



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), NAMBUYE, WARSAME J.J.A)

CIVIL APPEAL NO. 17 OF 2014

BETWEEN

JOSEPH KINGSLEY KARURI.....APPELLANT

AND

HOUSING FINANCE CO. LTD.....1ST RESPONDENT

GETRUDE KAMANTHE MUNGUTI.....2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 21st February, 2014

in

HCCC NO 102 OF 1997

RULING OF THE COURT

1. The appellant filed a Notice of Motion dated 17th April 2015 seeking the following orders:

- (i) THAT this Court be pleased to grant the appellant leave to tender new evidence;*
- (ii) THAT leave be granted to the appellant to tender the said evidence in documentary form;*
- (iii) THAT leave be granted to allow oral evidence by one Richard K Gikuhi; and*
- (iv) THAT costs be in the cause.*

2. The application was predicated on the grounds that:

- (a) the appellant has now established new grounds of appeal;*
- (b) the new evidence has a crucial bearing on the outcome of the appeal;*
- (c) the new evidence was not available to the appellant at the time of the trial;*
- (d) it is in the interest of justice that this new evidence be admitted and that this Court has the opportunity to examine it in light of the appellant's grounds of appeal; and*
- (e) the application is made in good faith and in good time.*

3. Supporting the application, **Mr.Kairu**, learned counsel appearing for the appellant, referred to the affidavit sworn by **JOSEPH KINGSLEY KARURI MAINA** who deposed that the evidence concerns fraud instigated and carried out by the respondents; that the evidence was not available at the time of the trial because it incriminated one **THOMAS MUNGUTI NZENGU** (hereinafter "the

Deceased”), who was then the 1st respondent’s BranchManager; that the Deceased was the father of the 2nd respondent; that the auctioneers who conducted the sale were not duly registered; and that the highest bidder one **RICHARD K GIKUHI** was intentionally frustrated from buying the suit property.

4. The affidavit annexes the following documents:

(a) a certificate of confirmation of grant dated 6th October 2010 evidencing the relationship of father and daughter as between the Deceased and the 2nd respondent;

(b) a notice dated 17th April 1997 that the auction had taken place and the sale had been awarded to the 2nd highest bidder; and

(c) a letter from the Auctioneers Licensing Board dated 26th April 2010 confirming that the auctioneers who conducted the auction were not registered at the time of auction.

5. The application was further supported by an affidavit sworn by the said **Mr. Richard K. Gikuhi** who deposed that he found out about the auction of the suit property from an advertisement in the newspapers placed by the auctioneers; that he emerged as the highest bidder at Kshs.805,000 but his attempts to pay the deposit of 25% of the purchase price were frustrated; that he was later informed the property had been sold to the 2nd highest bidder; and that he was not aware of the suit until October 2014 when the appellant tracked him down for purposes of supporting the appeal.

6. The application is opposed by 1st respondent’s counsel **Mr. Mugambi** who in highlighting the replying affidavit dated 10th November 2015, argued that the application lacks merit and should be dismissed with costs to the 1st respondent; that the proof of relationship between the bank manager and 2nd respondent was not evidence of fraud; that the appellant did not show how his efforts to gather evidence in the 1st respondent’s possession had been intentionally thwarted; that there had been ample time during the trial process for the appellant to summon his intended witness; and that the said branch manager was deceased and therefore unable to answer the serious allegations of fraud. Counsel thus contended that the appellant had failed to meet the requirements of **Rule 29** of the Rules of the Court and prayed that the application be dismissed.

7. Similarly opposing the application, the 2nd respondent filed a replying affidavit dated 30th October 2015, and a further affidavit dated 24th November, 2015. She contended that the application was an abuse of court process as the appellant had willfully neglected to produce evidence or key witnesses in support of his allegations of fraud at the hearing before the High Court; that she had properly participated in the public auction and her offer was accepted as the winning bid; that it was not her duty to ascertain that the auctioneers were legally licensed to carry out the auction; and that allowing the application would result in a miscarriage of justice.

8. We have considered the application, and the submissions which are made under **Rule 29** which provides:

“29. (1) On any appeal from a decision of the 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.”

9. The principles that guide this Court when exercising this discretionary power were well summarized in **Mzee Wanje & 93 Others vs. A K Saikwa & Others (1982-88) 1 KAR 462** where it was stated that for the court to receive further evidence it must be shown that:

“(a) the evidence could not have been obtained with due diligence at the trial;

(b) the evidence must be such that, if given, it would probably have an important influence (though not necessarily be decisive) on the results of the appeal; and

c) it must be apparently credible, though it need not be incontrovertible”.

*(See also **Ladd vs. Marshall [1954] 1 WLR 1489**)*

10. The discretion is not meant to allow admission of evidence for the purpose of filling up the gaps in evidence nor to enable a party to make out a fresh case on appeal. As was emphasized by the Supreme Court in **Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed & 3 Others Sup Petition No. 7 of 2018**, the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filing gaps in the applicant’s evidence, and the Court must find the further evidence needful.

11. From the principles set out above, it is clear that except, on grounds of fraud or surprise, the general rule is that the 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. The question therefore, is whether the applicant herein has fulfilled the above conditions for this Court to allow adduction of new or additional evidence.

12. The substantive appeal before the Court arises from a ruling of the High Court (**Sergon, J**) in which the appellant prayed for the sale of the suit property by the 1st respondent to 2nd respondent to be set aside on grounds that the 1st respondent had failed to act in good faith as chargor by selling the property at an undervalue. In its decision, the superior court held that the appellant had failed to prove fraud on the part of the 1st respondent and stated that once a statutory power of sale has been exercised, the mere irregularity in the exercise of that power

does not in itself result in invalidation of a sale; and that the remedy for the aggrieved party is a claim in damages. The court, therefore, declined to issue orders of injunction and awarded costs to the respondents.

13. As this Court has previously stated, it is not enough to simply infer fraud from the facts. Fraudulent conduct must be distinctly alleged and as well as distinctly proved. (See *Vijay Morjaria vs. Nasingh Madhusigh Darbar & Another [2000] eKLR*). The onus of proof is on the party alleging fraud to not only plead and particularize the fraud, but also to lay a basis by way of evidence, the standard being beyond that of a balance of probabilities. The material that the applicant wants to introduce as additional evidence is supposedly proof of the alleged incidences of fraud and misrepresentation by the respondents.

14. Fraud and conspiracy to defraud are very serious allegations and this Court has a duty to uphold the rights of parties in commercial transactions. (See *Aiman vs. Muchoki (1984) KLR 353*). The question here is whether the evidence sought to be adduced is relevant to the determination of the substantive appeal which is predicated on the grounds that the trial Judge took into account irrelevant matters or failed to take into account relevant matters.

15. Banks operate in an environment in which utmost trust and good faith are crucial. The relationship between bankers and their customers is premised on a high degree of honesty and integrity and courts must uphold those principles. It is on oath that the relationship between the then branch manager of the Bank and the 2nd respondent is a pertinent matter to be investigated and determined. It is not for us to determine, whether there was a conflict of interest and secondly the existence of father/daughter relationship. Again it is important to verify the extent of how that relationship if it exists, prejudiced or disadvantaged the appellant. It is for the trial court to investigate and decide, the existence of a direct vested, beneficial and pecuniary interest that may have compromised the interest of the appellant/applicant. Another important factor, is whether the relationship was to be disclosed and whether it was a clog on the redemption rights of the appellant.

16. There is also an allegation that the branch manager together with the Auctioneer frustrated other bidders in order to give the property to the 2nd respondent on a silver platter. Tied to that point is whether the appellant's property was sold at the correct and appropriate price. In our view the above issues are not pedantic or flimsy and warrant an investigation. They are fundamental and weighty issues which go to the root of the power of sale exercised by the 1st respondent and ratified by the trial court.

17. Without making any definitive conclusion, we think the internal memo dated 21st April, 1997 is pointer to support the assertion that Mr. Gikuihi may have been the highest bidder. That was, however, discounted by the 2nd respondent's assertion that she had properly participated in the public auction. In view of the apparent contradiction, we think this is a matter which needs proper investigation and conclusion. Again, it is not clear to us, why the Bank did not accept the bid of the alleged Mr. Gikuihi

18. With regard to the auctioneer's authority to conduct the sale, the appellant has a letter from the Auctioneers Licensing Board stating that the auctioneers were not licensed at the time of the said auction; a breach of the mandatory provisions of the Auctioneers Rules. This is a new factual situation that was not brought to the trial court's attention, and which needs to be investigated and determined.

19. All in all, we are persuaded that the evidence the applicant seeks to adduce is new evidence that was not available at the time of the hearing before the High Court. We are inclined to conclude that the application meets the threshold circumscribed by **Rule 29** and the principles set down in *Mzee Wanje (supra)*.

20. We order that the matter be taken before the High Court for taking the additional evidence before any other Judge other than Sergon, J.

The application is therefore allowed with costs.

Dated and Delivered at Nairobi this 6th day of December, 2019.

W. OUKO (P)

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR