



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & KOOME, JJA)

CIVIL APPEAL NO 87 OF 2017

Between

PGM.....APPELLANT

And

AWM.....RESPONDENT

(Being an application for leave to adduce evidence from the judgment/orders (findings and holdings) of the High Court of Kenya at Nairobi (M.W. Muigai, J.) dated 15<sup>th</sup> February, 2016 in Civil Suit No. 71 of 2011 formerly ELC No. 2014 OF 2011)

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RULING OF THE COURT

1. **PGM** (applicant), filed an appeal against the judgment and orders made in **HCCS' Family Division No. 71 OF 2011** on the 3<sup>rd</sup> October, 2017. Before the said appeal was heard, on the 3<sup>rd</sup> October, 2017, he filed a notice of motion principally under **Rule 29 (1) (b) and (2)** of the Court of Appeal Rules seeking leave to adduce additional evidence by way of an affidavit and/ or as may be found suitable by the Court. [2] This motion is supported by the grounds asserting that the suit before the High Court was initiated by way of an originating summons dated 29<sup>th</sup> March, 2011. The suit was instituted by the applicant's wife, **AWM**, (respondent) and the allegations made in the said suit were not accompanied by certain information which now obligates the applicant to adduce additional evidence in regard to a property known as **Nairobi/Block \*\*\*\*\*** (suit property) before the appeal is heard.

2. The motion is also supported by a brief affidavit sworn by the applicant on 3<sup>rd</sup> October, 2017 which underscores the importance the applicant attaches to the new evidence he seeks to adduce as thus: -

**“3. That in the petition at the Superior Court where this matter originated from, Nairobi/Block \*\*\*\*\* was not cited as material evidence that now obligates the (sic) myself to adduce and to prove the contrary to evidential materials produced.**

**“Annexed hereto and marked “PGM1” is a true copy of official search”**

**4. That it is only fair and just that the application herein is granted so as this honourable court may have an opportunity to make considerations on both the evidence produced by the applicant/appellant herein as well as that constituting the record of appeal that was adduced before the superior court so as to make a findings on the issues raised in the appeal herein.**

**5. That such adverse decision have been delivered, the applicant/appellant is only fighting for a chance to safeguard his interest which chance now only lies in prosecuting an appeal against the said judgment of 15<sup>th</sup> February, 2016. (Annexed hereto and marked “PGM2” are photos of the development on the said parcel of land...”**

3. The application was opposed by the respondent's replying affidavit sworn on the 2<sup>nd</sup> day of October, 2018. The respondent states that the matter in issue before the High Court was the determination of shares held in properties being **NAIROBI/BLOCK \*\*\*\*\*** and **KJD/KITENGELA/\*\*\*\*\*** (matrimonial properties) held or acquired by the applicant and respondent during their marriage. The marriage itself was dissolved vide a decree absolute issued on 14<sup>th</sup> January, 2011. That the suit property never featured before the trial court and was not a subject of division of matrimonial property and as such no evidence was adduced thereto. According to the respondent, the applicant had every opportunity to adduce all evidence in his possession but he never mentioned the suit property; that bringing this application after two (2) years since the judgment was delivered, is a deliberate move to delay the effectual conclusion of the appeal. Moreover the applicant

has not demonstrated what stopped him from adducing this evidence; that a perusal of the documents attached in support of the application shows that they came into existence recently which is a clear demonstration that the applicant is trying a second bite of the same cherry by litigating in instalments. Finally that the applicant has not demonstrated how the introduction of the so called new evidence would influence the outcome of the

appeal .

4. During the plenary hearing, **Mr. C. N. Kihara** appeared for the applicant. He repeated the matters stated in the applicant's affidavit by highlighting that since the matter was filed by way of an originating summons, the applicant was circumscribed by the kind of evidence he adduced as it was tried as a case between a husband and a wife under the defunct **Section 17 of the Married Women's Property Act 1882 of England**. Also, the suit property was mentioned in evidence when the applicant stated that he had bought it for the respondent and had it registered in her name. Counsel therefore urged us to allow the application so that his client can get a fair chance of adducing the new evidence regarding the suit property.

5. **Mr. Gichuru**, learned counsel for the respondent, opposed the application arguing that the matter was before the High Court for a period of five (5) years and the applicant had an opportunity to make an application to introduce additional evidence which he now wishes to bring 2 years after the judgment. Moreover, the applicant is not saying what prevented him from presenting the evidence; that the suit was over determination of properties acquired during the subsistence of a marriage and looking at the document annexed to the applicant's application, it clearly shows the suit property was purchased by the respondent on 31<sup>st</sup> March, 2016 which explains why it was not a subject matter before the High Court as it was acquired after the judgment and also five (5) years after the marriage was dissolved.

6. Counsel for the respondent went on to state that, introducing the suit property that was acquired five (5) years after the dissolution of the marriage is only meant to cause delay, confuse the proceedings and prejudice the respondent. Lastly, if the applicant, as he stated in passing had purchased the plot for the respondent, he did not attach any sale agreement nor did he say whether he had forgotten about it but remembered two (2) years after judgment and seven (7) years after divorce. According to counsel, what is clear from the instant application was that the issue of additional evidence is an afterthought meant to delay the execution of the judgement and delay the effectual conclusion of the appeal. Counsel urged us to dismiss the application

7. We have considered the application, the affidavit in support, the replying affidavit, the submissions by counsel and the authorities cited. This is a matter to be decided within the context of Rule 29 of the Court of Appeal Rules which provides as follows:

**“29. (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-**

**a.. ...**

**b. In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.**

**2. When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent.**

**3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court, without any such statements of opinion.**

**4. The parties to the appeal shall be entitled to be present when such additional evidence is taken.”**

**8. Rule 29** has been subjected to interpretation by this Court before and certain principles that guide the Court have emerged. To begin with this is a discretionary power which is exercised within certain parameters as summarized by **Chesoni Ag. JA** (as he then was) in **Mzee Wanje and 93 others vs. A K Saikwa and others** (1982-88) 1 KAR 462 where he stated:-

**“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to 5 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”.**

See also **Joginder Auto Services Ltd vs. Mohammed Shaffique and another** Civil Appeal (Application) No. Nai 210 of 2000 (2001) eKLR and also

**Kuwinda Rurinja Co. Ltd vs. Kuwinda Holdings Ltd Civil Appeal No. 8 of 2003**

9. In *Mzee Wanje Case* (supra) the Court cautioned that the power to receive further evidence should be exercised very sparingly and great caution should be exercised in admitting fresh evidence. This is what was stated:-

**“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. The appellate court must find the evidence needful. 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 parties to 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.”**

10. Bringing the above considerations to bear in the circumstances of this case, we find that, the applicant first of all does not explain why he failed to produce the evidence before the trial court. He merely blamed the procedure under which the suit was filed which was by way of an originating summons. It is a recognized practice that even when a suit is filed in that format, nothing stops a party from introducing evidence by way of affidavits and even calling witnesses for examination and cross-examination. Even more glaring on the part of the applicant, is the fact that he does not state that the evidence regarding the ownership of the suit premises could not have been obtained with reasonable diligence. Is it that he did not know that the respondent owned the suit property, or since he claimed that he had bought it for her, had he forgotten about it? All that is not explained and in the absence of any clarification, the only other sound explanation was as stated by the respondent that the suit property was acquired after the dissolution of the marriage and after the delivery of the judgment and was not therefore part of the dispute before the trial court.

11. We have also considered the application against the second principle that the evidence the applicant intends to adduce would probably influence the outcome of the appeal. The applicant asserted that he had bought some plots for the respondent but he did not annex any documents of sale. Moreover, he did not say why he did not produce this evidence at the trial but more importantly he annexed a search certificate that shows the suit property was registered in the name of the respondent on 31<sup>st</sup> March, 2016. The judgment, the subject matter of this appeal was delivered on 15<sup>th</sup> March, 2016 and the marriage between the applicant and respondent was dissolved culminating into a decree absolute that was issued on 14<sup>th</sup> January, 2011 and the suit that gave rise to the appeal herein was filed on 10<sup>th</sup> May, 2011. In our considered opinion, the intended evidence will not assist the appeal as the applicant seems to be litigating in segments and building a new case along the way.

12. In the upshot, we find no merit in the application which is hereby dismissed with costs to the respondent

**Dated and delivered at Nairobi this 6<sup>th</sup> day of March, 2020.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**M.K KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**