



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & M’INOTI, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 325 OF 2013

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....APPLICANT

AND

WILLESDEN INVESTMENTS LIMITED.....1ST RESPONDENT

BEN MULI.....2ND RESPONDENT

JATIN PATEL.....3RD RESPONDENT

HITESH RATHOOD.....4TH RESPONDENT

MARTHA KIMWELE.....5TH RESPONDENT

KENYA HOTELPROPERTIES LIMITED.....6TH RESPONDENT

WILSON GACHANJA.....7TH RESPONDENT

CITY COUNCIL OF NAIROBI.....8TH RESPONDENT

(An Application for leave to introduce new documents under Rule 29 and 47 of the Court of Appeal Rules in an Appeal against the Ruling and Decree of High of Kenya at Nairobi (Muchelule, J) dated 27th May, 2010

in

NAIROBI CIVIL CASE NO. 35 OF 2010)

RULING OF THE COURT

1. In its application dated 24th August 2016, the applicant, Willesden Investments Limited, (the 1st respondent in the appeal), has moved the Court, under Rule 29 of the Rules of the Court, for leave “to introduce new documents” in this appeal. The applicant states, in an affidavit sworn by Ben Muli in

support of the application that the documents proposed to be introduced relate to developments that have taken place subsequent to delivery of the impugned ruling and include “new documents/reports from the National Lands Commission” as well as a consent order in Civil Case No. 24 of 2008 between the applicant and the City Council of Nairobi that put to rest the question of ownership of the suit property. The applicant asserts that the documents proposed to be introduced “demolishes the only pillar that the subject suit and this matter is standing on...” and that the introduction of the documents will “enable the court to conclude the matter.”

2. In opposition to the application, the 1st respondent filed a replying affidavit sworn by Dedan O. Okwama, an employee of the Ethics and Anti-Corruption Commission, the successor to the applicant, in which he asserts that contrary to the applicant’s assertion, the issue of „unlawful alienation? and legality of the ownership of the property is yet to be resolved as the National Land Commission has not conclusively dealt with the matter.

3. During the hearing of the application Mr. Fred Athuok learned counsel for the applicant relied on his written submissions which he highlighted and urged that the application is merited; that the evidence proposed to be introduced could not have been obtained with the exercise of reasonable diligence; that if the evidence had been given, it would probably have had an important influence on the outcome of the case and that the evidence is credible. Counsel drew our attention to decisions of this Court on the legal principles applicable when considering an application under Rule 29 of the Rules.

4. Supporting the application, learned counsel Mr. Oyatta appearing for the 2nd to 5th respondents stressed that the documents proposed to be introduced arose after the dismissal of the applicant’s suit in the High Court; that the documents touch on the ownership of the subject property and indicate that the National Land Commission has confirmed ownership is lawfully vested in the applicant.

5. Opposing the application, learned counsel for the appellant Mr. David K. Ruto in highlighting his written submissions argued that the application does not satisfy the legal requirements applicable under Rule 29 of the Rules; that by the time the order the subject of this appeal dismissing the appellant’s suit was made on 27th May 2010, the documents sought to be introduced were not in existence; that the suit was struck out on grounds of res judicata and the evidence sought to be introduced is in any event contested. Counsel also drew our attention to numerous decisions of this Court on the legal principles that should guide us.

6. Mr. Kigata learned counsel for the 6th respondent also referred to his written submissions urging that the primary motivation in bringing the present application is to delay the conclusion of this matter. He urged us to dismiss the application.

7. We have considered the application, the submissions and the authorities cited. As we have already indicated, the motion before us is made under Rule 29 of the Rules of the Court. The relevant part of that rule provides:

“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.

8. The Court is thereby clothed with judicial discretion. The principles on which the Court acts when exercising that discretion were summarized by Chesoni Ag JA in **Mzee Wanje and 93 others v 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 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.”

9. In the same case 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. The Court said:

“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. The guidance provided in that case has been applied in many subsequent cases. Examples are Joginder Auto Services Ltd v Mohammed Shaffique and another Civil Appeal (Application) No. Nai 210 of 2000 (2001) eKLR and also Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd Civil Appeal No. 8 of 2003.

11. Guided by those principles, is the application before us merited? The substantive appeal before the Court arises from a ruling of the High Court (Machelule, J) in HCCC No. 35 of 2010 delivered on 27th May 2010 by which the appellant's suit was “*dismissed and/or struck out with costs*” on the basis that that suit was “*raising issues which have been determined by the High Court and the Court of Appeal.*” That is to say, the suit was dismissed and/or struck out on the grounds that it was *res judicata*.

12. In that suit, the appellant was seeking orders for cancellation of the title to the suit property, namely L. R. No. 209/12748, registered in the name of the applicant. It averred that it had conducted investigations in relation to that property and established that the same is a road reserve that was irregularly and illegally allotted to the applicant; and that the property was previously a section of Kaunda Street, a public road that was fraudulently alienated. It sought declarations that the allotment of the property and subsequent grant of the same to the applicant was null and void; that the allotment and the grant over the property should be cancelled or revoked; and a permanent injunction restraining dealings and interference with the property be issued.

13. In its defence, the applicant pleaded that the suit was an abuse of the process of the court as the issues raised by the appellant in that suit had already been litigated and adjudicated upon in previous proceedings. The lower court agreed with the applicant and struck out the suit on basis of the doctrine of *res judicata*.

14. The question for determination in the substantive appeal therefore is whether the High Court properly exercised its discretion in striking out or dismissing the appellant's suit. That in turn calls for an inquiry whether among other things, the Judge took into account irrelevant matters or failed to take into account relevant matters (See Mbogo vs. Shah [1968] E. A 93). The material proposed to be introduced is not in

our view relevant to that inquiry.

15. The material that the applicant wishes to introduce as additional evidence is correspondence exchanged between applicant and the National Land Commission to the effect that the property in question belongs to it. Quite apart from the fact that the „additional evidence? consists of material that has come into existence subsequent to the rendering of the impugned ruling, it does not in our view speak to the question arising in the appeal, namely, whether Judge properly exercised his discretion in striking out/dismissing the suit. In the words of the Court in Mzee Wanje and 93 others v A K Saikwa and others,(above) that material is not „needful? for the task the Court will be required to discharge in determining the appeal before it.

16. The application is according without merit and is hereby dismissed with costs to the appellant.

Dated and delivered at Nairobi this 20th day of April, 2018.

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR