Applicants leave to amend the Notice of Motion dated 5th February 2020 and that the attached amended version be considered duly filed and served upon payments of the requisite fees.

2. That the costs of this Application shall abide by the outcome of the appeal.

The Application is premised on the grounds that the Court has General powers to allow an amendment to any document presented before it so as to correct a defect or error thus enable a determination of the real question in controversy between the parties. That a mistake was made in drafting the Notice of Motion dated 5th February 2020, by the 1st Appellant/ Applicant who is a layman and the Appellant/ Applicant should not suffer the penalty of not having his case heard on merit. That the amendment is necessary to correct an inadvertent defect on the face of the Notice of Motion dated 5th February 2020, as it did not contain specific pleading for fraud and did not itemise the particulars of fraud even though the details were provided in the Supporting Affidavit attached and relevant exhibits were also annexed.

That given the serious nature of fraudulent conduct levelled against the Respondents, as itemised in the particulars of fraud in the amended Notice of Motion, it is fair that the Application be allowed in the interest of justice.

Further that the defect in the Notice of Motion dated 5th February 2020, was not fatal and can be easily corrected as the alleged fraud was repeatedly mentioned on the face of the Notice of Motion and full details were provided in the Supporting Affidavit thereto, but only the particulars of fraud were not itemised. That the particulars of fraud in the Amended Notice are a summary of the evidence already contained in the Supporting Affidavit of the 1st Appellant/ Applicant dated 5th February 2020, attached to the initial Notice of Motion of even date and the amendment requested is purely technical. That the amendment sought will help in determining the real question in controversy. That the Constitution encourages Court to determine cases without undue regard to procedural technicalities and the Application is meant to resolve the technicality.

In his Supporting Affidavit, **Isaac Mwangi** averred that he stated his full case in the Supporting Affidavit dated 5th February 2020, and attached exhibits and repeatedly mentioned on the grounds of the Notice of Motion that the matter concerned additional evidence of forgery, use of a fake address, fake buyer.

That as a lay man he was not aware that he was to make a specific pleading for fraud and have listed the particulars of fraud on the Notice of Motion itself. That the weakness in the earlier Application is not fatal and can be cured by way of an amendment as the omission was a technical matter. That the lack of a specific prayer for a finding of fraud and a summarised itemised list of the particulars of fraud on the face of the Notice of Motion Application can be easily corrected with leave of Court. That he seeks leave of Court to make a correction in the interests of justice so as to allow the Court to focus on the merits of the case. That the Court has general powers to allow the amendment of any documents before it, hence leave was sought to allow the present amendment.

Further, the Application does not prejudice the Respondents since they will have an opportunity to respond to the particulars of fraud as the facts which he relies on are detailed in the supporting Affidavit. That considering the nature of allegations made in the particulars of fraud, it is important that any technicality that may stand in the way of justice be corrected. That the Constitution exhorts Courts not to pay undue regard to procedural technicalities and he is prepared correct the defect on the earlier Application.

As the question of whether or not the Court will allow the Amendment goes to the Application, to be considered, the Court will first seek to determine the said question.

The Court has carefully considered the said Application. The Appellant/ Applicant having sought leave to amend the Notice of Motion Application, the Court is guided by the provisions of **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** which provides that:

“the Court may at any stage of the proceedings order that the name of any person who ought to have been joined and whose presence may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit be added.”

In the case of **St. Patrick's Hill School Limited ...Vs... Bank of Africa Kenya Limited [2018] eKLR** the Court held that;

A wider footage on the same issue was given in a more recent case of Ochieng and Others v First National Bank of Chicago, Civil Appeal Number 147 of 1991, where the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) the amendments should be timeously applied for;

c) power to amend can be exercised by the court at any stage of the proceedings;

d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;

e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

Further in the case of Kampala Coach Limited...Vs...First Community Bank Limited & another [2016] eKLR the Court held that;

With regard to the prayer to amend the plaint, it is trite law that amendments to pleadings can be freely allowed at any time before delivery of a judgment. According to Mulla, The Code of Civil Procedure, 17th Edition Volume 2, at pages 333, 334 and 335; as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order.

Bearing in mind the above decided cases and provision of law, it is quite clear that an amendment should not only be granted when it causes an injustice or where the said amendment would change the action into a different subject.

In this instant the Amendment sought by the Appellant/ Applicant is only to particularize fraud. The Court has gone through the said amendment together with the Supporting Affidavit sworn by the Applicant on **5th February 2020**, and there is nothing new that has been introduced. The Court is thus inclined to allow the said amendment. Consequently, the Court finds and holds that the Notice of Motion Application dated **3rd July 2020**, is merited and the same is allowed entirely.

Having allowed the said Amendment the matter for determination is Notice of Motion Application dated **3rd July 2020**, the Appellants/ Applicants sought for orders that;-

1. That this Honourable Court be pleased to grant leave to the Appellant/ Applicants to serve the 3rd Respondent by way of substituted service through Newspaper Advertisement.

2. That this Honourable Court be pleased to grant leave to the Appellant/ Applicants to adduce and file additional evidence of fraud with regard to the following documents.

i) Attendance register of the Auction of the suit property purportedly held on 23rd March 2016.

ii) The title deed in the name of the 3rd Respondent.

iii) Electronic evidence in form of an audio recording of a telephone conversation between the 1st Appellant and 2nd Respondent held on 6th December 2017.

iv) Electronic evidence in form of an audio recording of a telephone conversation between the 1st Appellant and 2nd Respondent held on 16th August 2018.

v) Transfer form signed by the 1st and 3rd Respondent and witnessed by Counsel for the 1st Respondent.

vi) Printout of voter details of the 3rd Respondent from the website of the Independent Electoral and Boundaries Commission.

vii) Printout of contact details of the 3rd Respondent from the website of the Higher Education Loans Board.

viii) Academic transcript of the 3rd Respondent.

ix) redemption notice and notification of the sale from Regent Auctioneers dated 12th January 2016.

3. That the additional evidence be adduced by means of affidavit and be filed as a supplementary record of Appeal.

4. That a Declaration be made that the sale and transfer of the suit property Juja/Kalimoni Block 8/462 was fraudulent and was null and void.

5. that costs of this Application be provided for.

That the particulars of fraud were; that the signature of the successful bidder who is the 3rd Respondent on the attendance of the register of the purported auction held on **23rd March 2016**, differs from his regular signature in other documents before this Court which proves that he did not attend the purported auction, that the signature of the Chief Executive Officer of the 1st Respondent in the attendance register of the purported auction that appear alongside her name differs from her regular signature in various other documents before this Court. Further that in the auction register her name is spelt as **Anyango** as opposed to her proper name **Anyangu** which means she could not have made the entry.

The attendance register of the purported auction includes the name of a person who signed twice as **Peter Chege Nganga** and as

Nganga Chege with same telephone number but different handwriting and signatures, the 5th bidder at the auction **Robert Ngugi** is also listed as the 8th bidder in the auction of land belonging to **Evans Abicha**, shown above the auction of the suit property on the same page of the attendance register and the number is the same in both entries but the handwriting and signatures differ.

That taking into account that the 1st two bidders in the purported auction of the suit property **B. Gathiru** and **P.M Gachie** were auctioneering staff and did not participate in the alleged bidding and the entries for all other bidders were questionable, there was not a single clean bidder in the purported sale of the suit property.

Further that the signature of **D. Kigo**, the 3rd Bidder in the land belonging to **Evans Abicha** shown above the suit property closely resembles that of **B. Gathiru** one of the auctioneers staff in the Notification of Sale and Redemption Notice issued to the 1st Appellant dated **12th January 2016**. That **D. Kigo** is also indicated as having participated in the auction of the suit property belonging to Open Kenya Investments, the telephone number is the same in both entries but the signature differ proving that the auctions contained in the attendance register lack integrity.

That a comparison of the handwriting of the name of **Robert** in the entries for **Robert Ngugi** and **Robert Mburu** shows that the handwriting is substantially similar and therefore the same person wrote both entries under different names and signatures. That a number of documents issued in the name of the 3rd Respondent contain fake address to wit **P.O Box 409-50100 Nairobi**, whereas the Post Code **50100** is for **Kakamega**.

That the use of a fake address in multiple official documents was deliberate and is an offence that proves the 3rd Respondent was party to conspiracy of fraud, 3rd Respondent was at the time of the purported auction an undergraduate student and his education was financed through the Higher education Loans Board and had no financial capacity to have bought the suit. That in an attempt to seal the loophole the 3rd Respondent introduced an alleged Uncle in the Police investigation claiming the said Uncle bought the land for him. Further the alleged Uncle **Stanley Shiundu Amukaya**, is professional fraudster who could not account for the source of funds for his alleged gift to his purported nephew and he is also known to have collaborated with 1st Respondent in numerous land fraud matters.

Further that the alleged bidders at the purported auction did not pay a refundable deposit prior to the said auction. That **Regent Auctioneer**, who sold the property on instructions from Counsel for the 1st respondent did not receive any monies at all on the fall of the hammer and the same was purportedly paid to the 1st Respondent in violation of the Auctioneers rules. That the alleged payment of deposit at the fall of the hammer was fictitious as no receipt was issued by the 1st Respondent.

Further, Counsel for the 1st Respondent processed the Certificate of title in the name of the 3rd Respondent and collected the same on **10th October 2016**, whereas the fictitious payment for the balance of the purchase price was allegedly made on **18th October 2016**, and no official receipt was issued. That Counsel for the 1st Respondent paid stamp duty and other fees in processing the Certificate of title in the name of the 3rd Respondent on his behalf. That the 1st Respondent's Counsel has recorded a statement with the police regarding his role in the fraudulent sale and transfer of the suit property and the Disciplinary tribunal of the Law Society of Kenya has found that a prima facie case has been established and has initiated a trial which is still pending.

That as the Advocate who gave instructions **Moses Muchoki** had overall responsibility in ensuring that the auction was conducted in accordance with the law. That the 3rd Respondent denied having purchased the suit property at a public auction in a recorded conversation with the 1st Appellant presented as evidence and thus he was not a bonafide purchaser.

The 1st Respondent and its Counsel misled the trial court by claiming falsely that the suit property was disposed of through public auction in exercise of the 1st Respondent's power of sale when they knew that no public auction had been held and attendance register had been falsified. They further deceived the Court that the purported buyer had paid the full purchase price for the suit property, 2nd Respondent deceived the Court that his instructions to distraint the 1st Appellant of his household goods for alleged rental arrears had been given by the 3rd Respondent and not the 1st Respondent, yet he later confided to the 1st Appellant the contrary, in a recorded telephone conversation presented as evidence alongside the instant Application. That the trial Court was further deceived that the 1st Respondent had no improper interest in the suit property. That the 1st Respondent and its Counsel colluded in deceiving the trial court by failing to reveal the sale and transfer of the suit property while the matter was pending in the Court despite several mentions of the case after the purported auction on **23rd March 2016**. That as a way of concealing the fraud from the Plaintiff, the 1st Respondent and its Counsel deliberately overlooked key mandatory provisions in the sale of the property.

The Application is premised on the grounds that the 3rd Respondent who is the purported buyer of the suit property has become inaccessible on the telephone number known to the Appellants making it impossible to serve him with pleadings despite an order that the Appellants serve him directly. That the 3rd Respondent has used a fake address in official documents making it impossible to serve him through registered mail as earlier ordered by the lower Court. Further that the 1st Appellant tracked the 3rd Respondent down and spoke to him on phone, but he declined to receive the Court papers. That if not served by substituted means, there is a likelihood the 3rd Respondent may interfere with the Appellants peaceful stay on the suit property while feigning ignorance of the existence of the orders of injunction. That he may later appear on the ground that he was not given a fair hearing. That fresh evidence of fraud in the sale and transfer of the suit property is directly relevant to the matter before Court.

That fresh evidence of fraud involving various Respondents in this matter removes any doubt or vagueness that there was conspiracy in the sale and transfer of the suit property and fraud was committed. That the fresh evidence has a decisive and direct influence on the determination of the appeal since a fake buyer cannot enjoy the protections accorded to an innocent purchaser as envisioned in the law and ought not to be rewarded for the successful concealment of a crime while the matter was before the trial Court. Further that the fresh

evidence of fraud discloses a strong prima facie case of wilful deception of the trial Court by the 1st Respondent, who knew the 3rd Respondent, was not a bonafide purchaser for value yet they swore affidavits to the contrary.

That failure by the Court to consider the fresh evidence of fraud may occasion grave injustice as the rights of the Appellants/ Applicants will be weighed against those of a purported innocent purchaser whose rights ought to be protected which may occasion the unfair loss of their matrimonial home to fake buyer. Further the said fresh evidence was not available to the Appellants and could not have been obtained through reasonable diligence while the matter was at the trial Court, since the Respondents had concealed the information regarding the fraud they had committed. That as fraud is a serious crime even when it is discovered late, the constitutional concern for justice outweighs the concern that there ought to be finality in litigation

In his Supporting Affidavit sworn on **5th February 2020**, **Isaac Mwangi** averred that on **16th February 2017**, he received a **Proclamation Notice** even dated from the 2nd Respondent seeking to distrain his household goods for alleged rent arrears on instructions from the 1st Respondent leading to his Application dated **17th February 2017**. That the 2nd Respondent later issued a 2nd Proclamation Notice dated **16th February 2017** seeking to distrain his household goods for alleged rent arrears on instructions of the 3rd Respondent whose address was indicated on the proclamations Notice as **P.O Box 409-50100 Nairobi**. That he has never had a tenancy agreement with the 3rd Respondent and he has never visited the suit property. That in response to his Application, the 2nd Respondent filed a Replying Affidavit dated **10th March 2017**, and he disowned the Proclamation Notice containing instructions from the 1st Respondent as a forgery and affirmed that his instructions had emanated from the 3rd Respondent who had allegedly bought the suit property at an auction. That his then Advocate filed an Application to enjoin the 3rd Respondent and to serve him by registered mail. That his Advocate assured him that the mails had been dispatched and yet no appearance was entered by the 3rd Respondent

That after filing his Appeal at the **Thika Environment and Land Court** on **6th December 2017**, he spoke on phone and recorded his conversation with **Bernard Gathuruku**, proprietor of the 2nd Respondent and it emerged that he had never met the purported buyer and the instruction to distrain him had come from the Chief Executive Officer of the 1st Respondent, who only used the 3rd Respondent to over her tracks. That on the same day he obtained a copy of the green card and no contact details were provided therein. That when he searched the IEBC data base by entering the 3rd Respondents Identity card number, he discovered that he as 21 years old. That when he further searched on the HELB website, he obtained his mobile number to wit **0723 920 917** and email address swalleh1994@gmail.com. That on **16th August 2018**, he called the purported buyer and introduced himself and he denied owning the suit property in Juja and further denied attending the alleged auction on **23rd March 2016**, and their conversation confirmed that fraud had indeed taken place. He further averred that on **16th August 2018**, he reported the matter to Juja Police Station and he was informed that the police needed a Court Order to investigate the matter. That towards the end of **2018**, he began receiving return mails from the Post Office mails that had been sent to the address of the 3rd Respondent. It was then that he learnt that the address used by the 3rd Respondent was a fictitious address meaning that the mails dispatched to the 3rd Respondent by his Advocate had never reached the 3rd respondent. That the 3rd Respondent was summoned by the police using the telephone number he had obtained from the **HELB** portal upon which he changed his story and alleged that he had bought the suit property using funds from his uncle. That the 3rd Respondent has become unavailable and process server has been unable to serve him. That he has sent Court documents to the 3rd Respondent through his email address and the same were successful.

Further that the Law Firm of **Muchoki Kangata Njenga & Co Advocates** oversaw the sale and drafted the transfer documents and **Muchoki Kangata** certified the documents and processed and collected the Certificate of title. That he filed an Affidavit of complaint with the **Auctioneering Licensing Board** seeking disciplinary action against **Regent Auctioneers** from conducting a fraudulent auction and **Bensure Auctioneers**, but that the board struck the complaint on the ground that it had been filed beyond the statutory limit of one year. That through the said action he obtained critical documents by way of annexures to the Replying Affidavits of the 2nd Respondent and of Regent Auctionee. That the said evidence obtained at the Auctioneers Licensing Board is directly relevant to the case. That **Regent Auctioneers** produced an attendance register purportedly signed by bidders and the same shows several anomalies. That the anomalies show that all the three purported auctions appearing on the said page lacked integrity including that of the suit property.

Further that **Regent Auctioneers** annexed a copy of a valuation report dated **2nd March 2016**, that was used in the auction to which he pointed out it was a fake valuation and he lodged a complaint with the **Valuers Registration Board** and the Board found **CMT Realtors** who prepared it guilty and has taken disciplinary action. That a copy of the title deed contained the fake address. Further that he has been informed by the office of the **DCIO Juja** that the proprietor of **Bensure Auctioneers** recorded a written statement confessing that his instructions came from the CEO of the 1st Respondent purportedly on behalf of the fake buyer. That even though a Notice to produce documents dated **28th March 2017**, had been issued to the 2nd Respondent the document was never availed. That the 1st Respondent and its Counsel misled the Court that they had not instructed the 2nd Respondent, yet the 2nd Respondent has confessed that his instructions emanated from 1st Respondent CEO. That even though there were serious illegalities in the sale and transfer of the suit property that were highlighted before the trial Magistrate, he did not obtain the hint of outright fraud while the matter was before the lower Court.

He further averred that he has signed a Certificate of **Electronic evidence** as required by the **Evidence Act**. That when it became clear that the DCI officers were preparing to open criminal charges over this matter, he was contacted by **Peter Gachie**, the proprietor of **Regent Auctioneers** regarding the possibility of an out Court settlement to which he is amenable and they have had various meetings that could see him recovering the suit property. That from the fresh evidence and the inconclusive out of Court settlement, it is clear that the 3rd Respondent is an appendage of the 1st Respondent. That the 1st Respondent has been involved in multiple cases of fraud and in one cases, it was found to have fraudulently transferred a title to themselves

The Application is opposed and the 1st Respondent filed Grounds of opposition dated **20th February 2020**, on the grounds that the Application as drawn is fatally defective, incompetent and bad in Law, that the grounds disclosed and laws invoked in the Application and the Supporting Affidavit are absolutely misconceived and cannot justify the Court to grant the orders sought. That the Application is a non starter as it has no merit has failed to establish the essential requirements for grant of orders sought.

That the Appellant has not demonstrated that the evidence he seeks to adduce could not have been obtained with reasonable diligence for use at the trial Court. That the evidence would have important influence on the result of the case, Further that the Appellant/Applicants seeks to adduce evidence that is not credible and is not capable of belief. That the evidence is for mere purpose of filling gaps in the evidence adduced and make a fresh case on Appeal. That there is no basis for the Application made.

The Application was canvassed by way of written submission which the Court has carefully read and considered. The issue for determination are:-

1. Whether the order sought to serve the 3rd Respondent by way of Advertisement in the News paper is merited.

2. Whether the Court should grant the Appellant/ Applicants leave to produce additional evidence

1. Whether the Order Sought to serve the 3rd Respondent by way of Advertisement in the News paper is merited

The law that governs the grant of leave to effect substituted service is set out in **Order 5, Rule 17 (1) of the Civil Procedure Rules of 2010** which provides;

17. (1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.

(4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.

The Court had ordered that the 3rd Respondent be served personally with the suit papers. The Appellants/ Applicants has deponed that his efforts to serve the said 3rd Respondent have not been fruitful as the address given by the said Respondent in the official documents keeps returning the mails to sender. Further the Process server **Peter Ngei Kimatu** in his Affidavit of service sworn on **6th February 2020** has averred that his efforts to personally serve the 3rd Respondent have not been fruitful thus the Court is satisfied that service cannot be effected to the 3rd Respondent personally and is therefore inclined to allow the said prayer.

2. Whether the Court should grant the Appellant/ Applicants leave to produce additional evidence

The Appellant/ Applicant has sought leave to file additional evidence at the Appeal stage as the evidence sought to be adduced are relevant to the matter at hand. He further submitted that the evidence sought to be adduced is bordered on fraud and would vitiate the proceedings at the lower Court .

The 1st Respondent is opposed to the said Application and has submitted that the Appellant failed to explain why the evidence was not adduced at the lower Court , that the lengthy allegations from purported investigations by the 1st Appellant/ Applicant cannot form the basis of fraud as the standard of fraud is higher than that of probabilities .

The applicable law as regards the admission of additional evidence by an appellate court is **Section 78 of the Civil Procedure Act which provides that: -**

“(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

The procedural Rules that are hand maidens to Section 78 of the Civil Procedure above provide under Order 42 rule 27 of

the Civil Procedure Rules that:-

“(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 reasons for its admission.”

In the case of Fibre Link Limited V Star Television Production Limited [2015] eKLR the court held as follows on admission of evidence at appeal stage;

"Appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in TARMOHAMED & ANOTHER V LAKHANI & CO (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in LADD V MARSHALL (1954) 1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:

“except in cases where the application for additional evidence is based on fraud or surprise:

“to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, 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; thirdly, 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.”

"In National Cereals And Produce Board V Erad Supplies & General Contracts Ltd (Ca 9 Of 2012), The Administrator, H H The Agha Khan Platinum Jubilee Hospital V Munyambu (1985) Klr 127 the Court of Appeal emphasized that the principal rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. In Wanjie & others v Sakwa & others (1984) KLR 275 the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the Court of Appeal Rules. Chesoni JA observed at page 280:

“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 the 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.”

Hancox JA as he then was in the same case above stated that the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.

On the other hand, courts have been urged to administer justice by exercising a delicate balance and in exceptional circumstances, new evidence should be allowed after weighing the two interests, that of doing justice and that of avoiding being mired by endless litigation which would occur if parties were allowed to adduce fresh evidence at any time during and after the trial without any restrictions. (see GENERAL PARTS (U) LTD V KUNNAL PRADIT KARIACA NO 26 OF 2013 UCA.

With the above in mind the Court will then determine whether the Appellant/ Applicant is entitled to the leave sought. The Court has carefully gone through the evidence sought to be adduced by the Appellant/ Applicant and notes that the said evidence borders on the alleged fraud committed during the auction of the suit property. That the said evidence involves the attendance register that was used at the auction, and the parties involved in the auctions. The Court has gone through the Application forming the basis of the instant Appeal. The Court has also gone through the various Replying Affidavits and the written submission by the parties. What the Court has adduced from the said pleadings is that the Appellant/ Applicant was not aware of the Auction that took place.

That it is clear that when the Appellant/ Applicant sought to stop the Proclamation of his household goods and further to restrain the auction, the same had already happened. Would the Appellant even with due diligence have been aware of the various information?

Having gone through the Appellant/ Applicant Supporting Affidavit it would seem that the said evidence sought to be adduced were evidence that were being obtained as a process. That while the process of the trial Court was ongoing it was when the said evidence were being discovered as the same had been concealed. Therefore, the Court finds and holds that it would have been impossible for the Appellant/ Applicant to be aware of the said fraud if he did not know the auction had taken place until it was too late in the day.

The Court is also required to allow leave in exceptional circumstances. Fraud is being alleged as against the auction that led to the sale of the Appellant/ Applicants suit property that the alleges to have fully paid for. The said property is matrimonial property and at the very least in the Court's considered view, it is in the interest of justice to at least interrogate the said evidence. The allegation that have been made in the Application are very serious and in the Court's find that it warrants proper interrogation as there is claim that the trial Court had been being misled.

Having analysed the available materials before this Court, it is satisfied that it would be in the interest of justice and for the just adjudication of the matter that it grants leave to the Appellant/ Applicant as the said evidence is important for the proper adjudication of the matter. The Application forming the basis of the appeal bordered on fraud in auctioning the suit property.

Having carefully considered the instant Amended Application dated **3rd July 2020**, the affidavit thereto and the annexures thereon the Court finds the said application is merited and the same is allowed in this Ruling and the prayers granted are **No. 1, 2, and 3** with cost being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 18TH DAY OF MARCH, 2021.

L. GACHERU

JUDGE

18/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Isaak Mwangi 1st Applicant and appearing in person

No appearance for the Respondent

L. GACHERU

JUDGE

18/3/2021

COURT

Mention on 28th April 2021 for further orders.

Mention notice to issue.

L. GACHERU

JUDGE

18/3/2021