



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 163 OF 2015

DAVID MWANIKI KASIMU.....APPELLANT

VERSUS

COLLINS MUSYANI MUTHANGYA (sued as the legal representative of

JOHN MUTHANGYA KASIMU.....1ST RESPONDENT

TOWN COUNCIL OF MWINGI.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of

Senior Resident Magistrate's Court at Mwingi in Civil Case No. 56 of 2002

delivered on 21st November, 2012 by Hon. H.M. Nyaberi Ag. SPM)

RULING

1. In the Notice of Motion dated 24th January, 2018, the Appellant is seeking for the following orders:

a. Additional evidence limited to production and admission in evidence of the report of E. Kenga, government document examiner dated 14th April, 2008 be and is hereby allowed.

b. The Subordinate Court at Mwingi from whose decree the appeal is preferred be and is hereby directed to take the additional evidence and send it to this court.

c. The costs of this Application be in the appeal.

2. The Application is premised on the grounds that the dispute revolves around forgery of transfer documents in respect of parcels of land known as Plot Numbers 15A and 15B, Mwingi Township; that the report of the document examiner is necessary to enable the court to pronounce its Judgment and that as at the time of trial, the Report of the document examiner was either not available to the Appellant or was withheld and kept out reach of the Appellant and could not be produced in evidence.

3. The Appellant deponed that he was the Plaintiff in Mwingi SRMCC No. 56 of 2002; that the suit in Mwingi revolved around the issue of forgery of transfer documents for Plot No. 15A and 15B; that the police took his specimen signatures and handwriting and from the late John Muthangya for comparison with the disputed writing and that despite making a follow up on the document examiner's report, the same was not available as at the time the trial was finalized.

4. The Appellant deponed that John Muthangya died during the pendency of the suit and that it is only recently that he learnt that the government document examiner had compiled a report in which he confirmed that indeed the transfer documents of the suit properties had been forged by the late John Muthangya Kasimu.

5. In the Further Affidavit, the Appellant deponed that it is not true that he did not state in the proceedings in the lower court that there was forgery that was being investigated; that he was only able to obtain a certified copy of the report from the document examiner and that he does not have access to police records.

6. The Appellant's advocate submitted that the powers of an Appellate Court to allow additional evidence is spelt out at Order 42 Rule 27 of the Civil Procedure Rules; that fraud or surprise is the exceptional ground on which additional evidence may be allowed and that the Appellant could not, without the goodwill of the police, have obtained the report sought to be introduced.

7. Counsel submitted that the document examiner's Report is on forgery which is at the centre of the current Appeal and that the Application is merited.

8. The Respondents' advocate submitted that the grounds given for the Application are not sufficient to warrant the prayers sought; that the Appellant never stated in his evidence that he had reported the issue of forgery to the police; that he never complained that the examiner's report had been kept away from him and that the Appellant did not make any application to call the document examiner or the police as witnesses.

9. The Respondents' counsel finally deponed that the alleged report is not credible because the Appellant has not indicated or shown how he came into possession of the report.

10. The powers of an Appellate Court to allow additional evidence is provided for under Order 42 Rule 27 of the Civil Procedure Rules which provides as follows:

“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.

11. The Court of Appeal has set out the criteria that should guide the Appellate Court in exercising the power to allow additional evidence. In *K. Tarmohamed vs. Lakhani (1958) E.A 367*, the Court held as follows:

“Except on grounds of fraud or surprise, the general rule is that an Appellate Court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available.”

12. The court further referred with approval the holding by Lord Denning in *Ladd vs. Marshall (1954) 1 W.L.R 489* where he held as follows:

“To justify the 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.”

13. In his Application, the Appellant is seeking to produce additional evidence being the report of Mr. E. Kenga, a government document examiner, dated 14th April, 2008.

14. In the Complaint that was filed in the lower court, the Appellant alleged that on 25th January, 1970, he purchased plot number 15 Mwingi from the original allottee, one Mang'aro Kasimu and that in 1990, the 1st Respondent (*deceased*) by stealth and fraud, sub-divided parcel number 15 into parcel numbers 15A and 15B which plots were eventually transferred to the 1st Respondent. In the particulars of fraud, the Appellant pleaded that the Respondents fraudulently forged his signature in the application for sub-division of the land and the subsequent transfer of the land to the 1st Respondent. The Respondents denied those allegations in their Defences.

15. After taking the evidence, the trial Magistrate held that the Appellant had not proved his case on the required standards. I would not go into the issue of whether the Appellant indeed did not prove his case, save to state that the Appellant never sought the assistance of the court to have the document examiner or the police investigating officer to testify on the alleged forgery of the transfer documents by the 1st Respondent.

16. If indeed the Appellant had complained to the police about the alleged forgery of his signature, and the police had obtained his specimen and known handwriting and signature, then due diligence required the Appellant to request the court to compel the document examiner to testify. He never did that but instead proceeded with his case without the benefit of the report of the document examiner.

17. Although the Appellant has deponed that he requested for the examiner's report, and that the police declined to supply him with the said document, the Appellant has not adduced any evidence to show that he formally requested for the document. The Appellant was therefore contended in prosecuting his suit without the said document. He cannot, after losing the case, turn around and allege that the said document is crucial to his case.

18. Having not formally asked for the document from the police during the pendency of the suit, I find that the Appellant did not exercise any due diligence that was expected of him in obtaining the document. For those reasons, I find that the Application before me does not meet the conditions required for the Appellate Court to call for the report of the document examiner as additional evidence. Consequently, I dismiss the Application dated 24th January, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE