**M'miti v Ndwiga (Civil Appeal (Application) 161 of 2023)**
**[2024] KECA 725 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 725 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL (APPLICATION) 161 OF 2023**

**J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA**

**JUNE 21, 2024**

**BETWEEN**

**BEDAN IRERI M'MITI ..... APPELLANT**

**AND**

**IRERI NDWIGA ..... RESPONDENT**

***(An application brought under Rule 29 (1) (b) of the Court of Appeal Rules, 2010 to adduce additional evidence in the pending appeal from the decree and Judgment of the Environment and Land Court of Kenya at Embu (Y.M. Angima, J.) dated 16th May 2019 in ELC Case No. 221 of 2014)***

**RULING**

1. The appellant, Bedan Ireri M'miti, was aggrieved by the judgment of the Environment and Land Court at Embu. In the judgment that was delivered on 16th May 2019, the learned Judge found that the respondent, Ireri Ndwiga, was the registered proprietor of land parcel Gaturi/Weru/313 (the suit property) which the appellant had in 1975 fraudulently caused to be registered in his name after he had changed his name and identity card which had enabled such transfer. The court ordered the retransfer of the suit property into the name of the respondent.

2. In a notice of motion dated 18th February 2020 under Rule 29(1)(b) of the *Court of Appeal Rules*, the appellant has sought leave to adduce additional evidence in the appeal (Civil Appeal No. 161 of 2019 at Nyeri) filed before this Court. The additional evidence is the judgment in Chief Magistrate at Embu Criminal Case No. 1515 of 2015 in which he had been charged with altering a false document, obtaining registration by false pretenses and fraudulently altering a forged document. The case related to the suit property and the appellant's registration as the proprietor. The respondent was the complainant. It does appear that the respondent filed the complaint with the police who charged him in the criminal court even as he filed the suit subject of this appeal.

3. From the judgment subject of the appeal before this Court, the respondent applied to have the civil proceedings stayed until the criminal trial had been heard and determined. The learned Judge declined to grant the request.

4. In the criminal case, the trial magistrate found the charges against the appellant had not been proved. He dismissed the charges because –

> " it is not possible to determine with the evidence available and in a criminal case who between the accused and the complainant is the real allottee of the land in question."

5. In support of the present application for additional evidence, the applicant has deponed that his acquittal on all the charges in the criminal case, which acquittal came after the conclusion of the civil suit subject of this appeal, is credible and relevant evidence which, if it had been considered, would probably have influenced the learned Judge into finding that he was the owner of the suit property. He stated that the criminal court judgment was subsequent to the impugned judgment.

6. The respondent swore a replying affidavit and opposed the application. According to the respondent, the same witnesses who testified in the criminal case testified in the civil case. He pointed out that there was a witness, one Karanja Mathanjuki, who had testified for the appellant in the civil case and also testified for him in defence in the criminal case. The appellant blamed this witness for giving conflicting evidence and states that this witness is responsible for what befell him in the civil case.

7. It should be pointed that, according to the appellant, the evidence contained in the judgment is not only relevant but that its admission will cause no injustice or prejudice to the respondent.

8. One of the grounds in the appeal was that the learned Judge had erred in finding in favour of the respondent when the particulars of fraud had not been proved and that no sufficient evidence had been adduced to support the allegation of fraud. Then that the learned Judge had erred in relying on the testimony of Karanja Mathanjuki when he was old and frail and whose evidence was inconsistent –

> " with the evidence he was liable to produce and with his earlier sworn evidence before another court of law."

9. During the hearing of this application, learned counsel Mr. Mungai Kalande appeared for the appellant whereas learned counsel Mr. Karanja Maina appeared for the respondent. Each filed written submissions. Mr. Mungai Kalande highlighted his submissions.

10. We have considered the application and the rival submissions. We caution ourselves that additional evidence should be sparingly allowed at this stage because generally this Court proceeds on the basis of the evidence as contained in the record of appeal. It is not a trial court. That said, the Court can still exercise its discretion to allow additional evidence to be taken by it or to be taken before the superior court from which the impugned decision emanated. The evidence must be relevant, believable and be shown to be of probable influence on the result of the case, though it need not be decisive; and, quite important, it should be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. (See Hon. *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others* [2018] eKLR). Lastly, the additional evidence should not be used to bolster what was otherwise a hopeless case, should not prejudice the respondent and should not be used to delay the cause of justice.

11. In the submission by learned counsel for the appellant, the parties in the two cases were the same, litigating over the same suit property and the question in issue was fraud; that fraud was proved in

the civil case and not proved in the criminal case. We have considered this submission carefully. We point out that the standard of proof in the civil case was not as high as what was required to prove the criminal case. Secondly, in the civil case, the learned Judge made a determination one way. In the criminal case, the trial magistrate was not able to find either way. He did not find that there was fraud. In the civil case, the learned Judge found that the fraud had been proved by the respondent against the appellant. In the criminal case, the trial magistrate found that on the available evidence he could not determine the question either way.

12. In other words, we do not find that the trial magistrate made any findings that will help the appellant in any way in this appeal. We do not think that the judgment would have any important influence on the result of the appeal.

13. As to whether the additional evidence contained in the judgment will remove any vagueness or doubt regarding the ownership of the suit property, our answer is that he appellant has not demonstrated this.

14. We reiterate that, the question that the substantive appeal will seek to determine is who between the appellant and the respondent is the rightful owner of the suit property. The trial court in the criminal case was not able to determine the issue, and therefore its judgment will not aid this Court in its effort to resolve the appeal.

15. In conclusion, we find no merit in the application dated 18th February 2020. We dismiss it with costs.

**DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE 2024.**

**JAMILA MOHAMMED**

**.....**

**JUDGE OF APPEAL**

**L. KIMARU**

**.....**

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

signed

**DEPUTY REGISTRAR**