



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO 122 OF 2017

BETWEEN

ERI LIMITED.....APPELLANT

AND

EQUITORIAL COMMERCIAL BANK (FORMERLY SOUTHERN CREDIT

BANKING CORPORATION) LIMITED.....1ST RESPONDENT

ZAINUL GALIB VELJI.....2ND RESPONDENT

(Being an application for leave to adduce additional evidence pursuant to Rule 29(1) (b)

of the Court of Appeal Rules in An Appeal against the Judgment and decree of the

Environment and Land Court at Kisumu (Kaniaru, J.) dated 8th September, 2016

in

ELC Case No. 269 of 2017)

RULING OF THE COURT

What is before us is an application by way of notice of motion dated 13th December, 2017 brought by the appellant pursuant to **Rule 29(1) (b) of the Court of Appeal Rules** and **Sections 3, 3A and 3B of the Appellate Jurisdiction Act**. The appellant in the main suit seeks to have additional evidence introduced at the hearing of this appeal.

The background to the application is that the appellant vide a Plaint dated 20th July, 2010 and amended on 26th August, 2010 filed a suit in the High Court against the Respondents on grounds of fraud and illegality with regard to the sale, transfer and registration of the parcel of land known as **Kisumu/Municipality Block 12/265**, hereinafter "*the suit property*". He sought a declaration that there was no valid sale or at all of the suit property by the 1st respondent to the 2nd respondent; that the transaction and registration of the suit property in the name of the 2nd respondent was fraudulent and illegal and was therefore null and void; and order for rectification of the register by cancelling the 2nd respondent's name as the registered proprietor of the suit property and substituting therewith the appellant's name, costs and interest:

The respondents denied the claims and in particular that the sale and transfer was tainted with fraud and illegality. They also pleaded that the suit was an abuse of court process, barred by limitation and was in any event *res judicata*. Subsequently the respondents filed concurrent applications seeking to strike out the appellant's suit on those grounds which applications were allowed by the Ruling of Kaniaru, J. dated 8th September, 2016.

Aggrieved by the ruling, the appellant filed this appeal. Subsequently it filed the instant application. The application was supported by the affidavit of **Rasik Lavji Sanghrajka**, a Director of the appellant in which he deposed that the appellant was now in possession of a letter dated 27th April, 2017 from the Land Registrar, Kisumu stating that there was no record of transfer of the suit property from the appellant to the 2nd respondent or at all, and that any Certificate of Lease allegedly held over the suit property should be surrendered for verification. The

said letter is the additional evidence the appellant seeks now to adduce.

In a Replying Affidavit to the application sworn by one **Kenneth Likoko**, the Manager-Legal Department of the 1st respondent, it is deposed that at no point in time did any party tender its evidence to warrant the application being made by the appellant. That the Appellant's application would be tantamount to opening up an avenue for fresh hearing as parties will be entitled to respond and possibly cross examine the maker of the intended document sought to be relied on by the appellant.

The 2nd respondent in her Replying Affidavit stated that at all material times the appellant was ready and able to prosecute its case in the High Court without the document that it now seeks to be admitted as additional evidence. That the alleged fraud against the appellant was uncovered in 2004 and the appellant had the facts it needed to prove fraud and one extra letter from the lands office would not make any difference. That the appellant failed to hint to the trial court that it was pursuing further evidence in support of its case. That the letter sought to be admitted in evidence purports to be summary of what the lands office allegedly found. No purpose would be served by it as the evidence alluded to was already available and there is no explanation as to why the Appellant did not place the evidence before court.

When the application came up for interpartes hearing, **Mr. Amondi**, learned counsel, appeared for the appellant; **Mr. Songok**, learned counsel, appeared for the 1st respondent; whereas **Mr. Otieno**, learned counsel represented the 2nd respondent. They all relied on their respective written submissions that they had filed in court and preferred not to highlight.

Mr. Amondi, urged that the law appreciates that situations may arise that make it imperative for a party to introduce new evidence at an appellate stage. That the letter proposed to be introduced in evidence could not be availed before the High Court as the appellant's effort to obtain it at the time bore no fruits. That the additional document could only be obtained after investigations regarding the suit property file by the Land's registry officials. It only became a public document when the respondents were invited for the verification of the lease certificate.

On the other hand, Mr. Songok submitted that the letter sought to be introduced does not allege the existence of fraud. It merely says that there were no records available at the registry with regard to the certificate of lease. That the unavailability of records in the registry was not a new thing and that the information sought to be introduced in the said letter was not new nor was it unavailable at the time of hearing. That the wording and information in the letter only confirms what has been consistently communicated in previous letters. That the letter does not suggest any fraud and in any event the issue of fraud was extensively dealt with in the Ruling and will be in issue for determination of the appeal. That the evidence sought to be introduced was not new nor material to the determination of the appeal.

Opposing the application as well, Mr. Otieno submitted that the Court should be reluctant to allow such evidence and the power to allow such evidence should be exercised sparingly. That the appellant cannot say that it required 14 or so years to get the letter it is now waving in court. That there would be no end to litigation if cases were freely re-opened whenever parties bump into what they imagine to constitute new evidence. That the principles and conditions to be met for such applications to be allowed have not been met in this case. That the 2nd respondent would be prejudiced should the application be allowed since the issue before the trial court was whether the suit was *res judicata*, barred by limitation or an abuse of the court process. However, the document sought to be introduced deals with the validity of the title, an issue not before the court.

We have considered the application, the submissions and the authorities cited by the parties and the law. The issue for our determination is *whether the application is deserving*. As we have already indicated, the motion before us was made under Rule 29(1) (b) of the Rules of this Court. The relevant part of that rule provides that:

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

(a) to re-appraise the evidence and to draw inferences of fact; and

(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.” Emphasis ours.

This court is therefore clothed with judicial discretion in view of the above provision in applications of this nature. In exercising this discretion we must revert to the principles summarized in the case of **Mzee Wanje and 93 others v A K Saikwa and others (1982-88) 1 KAR 462** where the Court stated:

“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 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.”

Further, the Court cautioned that the power to admit additional and fresh evidence should be exercised very sparingly and with great caution. It stated thus:

“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.”

The substantive appeal before us arises from a ruling of the High Court by which the appellant’s suit was struck out with costs on the basis that, the suit was time barred by limitation, was *res judicata* and an abuse of the court process.

The main question for determination in the substantive appeal therefore is whether the High Court properly exercised its discretion in striking out the appellant’s suit on the above grounds. As was stated in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] eKLR**, a first appellate court will interfere with the exercise of the trial court’s judicial discretion if satisfied that the trial court misdirected itself, misapprehended the facts, took account of considerations of which it should not have taken account; or failed to take account of considerations of which it should have taken account; or that its discretion albeit a discretionary one, was plainly wrong.

We have no doubt that the material proposed to be introduced is not relevant to that inquiry. The material that the Applicant wishes to introduce as additional evidence is correspondence from the Ministry of Lands to the effect that investigations into the Appellant’s inquiries had taken long and the Lands Registry did not have any documents in its custody to confirm the disputed transfer and issuance of title in 2003 to the respondent. That letter thus does not in our view speak to the question arising in the appeal as to whether the learned Judge properly exercised his discretion in striking out the suit. Thus the letter is not relevant to the appeal and its introduction will not in any way advance the appeal filed by the appellant.

The upshot then, is that the application lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Kisumu this 21st day of May, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

PROF. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR