Ringi v Seif & another (Civil Appeal 44 of 2016) [2019] KEHC 12498 (KLR) (12 July 2019) (Ruling)

Neutral citation: [2019] KEHC 12498 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 44 OF 2016

M THANDE, J

JULY 12, 2019

BETWEEN

SALIM ALI RINGI .... APPLICANT

AND

OMAR HAMAD SEIF .... 1ST RESPONDENT

BAKARI SALIM BIZI .... 2ND RESPONDENT

RULING

1. By an application dated 26.4.19 (the Application), Salim Ali Ringi, the Appellant/Applicant seeks that this Court grants leave and admits the Appellant/Applicant's supplementary list of documents dated 25.1.19 and filed in Court on even date. The grounds upon which the Application is premised are set out in the Application as well as in the supporting affidavit of the Appellant/Applicant sworn on 26.4.19.
2. The Appellant/Applicant states that the documents are extremely crucial and will assist the Court in determining the real issues in the appeal herein. The Appellant/Applicant further states that the documents were discovered after he had filed the record of appeal. According to him, the documents will not prejudice the Respondents in any way. He averred that as a lay person he was not aware that the documents could only be filed with leave of Court and urged the Court to admit the same.
3. The Respondents though served with the Application did not respond to the same. The Application is therefore not opposed.
4. The jurisdiction of this Court sitting as an appellate Court to admit new evidence is stipulated in Section 78 of the *Civil Procedure Act* as follows:

    (1) Subject to such conditions 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; (underline mine)

(e) to order a new trial.

5. The prescribed conditions and limitations are contained in Order 42 Rule 27 which provides:

(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.

6. The power of this Court to admit additional evidence is discretionary. This discretion as in all other discretionary powers of the Court must be exercised judicially. It is well settled that the power of an appellate Court to admit fresh evidence should be exercised very sparingly and with great caution. The principles upon which the Court may exercise its discretionary power to determine whether or not to admit additional evidence were expressed by Chesoni, Ag JA (as he then was) in Wanjie & others v Sakwa & others (1984) KLR 275 as follows:

> "...the principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:
>
> (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> (b) 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;
>
> (c) 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."

7. I have looked at the documents the admission of which the Appellant/Applicant seeks. They include:

a) letters between Kwale Lands Office and the office of the Ombudsman dated 31.10.18 and 7.11.18.

b) official searches dated 8.10.18 and 11.10.18, caution dated 25.1.15, green card and Forms RL 1 dated 24.2.15 RL 7 dated 4.12.14, and RL 19 dated 4.12.14 all in respect of Plot No. Kwale/Kingwede Shirazi/Dalgube/721.

c) order dated 4.12.14 of the Kadhi's Court Succession Cause No 434 of 2014.

d) letter from Ministry of Interior to the Ombudsman dated 29.5.17

e) letters from the office of the Ombudsman to Kwale District Land Registrar, Assistant Chief, Mwambweni and Assistant County Commissioner, Msambweni dated 20.4.15, 5.6.15 and 8.9.16 respectively.,

8. The Court notes that the appeal herein is against the Hon. Principal Kadhi's judgment of 20.12.16 and order of 4.12.14. The letters between Kwale Lands Office and the office of the Ombudsman, the official searches and the letter from the Ministry of Interior were all written and issued subsequent to the impugned judgment and order. As such, it cannot be said that this evidence could not have been obtained with reasonable diligence for use at the trial. The said evidence simply did not exist at the time of trial. It therefore fails the principle laid down by Denning, LJ., in the Ladd v Marshall case.

9. Additional evidence that comes into existence subsequent to the impugned Judgment and order cannot be admitted. In this regard, I am duly guided by the holding in Kenya Anti-Corruption Commission v Willesden Investments Limited & 7 others [2018] eKLR. The Court of Appeal declined to admit evidence that arose subsequent to the delivery of the ruling appealed against and stated:

> Quite apart from the fact that the additional evidence consists of material that has come into existence subsequent to the rendering of the impugned ruling, it does not in our view speak to the question arising in the appeal, namely, whether Judge properly exercised his discretion in striking out/dismissing the suit. In the words of the Court in Mzee Wanje and 93 others v A K Saikwa and others (above) that material is not needful for the task the Court will be required to discharge in determining the appeal before it.

10. The letters from the office of the Ombudsman to Kwale District Land Registrar, Assistant Chief, Mwambweni and Assistant County Commissioner, Msambweni all related to a complaint by the Appellant/Applicant. All these letters were copied to the Appellant/Applicant and were therefore available to him during trial. Forms RL 1, 7, and 19 in respect of Plot No. Kwale/Kingwede Shirazi/Dalgube/721 were drawn and dated in 2014 and 2015 during the pendency of the trial in the Kadhi's Court. The Appellant/Applicant has not proffered any explanation as to why all these documents were not produced at the trial or the difficulties, if any, and efforts made in trying to obtain the same.

11. As regards the order of 4.12.14, the Court notes that the same is already in the record of appeal. The same may have been included in the list of documents to be admitted in error.

12. While considering this Application, the Court must caution itself against admitting new evidence that will enable the Applicant patch up the weak points in his case and fill up omissions and make out a fresh case on appeal thereby giving him another bite at the cherry. Chesoni, Ag JA (as he then was) in the Wanjie v Sakwa case (supra) went on to state:

> As is correctly stated in Mulla on Code of Civil Procedure, 13th Edn Volume 11 page 1606, in a commentary on a similar Indian rule, 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. …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 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.

13. Other than the documents which came into existence after the impugned judgment and order, all the other documents which the Appellant/Applicant seeks to have admitted were available to him during trial in the lower Court. It would therefore appear that the Appellant/Applicant realized after the impugned decisions that the same ought to have been produced at the trial.. The Application is in my view an attempt by the Appellant/Applicant who was unsuccessful in the trial Court to improve his case by firming up the weak points and filling in gaps in the evidence he adduced in the trial Court. The Application is also an attempt to make out a fresh case or by calling new evidence that came into existence subsequent to the impugned judgment and order. To allow the Application would be to give unfair advantage to the Appellant/Applicant and further prolong the matter, yet there must be an end to litigation.

14. In the circumstances I find that the Application dated 26.4.19 is devoid of merit and the same is hereby dismissed. Since the Respondents did not file any response, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 12TH DAY OF JULY 2019

M. THANDE

JUDGE

In the presence of: -

…………………………………………………………… **for the Appellant/Applicant**

…………………………………………………………… **for the Respondents**

……………………………………………………**……….Court Assistant**