



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 47 OF 2016

JAMES MWANGI KIBUCHI1ST APPELLANT

REGINA WANJIRU MWANGI.....2ND APPELLANT

VERSUS

GIKANDA FARMERS CO-OPERATIVE

SOCIETY LTD.....RESPONDENT

RULING

1. The appellants/applicants herein filed the instant application by way of Notice of Motion under the provisions of Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules seeking to introduce additional evidence at the appellate stage;
2. The Applicants relied on the grounds on the face of the application and on the Supporting Affidavit made by James Mwangi Kibuchi; which was made on his own behalf and on behalf of the 2nd appellant;
3. At the hearing hereof the applicants were represented by learned counsel Mr.A.J.Kariuki whereas the respondent was represented by learned counsel Mr.Runjo; hereunder is a summary of their respective rival submissions;

APPLICANTS' SUBMISSIONS

4. One of the grounds of appeal is that the Tribunal refused to have relevant documents submitted in evidence; the applicants now seek to have the annexures to the Supporting Affidavit of the application to be admitted as further evidence;
5. The additional evidence is in the form of receipts indicating their deliveries to the respondent's factory amounting to 10,000 kgs of coffee; that the applicants were denied an opportunity to file these receipts which form the basis for computation of their payments; without these documents the appellants submit that they have no basis for calculating monies paid to them by the respondent and those which were due to them;
6. The applicants contend that the respondent does not challenge the authenticity of the documents they seek to have admitted as additional evidence; which documents were in the custody of the respondents;
7. The applicants relied on the provisions of Section 81 of the Co-operatives Societies Act and submitted that this court had jurisdiction to exercise its inherent discretion so as to allow the introduction of the additional evidence at this stage as the documents had been wrongly excluded by the Tribunal;

RESPONDENT'S SUBMISSIONS

8. The application was opposed by the respondent through the Replying Affidavit made on the 22/07/2019 and sworn by the Secretary Manager of the respondent by the name James Ngatia Wanjohi;
9. Counsel argued that the documents sought to be admitted on appeal were not filed or expunged at the trial stage; that there was no effort made by the applicants to file these documents and they were never denied an opportunity of producing these documents at the trial stage; they instead sought to rely wholly on the documents filed by the respondents; nor did they even seek to have the case re-opened to have these documents adduced in evidence;
10. The issues pertaining to the receipt of cherries and payment were extensively dealt with at the Tribunal; the documents sought to be

included are not relevant to the case at this stage; and that there is no good reason given for the introduction of additional evidence at this stage; and the instant application is a means of delaying the disposal and determination of the appeal;

11. Case law relied on was **Nayan Mansukhal Salva vs Hanikassa Nayan Salva [2019] eKLR** where it was held that the rule on acceptance of additional evidence was not intended to assist a litigant to patch up the weak parts in a case; that the appellate court must find the evidence relevant;

12. In the instant case the respondent contends that the applicants only seek to patch up their case; and the respondent prayed that it be dismissed with costs.

ISSUES FOR DETERMINATION

13. Taking into consideration the above submissions this court has framed only one issue for determination which is whether the additional evidence meets the threshold for admission;

ANALYSIS

14. The applicable law that provides for the taking of additional evidence at the appellate stage is found at Section 78 of the Civil Procedure Act and at Order 42 Rules 27 of the Civil Procedure Rules;

15. Section 78 (d) reads as follows;

“Subject to the conditions and limitations as may be prescribed, an appellate Court shall have power;

a) To determine the case finally.

b) To remand a case.

c) To frame issues and refer them to trial.

d) To take additional evidence or to require evidence to be taken.

e) To order a new trial”

16. And Order 42 Rule 27 provides as follows;

“(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 reason for its admission.”

17. These provisions are to ensure any court is not deprived of relevant material facts that may enable it arrive at a justified conclusion; in this instance and stage the material placed before it must be of relevance to the appeal; case law relied on **Safe Cargo Ltd vs Embakasi Properties Ltd & 2 Others [2019] eKLR** where it was held;

“14. Following the guidelines as given by the Supreme Court, it is our duty to consider and determine if the instant application fulfills the principles as laid out in the case above. Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether 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 trial by the applicant.”

18. In **Republic vs Ali Babitu Kololo (2017) eKLR** the Court of Appeal held that;

“It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.”

19. The material placed by the applicants before this court is as follows; the applicants seek to introduce evidence of one Jane Wangari Kimondo who was one of the clerks who weighed their coffee upon delivery; they also seek to produce receipts which are records of the

amount of coffee actually delivered by them; and to also introduce letters from the area chief and two agreements for Coffee Plant Management;

20. Upon perusal of the record of the proceedings before the Tribunal nowhere is it indicated that the applicants sought to introduce these documents and were denied an opportunity to do so; indeed, the record reflects that on the 11/04/2012 the Tribunal directed the parties to file their respective documents; on the 19/02/2013 the record indicates that learned counsel Mr Waihinya acting for the applicants as having stated as follows;

“We will be relying on the same documents as those filed by the claimant.”

21. The above statement was adopted as an order of the Tribunal; it demonstrates that the applicants chose to rely on the documents presented by the respondents and therefore the assertion that the applicants were denied an opportunity to present their evidence is not true;

22. As for the evidence of the said clerk named Jane this is in the form of a supporting letter which states that the receipts were held by both the respondent and the applicants; this would then mean that at all material times the applicants were in possession of the receipts and have given no reasonable explanation as to why the receipts were not produced at the Tribunal hearing;

23. The letter from the Chief and the Coffee Management Agreements are to buttress the applicants’ contentions that they indeed own a coffee farm that could produce the amounts of coffee commensurate to the sums claimed; again upon perusal of the record this court notes that these were issues that were fully canvassed at the Tribunal hearing; the said documents as they stand do not espouse any fresh evidence to demonstrate the amount of coffee that was actually delivered and the monies paid out or received;

24. It is blatantly apparent that the evidence sought to be introduced by the applicants was obtainable with due diligence; the evidence was also within their knowledge and possession and could have been produced at the time of the trial at the Tribunal; lastly the evidence is not fresh and will not make a significant impact in the determination of the appeal;

25. This court is satisfied that the application does not meet the threshold of the conditions for admission of additional evidence on appeal.

FINDINGS AND DETERMINATION

26. For the forgoing reasons the court makes the following findings and determination;

(i) The application does not meet the threshold for admission of additional evidence on appeal; the application is found lacking in merit and it is hereby dismissed.

(ii) The Applicants shall bear the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 14th day of May, 2020.

HON.A. MSHILA

JUDGE