IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR JJ.A.)

NYERI CIVIL APPEAL (APPLICATION) NO. 31 OF 2018

BETWEEN

DAVID MULWA MALAMU.....APPELLANT/APPLICANT

VERSUS

JOHN WAWERU GAKURU.....1ST RESPONDENT

PETER MURAGE KAMANJA.....2ND RESPONDENT

(Being an application to adduce additional evidence in an appeal from the Judgment and Decree of the Environment and Land Court (L. Waithaka, J.) dated 19th December 2017

in

Nyeri ELCA No. 73 of 2014)

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RULING OF THE COURT

Before us is a Notice of Motion dated 25th February 2020, premised on **sections 3A** and **3B** of the **Appellate Jurisdiction Act**, Cap 9 of Laws of Kenya as well as **rules 29 (1)** and **42** of the **Court of Appeal Rules 2010**.

The motion seeks prayers as follows:

> **1. That this Honourable Court be pleased to take additional evidence taking the form of:**
>
> **a. The proceedings, exhibits, and judgment in Chief Magistrate's Court at Nanyuki, Criminal Case No. 611 of 2014; Republic vs. David Mulwa Malamu & Samuel Muiruri Kariuki.**
>
> **b. The Petition of Appeal, proceedings, and order made on 24th July, 2018 in High Court of Kenya at Nanyuki Appeal No. 119 of 2017; Republic vs. David Mulwa Malamu & Samuel Muiruri Kariuki;**
>
> **2. That if prayer (1) above is granted, the said documents mentioned in 1(b) annexed to the affidavit of the appellant herein, b deemed to be the supplementary record of appeal.**
>
> **3. That the costs of this application do abide the outcome of the appeal.**

The motion is supported by grounds on its body and a supporting affidavit sworn by **David Mulwa Malamu** (the applicant). The motion has not been opposed by any replying affidavit from the respondents. The motion was canvassed by the applicants' sole pleadings, written submissions and legal authorities of the respective rival parties without oral highlighting. The set for the applicant is undated while that for the respondents is dated 21st July 2020.

The background to the application albeit in a summary form is that the applicant purchased **LR No. Nanyuki Municipality Block 8/909** (the suit property) in good faith from one **Samwel Muiruri Kariuki** (**Samwel**). He filed **Civil Case No. 145 of 2009** at the Nanyuki Chief Magistrates' Court; **David Mulwa Malamu vs. John W. Gakuru and Peter Murage Kamanja** (the respondents), seeking *inter alia*, a

declaration that he was the legal owner of the suit property, having purchased it in good faith from **Samwel** without notice of any encumbrances thereon and or being party to any fraud touching on its acquisition. The civil suit was contested by the respondents whose merit decision resulted in the judgment delivered in his favour by the Chief Magistrates' Court, Nanyuki, on 17th September 2014. The respondents filed Nyeri ELC Civil Appeal No. 73 of 2014 against that judgment of 17th September 2014 heard by the ELC on 3rd October 2017, and judgment reserved for delivery until 7th November 2017 and subsequently extended to 19th December 2017 when it was delivered, reversing the decision of the trial court which had been rendered in favour of the applicant. Meanwhile, on 15th November 2017, the Chief Magistrates' Court at Nanyuki in Criminal Case No. 611 of 2014**; Republic vs. David Mulwa Malamu and Samwel Muiruri Kariuki** (the criminal proceedings) delivered a judgment holding, *inter alia*, that: the applicant was a bona fide purchaser of the suit property from **Samwel**; and that the Chief Land Registrar followed the proper procedure when issuing a title deed to the suit property. On 29th November 2017, the Director of Public Prosecutions appealed to the High Court at Nanyuki against the said judgment but subsequently withdrew the appeal on 24th July 2018 with the result that the judgment delivered by the Chief Magistrates' Court in favour of the applicant in the criminal proceedings stood unassailed.

It is against the above background that the applicant contends that had the ELC had the benefit of considering the judgment delivered in his favour in the criminal proceedings, the judgment it delivered on 19th December 2017 against him would have definitely taken a different dimension. He blames inadvertence on the part of his advocate for failure to apply for the arrest of the judgment subsequently delivered on 19th December 2017 and seek leave of the Court to adduce evidence pertaining to proof of the favourable decision in the criminal proceedings before delivery of that judgment. The applicant relies on the case of **Standard Resani Group Limited vs. Attorney General & 2 Others**

[2016]eKLR for the proposition that where facts deponed to by a party are not controverted by the opposite party they are deemed to have been accepted by the opposite party in support of his contention that his explanation that the failure to arrest the ELC judgment and seek introduction of the favourable decision in the criminal proceedings before delivery of the ELC judgment was due to inadvertence on the part of his advocate and is therefore not only reasonable but also excusable. He also relies on **rule 29(1)** of the rules of the Court, the case of **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others** [**2018**] **eKLR**; **Murai vs Wainaina (No 4) [1982] KLR 38**; **Council of Governors vs. Senate & Another [2014]eKLR** and **Geoffrey M. Asanyo & 3 Others vs. Attorney General [2018]eKLR;** all on the parameters for sustaining an application of this nature and to which we shall revert at a later stage of this ruling.

In rebuttal, the respondents rely on **rule 29(1)** of the Court of Appeal Rules 2010; the case of **J.O vs. S.A.O [2015] eKLR**; **Mount Elgon-Beach Properties Limited vs. Kalume Mwanongo Mwangaro & Another [2019]eKLR** and **Samuel Kungu Kamau vs. Republic [2015] eKLR** in support of their submission that the Court has no jurisdiction to entertain and grant the relief sought; and on the case of **Diana Kethi Kilonzo vs. Independent Electoral & Boundaries Commission & 2 Others [2014]eKLR**; in which the holding in **Ladd vs. Marshall [1954] 1 WLR 1489** was approved and **Mohamad Abdi Mahamud vs. Ahmed Abdullahi Mohamed & 3 Others** [supra] in support of their submission that the applicants application does not meet the threshold for granting relief under **rule 29(1)** of the Rules of the Court because; the authenticity of the title which was the substratum of the litigation resulting in the appeal pending is a marginal issue that will have no impact on the outcome of the appeal pending; and second, that no good explanation has been given for the failure to apply to arrest the impugned judgment and seek to introduce the evidence currently sought to be introduced before the delivery of the said judgment.

The respondents further relied on the case of **James Gitahi Mwangi vs. Simba Colt Motors Limited [2015] eKLR** and submitted that the evidence sought to be introduced does not meet the threshold for granting relief under **rule 29(1)** of the Court's rules because: it could have been availed with reasonable due diligence as it was available at the time the impugned judgment was delivered; the applicant's allegation that he was not properly advised by counsel has no basis as it is not supported by any evidence on record; the probative value of the evidence sought to be introduced is in doubt especially when it is evident on record that the same is sought to be introduced to remove lacunaes and fill up gaps in the applicant's evidence tendered in the courts below. It is so voluminous that it will deny the respondents an opportunity to effectively respond thereto especially when it is not disputed that the respondents were not party to the criminal proceedings. The respondents will also be greatly prejudiced if the said evidence was introduced at this late appellate stage. They appreciate that one of the guiding principles on the exercise of the Court's mandate under **rule 29(1)** of the Rules of the Court is to allow additional evidence on a case by case basis but contend that the application under consideration is not one such case in which the Court's mandate under the said rule can be exercised in favour of the applicant on reasons alluded above.

We have considered the record in light of the applicant's sole pleadings, the respective parties rival written submissions and legal authorities cited in support of their opposing positions as well as principles of law that guide the court in the exercise of its mandate under **Rule 29(1)** of the Courts' Rules. It provides *inter alia* 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) ……**
>
> **(4) ……"**

The principles which guide the court in the exercise of its discretionary mandate under this rule are well settled. We take it from the *locus classicus* case of **Elgood vs. Regina [1968] E.A. 274** in which the predecessor of the court adopted the summary enunciated by **Lord**

Parker, C.J. in **Republic vs. Parks [1969] ALL ER** at page 364 as follows:-

> **"(a) That the evidence that is sought to be called must be evidence which was not available at the trial.**
>
> **(b) That it is evidence that is relevant to the issues.**
>
> **(c) That it is evidence that is credible in the sense that it is capable of belief.**
>
> **(d) That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."**

In **Mzee Wanje & 93 Others vs. A. K. Saikwa, A. K. Kanyorati, S. W. Kibogo and William Gachiringa [1982-88] 1KAR 462 at pg 465 Chesoni Ag. J.A.** (as he then was) had this to say:-

> **"In my opinion notwithstanding the above differences, between the English provisions and our Rule 29(1) the principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ,, as he then was, in the case of Ladd vs. Marshall [1954] 1 WLR 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."**

The principles enunciated by the Court of Appeal in the above case law were crystalized by the Supreme Court of Kenya in the case of **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others** [supra] in which that court laid down guidelines for admission of additional evidence for appellate courts in Kenya and which we fully adopt as follows:-

> **"(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:-**
>
> > **(a) The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;**
> >
> > **(b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;**
> >
> > **(c) It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;**
> >
> > **(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;**
> >
> > **(e) The evidence must be credible in the sense that it is capable of belief;**
> >
> > **(f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;**
> >
> > **(g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;**
> >
> > **(h) Where the additional evidence discloses a strong prima facie case of willful deception of the court;**
> >
> > **(i) The court must be satisfied that additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.**
> >
> > **(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.**

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

(80) We must stress here that this court even with the application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

We have applied the above tests to the rival position herein and find the application under consideration sustainable for reasons that: the litigation resulting in the impugned judgment was over the ownership of the suit property initially vested in the applicant by the Nanyuki Chief Magistrates' Court in Civil Case No. 145 of 2009 and subsequently divested from him by the impugned judgment. His deposition on oath that the judgment resulting from the criminal proceedings absolved him of any wrong doing in the acquisition of the suit property and that had the ELC in CA No. 73 of 2014 appraised the judgment in the criminal proceedings, the outcome of the impugned judgment may have taken a different dimension was not controverted by the respondents. The applicant's explanation that failure to apply to arrest the impugned judgment and seek introduction of the judgment on the criminal proceedings was due to inadvertence on the part of his advocate, is plausible and therefore excusable especially when it was not controverted on oath by the respondents. The applicant's assertion that the evidence sought to be introduced has a direct bearing on the suit property, and that it is likely to impact on the outcome of the appeal pending is also reasonable considering that the now undisputed unassailed judgment in the criminal proceedings absolved the applicant from any wrong doing in the manner he acquired the suit property.

It is also our finding that the evidence sought to be introduced is also credible considering that the DPP withdrew the appeal filed to impugn it. The respondents' complaint with regard to the size of the evidence sought to be introduced relates to their own difficulty in comprehending it. The evidence sought to be introduced will fall for appraisal by the appellate court in the exercise of its appellate mandate. There is nothing in the respondents' submissions to suggest that either they, themselves or their advocate on their behalf will not be in a position to properly appreciate the content of the said evidence and make appropriate submissions in opposition to the appeal. Likewise, respondents have not put forth any reason to suggest that the appellate court will not also be in a position to properly appreciate the evidence intended to be introduced, consider it in light of the rest of the record, including the rival submissions thereon and then determine the appeal appropriately. There is also nothing on the record to suggest that the applicant seeks to introduce the said evidence for purposes of deceiving the court; or that he intends to use it either to patch up his case, fill up gaps/lacunae or introduce a new case as has been asserted by the respondents. All that the applicant has deposed to in his uncontroverted supporting affidavit is that the criminal proceedings vindicated the manner he acquired the suit property and that had the ELC appraised that judgment before delivery of the impugned judgment on 19th December 2017, the decision may have taken a different dimension hence the request that the appellate court be accorded an opportunity to appraise, consider and rule appropriately on the appeal after factoring in the evidence intended to be introduced.

The upshot of the totality of the above assessment and reasoning is that we find merit in the application. It is accordingly allowed. Costs of the application to abide the outcome of the appeal.

Dated and Delivered at Nairobi this 23rd day of October, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR