REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA NO. 15 OF 2017

FRANCIS MUTURI MBURU.....APPLICANT

VS

FLORA WAMBUI KARANJA.....RESPONDENT

RULING

1. This appeal arises from the judgment rendered in PMCC No 220 of 1996, Muranga on the 12th November 1997. Being aggrieved by the judgement, the applicant filed the appeal which has dragged in Court for the last 17 years for an assortment of reasons. Before the hearing of the appeal commenced the applicant filled a Notice of Motion under Order 42 rule 27, Order 51 rule 1 of the Civil Procedure Rules, Section 3A and 78 (1)(2) of the Civil Procedure Act, seeking leave to adduce additional documentary evidence in form of a green card in respect to the suit land Loc 4/Gakarara/99.

2. The application is premised on the grounds enumerated in the application as well as the supporting affidavit of the applicant sworn on the 26th October 2016. The background of the suit in the lower Court is as follows; The applicant sued the Respondent who was the registered proprietor of the suit land, (having succeeded her father-in- law in ownership of the suit property) for a declaration that the suit property was being held by the respondent in trust for him and that the trust be dissolved and the suit land be registered in his name absolutely. Later in the proceedings his younger brother Peter Karanja Mburu joined the suit as the 2nd Plaintiff. His case was that the trust be dissolved and a half share of the land be given to him and the other half to his elder brother, the applicant herein. The respondent is the mother of the applicant and Peter Karanja Mburu. At the hearing of the suit the respondent stated that she had no interest in the suit land; all she wanted was to share the land equally between the two sons. The learned Magistrate, holding that the suit land being held under trust by the respondent on behalf of her two sons, proceeded to dissolve the trust and ordered that the suit land be subdivided into two equal parts and the same registered in the names of the applicant and his brother Peter Karanja Mburu.

3. In his supporting affidavit the applicant deponed that in the year 2016, while prosecuting criminal case No 3475 of 2016, he conducted an official search on the suit land and discovered that the respondent transferred the suit land to herself and his brother on the 5th December 1996. That the transfer was done during the pendency of interlocutory orders issued by the Magistrates Court on the 22nd October 1996 and 11 months before the judgement of the Court. That he wishes to produce the green card to demonstrate that the Court relied on false and perjured evidence when making the decision appealed against; That previously he held the original title for the suit land until 2003 and he had no reason to believe that the respondent could conduct herself so contrary to the Court orders in place then; That the new evidence had the likelihood of affecting the results of the Magistrates Court.

4. In resisting the application, the respondent filed grounds of opposition *interalia* that the application is

misconceived and incompetent, bad in law and an abuse of the process of the Court and the same should be dismissed.

5. Both parties filed written submissions to support their arguments for which I have considered. The Learned Counsel for the respondent did not file any precedent. The Appellant's Counsel relied on the case law to wit; **Karmali Tarmohamed & Anor Vs LH Lakhani (1958) EA 567; Samuel Kungu Kamau Vs. Republic (2015) e-KLR; and Governors Balloon Safaris Limited Vs Zacharia W. Baraza t/a Siuma Auctioneers (2016) e-KLR,** which I have considered in the ruling.

6. This Court is empowered to take additional evidence or require additional evidence to be taken under **Section 78 (1) (d)** of the Civil Procedure Act as follows;

> "(1) Subject to such conditions 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;,
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> (d) to take additional evidence or to require the evidence to be taken;
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> (e) to order a new trial.
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> (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.

7. The procedural provisions are succinctly stated under **Order 42 rule 27** of the Civil Procedure Rules which provide that;

> "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—
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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
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> (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,
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> (c) the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
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> (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.

8. The power to call additional evidence on appeal is a power that is discretionary. It must be exercised judiciously and with caution so as not to introduce contradictory evidence as opposed to new evidence as pleaded by the applicant. It is a trite law that the power of the court to receive additional evidence should always be sparingly used. Chesoni Ag JA (as he then was) in the case of **Wanjie Vs Sakwa (1984)KLR 275** stated that the rule is not intended to enable a party who has discovered fresh evidence to import 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 appeal. It does not authorize the admission of new evidence for purposes of removing a lacunae or filing in the gaps in evidence. The appellate Court must find the evidence needful.

Additional evidence should not be admitted to enable the plaintiff to make out a fresh case on appeal. There would be no need to litigation if the rule were used for the purposes of allowing parties to make out a fresh case or improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution be exercised in admitting fresh evidence.

9. In the case of Karmali Tarmohamed & Anor. Vs. I.H.Lakhani [1958] EA 567 the Court held that:

> "(i) 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."
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> And as was stated by the honourable Court in **Joginder Auto Service Ltd v Mohammed Shaffique & Another [2001] eKLR (Civil Appeal (Application) No. Nai. 210 of 2000)**
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> …….…. In summary these and several other cases decide that the power of the court and more particularly this Court, to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:
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> > (1) The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.
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> > (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
> >
> > (3) The evidence must be apparently credible, although it need not be incontrovertible.

10. The applicant submits that he could not with reasonable diligence obtain the evidence for use at the trial as he did not have it in his control. That he had no knowledge of the existence of the evidence or any reason to believe that such evidence existed. There is evidence on record during the proceedings to show that the respondent had many times stated that she had subdivided the land. For example, on the 9th October 1996, she did submit orally that she had divided the land equally among her two sons and that she had no personal interest in the suit land. It is on the basis of this admission that the trial magistrate granted the interlocutory orders on the 22nd October 1996. This evidence is also found paragraph 6 of her affidavit that she swore on the 30th September 1996 as follows;

> "that my interest in having the land subdivided is to have the same registered in the name of the plaintiff who should get half while my other son Peter Karanja Mburu should get the other half share".

11. The defence witness one Samuel Mwangi Kibari also testified that " we filed a succession cause then the land was registered in the defendants name. Later the defendant decided to subdivide the land between her two sons. The land was subdivided by a licensed surveyor and registered in the name of the plaintiff but the plaintiff refused to go for his title" this evidence was also corroborated by the appellants brother in his evidence when he alluded to the surveyor sub- dividing the suit land.

12. It would appear that the fact of the subdivision of the land into two portions to be registered in favour of the applicant and his brother was in the open and was canvassed openly in court where the applicant participated fully. I see nothing that prevented or could have prevented him from carrying out a search at that point in time to ascertain the position of the land. He also had the opportunity of challenging this evidence at the trial. There is no evidence that he did. The reasons advanced by the applicant are not convincing and in my considered view he did not exercise due diligence.

13. Whether the documentary evidence will affect the results of the appellants appeal if given. The appeal is premised on among other grounds that the learned magistrate failed to exercise her discretion judiciously. That title that the applicant is contesting has been closed and the new evidence will enable the Court to give directions on the dispute going forward. It is doubtful if the adduction of the green card

at this stage will affect the outcome of the appeal, given the grounds of the memorandum of appeal.

14. Is the documentary evidence credible? I have examined the green card which shows that the title was closed on subdivision on the 5th December 1996 and new titles to wit; 2162 and 2163 were issued. There is no other evidence which shows to whom the two parcels of land were registered. The green card on the face of it does not support any evidence that the applicant would have been entitled to the whole parcel of land. I find that the green card does not lend any credence or value to any proprietary rights that the applicant may be claiming in the suit land. It says little if any as to whether he is entitled to the suit property wholly or in part, by purchase or gift or any other manner. The credibility of the green card is therefore in doubt at this point.

15. In the end this court has addressed the issues whether the applicant exercised due reasonable diligence to obtain the document, the effect of the document on the case of the parties, and whether or not the Court would derive any evidential value or benefit from it in order to adjudicate the dispute in the interest of justice. The Court therefore declines to exercise its discretion in favour of the applicant.

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

DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 20TH JULY 2017.

J. G. KEMEI

JUDGE