REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO. 13 OF 2019

BERNARD KABEU KIRIU.....APPELLANT/APPLICANT

VERSUS

FRANCIS WAITHAKA KIRIU.....DEFENDANT/RESPONDENT

RULING

1. The Applicant filed the instant Motion on 7/8/2019 under Sections 3A and 95 Civil Procedure Act seeking orders THAT;

a. This Honorable Court be pleased to consider and determine the Applicant's application herein whether to grant leave to the Plaintiff/Applicant to render new documentary evidence crucial to the determination of the matter and consequently the Applicant be granted leave to produce additional documentary evidence on appeal.

b. The costs of this application be provided for.

2. The application is based on the following grounds;

a. That the SPM Court at Gatundu issued a judgement on the 24/9/18

b. The Applicant has appealed against the said judgment on the 24/9/2018.

c. The Applicant intends to produce a forensic document examination report authored by C J Michira Ndege.

d. The Applicant inadvertently did not call the maker to produce the documentary evidence in Court.

e. The evidence is very crucial to the determination of the main issue in dispute.

f. It is in the interest of justice that the above evidence be produced in the appeal or in the new trial for the fair determination of the dispute and in order to prevent a miscarriage of justice.

g. No party or parties will be prejudiced in any way if the application is allowed.

3. 3. In his supporting affidavit sworn on the 7/8/2019 the Applicant deponed that the Respondent is his biological brother. That despite having been appointed as joint legal administrators of the estate of Grace Mwangi, their deceased mother, the Respondent and one Felistas Nyakio Kuuma failed to involve him during the survey process that resulted in adversely affecting him in that his son's house fell on the Respondents portion of the land. Aggrieved, he challenged the survey in the **SPMCC Case No 241 of 2014**. In the absence of evidence of forgery, the Court held that the survey was properly done. That he advertently failed to call the document examiner to produce the forensic report, which report shows that his signature was forged. That the CID Gatundu did not take action on his complaint despite filing the same at the station.

4. That it is in the interest of justice that the report is produced in the appeal or a new trial for the fair determination of the appeal to prevent a miscarriage of justice.

5. The application is opposed by the Respondent vide his Replying Affidavit dated the 3/8/2020. He averred that he and the Applicant are the sons and beneficiaries/heirs of Kiriu Kuuma and Wairimu Kiriu alias Lydia Wairimu Kiriu. That they are the beneficiaries of the suit land in

equal shares vide the orders of the Court in **Succession cause No 22 of 2006**. That the Applicant filed the **CMCC No 241 of 2014** in which the Court rendered a judgement on the 24/9/2018. That the alleged forensic document was in the possession of the Applicant at the time of the hearing of the suit in Gatundu and there is no explanation why the said report was not produced. That the application is an afterthought, has no basis and the Court ought to dismiss it.

6. On the 27/7/2020 the Court directed the parties to file written submissions. Despite the directions of the Court the Applicant failed to file his written submissions by time of writing the ruling. The Respondent filed written submissions on the 2/11/2020, which submissions, I have read and considered.

7. Relying on the case of **Elgood V Regina (1968) EA 274** which adopted the decision of Lord Parker CJ in **R Vs Parks (1969) ALL ER at page 364** the Respondent submitted that the principle is that the evidence that is sought to be called must be evidence which was not available at the trial.

8. Further relying on the case of **Tarmohamed & Anor Vs Lakhani & Co (1958) EA 567** which Court adopted the judgment of Lord Denning in **Ladd Vs Marshall (1954) WLR 1489** where the Court stated as follows;

> **"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."**

9. Further the Respondent relied on the case of **Wanjie & Others v Sakwa & Others (1984)KLR 275** where 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 and had this to say;

> **"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."**

10. The Respondent further stated that the issues being raised by the Applicant are now resjudicata, having been heard and determined in the lower Court. That the Applicant has failed to show sufficient cause why the Court should exercise its discretion in his favour and allow adduction of new evidence.

11. The key issue for determination is whether the application has merit.

12. The applicable law regarding the admission of additional evidence by an appellate Court is found in **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 –**
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> **(a) to determine a case finally;**
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> **(b) to remand a case;**
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> **(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."**

13. The procedural rules that augment Section 78 Civil Procedure Act above are stipulated in **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—**
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> **(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."

14. The Supreme Court in the case of **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**, 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."

15. It is common ground that the Applicant and the Respondent are siblings, being the sons of the late Grace Mwangi. Felistas Nyakio Kuuma is their Aunt.

16. It is on record that the Applicant filed suit on the 27/11/2014 seeking a reversal of the survey of the original land Kiganjo/Nembu/991 that resulted into parcels 2822, 2823 and 2824. It was his case that despite the joint agreement between the Applicant, Respondent and Felistas Nyakio Kuuma to partition the original land into three in October 2013, the Applicant was excluded in the process so much so that the mutation form was executed by the Respondent and the said Felistas. He admitted that the trio attended the land control board and obtained the land control board consent. He pleaded fraud and accused the Respondent of forging his signature on the mutation form culminating into the impugned subdivisions in which he claims affected his and his son's house. The Respondent defended the claim and filed a counterclaim. He contended that the trio acquired their parcels pursuant to succession proceedings in CMCC No 22 of 2006 in the estate of Kamau Kiriu, deceased, their father. That parcel 991 was subdivided into three portions (parcels 2822, 2823 and 2824) and titles issued to parties according to the certificate of confirmed grant issued on the 4/4/2013. That the Respondents borne of contention is that their mothers house which was constructed by him fell on his side and he sought orders interalia for vacant possession of his parcel No 2823 together with mesne profits.

17. The trial Court delivered its judgement on the 24/9/204 and made a finding that in the absence of any evidence to support forgery and fraud the survey was properly done and ordered the Applicant to vacate the Respondents suit land.

18. In addressing the issue this Court is being called upon to exercise discretion. It is trite the discretion of a Court must be exercised in accordance with established legal principles to avoid arbitrariness, captiousness and whimsical use of discretion. See the case of **Shah Vs Mbogo & Another (1967) EA 1116.** Further the discretion is not meant to allow admission of evidence for the purpose of filling up the gaps in evidence nor to enable a party to make out a fresh case on appeal. See the case of **Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed & 3 Others Sup Petition No. 7 of 2018**, where it was held that the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filing gaps in the Applicant's evidence, and the Court must find the further evidence needful.

19. I have examined the document which the Applicant wishes to adduce as new evidence on appeal. The forensic document is dated the 13/3/2015. During the hearing the Applicant informed the Court that the signature on the mutation form was forged and that it was not his. He admitted signing the partition form but not the mutation. He stated that he took the documents to a hand writing expert. The Applicant did not apply to the Court to produce the said document in support of his case. One of the grounds for consideration of an application such as this is if the trial Court refused to admit the document. In this case the documents were neither produced nor sought to be produced and the trial Court refused. The Applicant states that he inadvertently did not call the maker to produce the document. I have examined the list of documents produced by the Applicant and this document was not one of them. This document was not produced at all leave alone calling the maker. I note that the Applicant was represented by counsel in the lower Court and their case having been premised on forgery and fraud, this is a document that ought to have been produced in support of their case. The Applicant is not being candid when he states that he did not call the maker. The maker could only have been called to produce the document had the said document been part of his pleadings in support of his case. Save for the averments that he had reported the matter of forgery to the police at Gatundu no evidence was annexed in form of a complaint or statement. Under para 10 of his supporting affidavit the Applicant deponed that he had annexed a bundle of documents marked as BKK-2. I have carefully perused the record and find that there are no such annextures.

20. The Applicant is silent on when he discovered that he had inadvertently omitted to call the maker of the document. From the application it is evident that the Applicant's case having been dismissed, the Applicant went back to the drawing board and fished out the evidence that would bolster his case. Regrettably, this was too late in the day as the horse had already bolted from the stable.

21. It is the finding of the Court that the Applicant has not shown that the document 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 by the party seeking to adduce the additional evidence. As explained above the Applicant had the document in his possession at the time of the trial and the Court concurs with the Respondent that this application is an afterthought.

22. I concur with the decision of Justice Hancox (as he then was) in **Wanjie & Others** (supra) when he stated as follows;

> **"…..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."**

23. Having carefully considered the application, the rival affidavit, the submissions and the trial Court record and the material placed before me I am satisfied that the Applicant is not deserving of the orders.

24.The application is dismissed with costs to the Respondent.

25.Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms Kadenge for Applicant

Ms. Ngugi Wambui for Respondent

Interested Party – Deceased

Ms. Phyllis – Court Assistant