



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 48 OF 2014**

**NANCY WANGARI KINYUA.....APPELLANT**

**VERSUS**

**ROSE WAMBUI .....1<sup>ST</sup> RESPONDENT**

**CATHERINE NJERI.....2<sup>ND</sup> RESPONDENT**

**(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 19<sup>TH</sup> JANUARY, 2012 BY HON. H.N. NDUNG’U – S.P.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 267 OF 2010)**

**RULING**

**Order 42 Rule 27(1) and (2) of the Civil Procedure Rules provides as follows:-**

**27(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;**
- b. **the Court to which the appeal is preferred requires any document to be produced or any witnesses to be examined to enable it 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”**

Citing the above provision, the appellant has moved this Court by her Notice of Motion dated 2nd May 2013 and filed herein on 8th May 2013 seeking the following orders:-

1. **That this Honourable Court be pleased to allow the appellant to produce additional evidence in this appeal to wit the proceedings in High Court Succession Cause No. 51 of 1996 in the matter of the Estate of DISHON CHUMA (deceased).**
2. **That costs of this application be provided for.**

The application is premised on the grounds set out therein and also supported by the affidavit of the applicant **NANCY WANGARI KINYUA**. The main reason for seeking the order is that during the trial in the subordinate Court, the appellant had prayed for an order that land parcel No.

MWERUA/GITAKU/827 be sub-divided into three portions between her and the respondents. The lower Court dismissed her orders for the reasons that she had sold her share of the original land parcel No. MWERUA/GITAKU/203 during the Succession Cause No. 51 of 1996 which was not true. It was on that basis that her claim was dismissed in the lower Court hence this application.

The respondents filed what they called a “*protest*” to the said application and which this Court, by virtue of the fact that the respondents are acting in person and also in the spirit of Article 159(2) (d) of the Constitution, treated as a reply to the said application. In the said “*protest*” the respondents averred that the appellant sold her one acre piece of land to one **JOSEPH GITHINJI JOEL** and is therefore not entitled to a share of the land subject to this appeal and all she wants is to take advantage of the 1st respondent’s illness to swindle her of her share. The respondents also allege that the appellant colluded with the local Assistant Chief to institute the Succession Cause without their knowledge.

I have considered the application and the respondents’ protest.

Order 42 Rule 27(1) (b) of the Civil Procedure Rules allows the Court to which an appeal has been preferred, and “*for any other substantial cause*” to admit additional evidence. The applicant has not indicated why this additional evidence was not availed during the trial in the subordinate Court. At least it has not been suggested that the trial magistrate refused to admit such evidence which is in the nature of the proceedings in Succession Cause No. 51 of 1996. It is clear however from the application that those proceedings are important for the determination of this appeal because the judgment in the lower Court was based on the claim that the appellant was not entitled to a share in land parcel No. MWERUA/GITAKU/827 having already sold her share during the succession proceedings in Succession Cause No. 51 of 1996. In my view, that is substantial cause enough to warrant the grant of the orders sought because the proceedings in that succession cause will play a pivotal role in this appeal.

Ultimately therefore, I grant the orders sought by the appellant in her Notice of Motion dated 2nd May 2013 and filed herein on 8th May 2013. The appellant will however meet the respondents’ costs of the same.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> MAY, 2015**

Ruling dated, delivered and signed in open Court this 12<sup>th</sup> day of May, 2016

Ms Wangechi for the Appellant present

Respondents both present.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> MAY, 2016**