



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 53 OF 2014

BETWEEN

HABIL NDISI1ST APPELLANT
CALISTO ALERI.....2ND APPELLANT
ALICIO KANORI O. OLOO3RD APPELLANT
MOSES WAMBANI OKWALO4TH APPELLANT
JAMES OMOLO 5TH APPELLANT
JOSHUA CALLINS NYULIA6TH APPELLANT
PAMELA ADEMBA7TH APPELLANT
D.F. ADEMBA8TH APPELLANT
JOHN LEONARD OKUNGA9TH APPELLANT
MARGARET TATU OKUNGA.....10TH APPELLANT
SAMUEL KHATENYA11TH APPELLANT

AND

PASKALI OUMA MUDAKHI1ST RESPONDENT
MICHAEL JUMA MUDAKHI2ND RESPONDENT
GRACE AUMA SIKUKU3RD RESPONDENT
MARY SIKUKU4TH RESPONDENT

(Being an Applicatin from the judgment of the High Court of Kenya,

Environment and Land Court at Busia, (Kibunja, J.) dated

10th day of July, 2014 in ELC NO. 1190 OF 2016)

RULING OF THE COURT

[1] The appellants have filed two applications in the pending **Civil Appeal No. 53 of 2014**. The first application is dated 20th August, 2015 brought under **Rules 29 (1) (b)** and **42 of the Court of Appeal Rules, 2010 (Rules)** and seeks two main orders namely:

- (1) The valuation report of suit properties be admitted as new and/or further evidence.
- (2) The 1st to 7th appellants be granted leave to adduce further grounds of appeal being:

“7. THAT the learned judge erred on evidence and law in declaring the appellants trespassers and ordering their eviction empty handed. (Sic).

8. THAT the learned trial judge failed on evidence and in law to consider the clear provisions of the Kenya Constitution, the principles of Equity and other laws applicable.” (Sic).

The second application which is dated 30th November, 2016 is brought under **Rule 29 (1) (b)** of the Rules; **Article 159 (2)** of the Constitution, **sections 1A, AB, 3A, 78 (1) (d)** of the Civil Procedure Act and **Order 42 Rule 27 (1) (b)** of the Civil Procedure Rules in essence seeks the amendment of the proposed ground 7 of the appeal to read:

“THAT, the learned trial Judge erred in law in ordering for eviction of the appellants without any regard to their being compensated in the circumstances of the case”

and to seek an additional prayer in the memorandum of appeal thus:

“(e) THAT if the appellants were to be evicted, they be compensated for the losses they have suffered.”

[2] The two applications were heard together. It is apparent that the appellants seek two distinct reliefs in the two application, first, leave to admit the annexed valuation report and secondly, leave to amend the memorandum of appeal to introduce two additional grounds and one additional relief.

[3] The 1st respondent **Paskali Ouma Mudakhi** is the administrator of the estate of his deceased father **Mudakhi Murere Ndege (deceased)** who died in about 1984.

It was alleged that the deceased had three wives. His first wife was **Wilimina Mudakhi** who is the mother of the 1st respondent and three other children. The second wife is **Philister Nyongesa** who had only one son- **Michael Jume Mudakhi**, the 2nd respondent herein. The third wife was **Teresa Nyangweso Mudakhi** who had five children, two sons and three daughters – all deceased.

The 3rd and 4th respondents are the two wives of **Peter Shikuku** – the first son of Teresa Nyangweso Mudakhi who died in 1996. Teresa Nyangweso died on 27th April, 2007.

[4] The deceased left two pieces of land **Bukhayo/Kisoko/737** where the first wife and her children were living and **Bukhayo/Kisoko/740 (suit land)** where Teresa Nyangweso Mudakhi lived.

According to the evidence adduced at the trial, the deceased had allocated Bukhayo/Kisoko/737 to the 1st wife which was to be inherited by her children and Bukhayo/Kisoko/740 to Teresa Nyangweso which was to be inherited by her children.

[5] Sometime in 2006, the respondents' filed **Civil Suit No. 5 of 2006** against the appellants claiming, in a nutshell, that after the deceased died, the 1st respondent filed a succession cause in respect of the estate of the deceased comprising of the two parcels of land, obtained a grant which was later confirmed, presented the documents to Busia Land Registry for registration of beneficiaries on transmission but the documents were not registered in respect of land title No. Bukhayo/Kisoko/740.

In para. 7 of the plaint, he pleaded:

“In or about 1998 and thereafter, the defendants have at various times unlawfully taken possession of the suit land without the consent of the plaintiffs and constructed thereon some buildings and structures. The plaintiffs have repeatedly requested the defendants to vacate the suit land and hand it over to them, but the defendants have refused and neglected to do so hence the institution of the suit.”

By the suit the respondent sought an order of eviction against the appellants.

[6] The appellants filed a joint defence and averred that the respective portions of the land they occupy were created from LR. Bukhayo/Kisoko/740 which they bought for valuable consideration, took possession and have carried out developments.

[7] The evidence at the trial showed in brief that Teresa Nyangweso had during her lifetime caused LR. No. Bukhayo/Kisoko/740 to be sub-

divided and sold some portions and that some purchasers had further sub-divided their portions and sold to others.

Thus the trial judge made a finding that the 1st, 2nd, 4th, 7th and 8th appellants herein claimed their right from Teresa Nyangweso while the 3rd and 5th appellants claimed their right from the 2nd appellant and that the father of the 6th appellant claimed his right for the portion occupied by the appellant from **Gabriel Barasa Mudakai (deceased)**, a son of Teresa Nyangweso.

[8] The trial court ultimately concluded, *inter alia*, that, Teresa Nyangweso had intermeddled with the estate; that she got registered as proprietor of LR. Bukhayo/Kisoko/740 without following due process and in collusion with some person or persons in the Land Registrar's office Busia; that in the process, the land office created registers under which the land was sub-divided, and further sub-divisions done for which some appellants had been issued with title deeds in respect of sub-divisions; that the Register of the original title was not closed; that although the appellants may not have been directly involved in the fraudulent transaction they knew that Teresa Nyangweso's title and sub-divisions thereof had been illegally or unprocedurally obtained and that the appellants were not *bona fide* purchasers for value.

Upon those findings, the trial judge granted a declaration that the suit land was part of the property of the deceased and an order of eviction against the appellants.

[9] The appellants' memorandum of appeal contains six grounds of appeal and four reliefs are sought numbered (a) to (d).

The respondents have filed a cross-appeal relating to the issue of costs of the suit.

[10] The applications are supported by the affidavit of **Moses Wambani Okwalo** – the 4th appellant herein who states, amongst other things, that, if the appellants are moved out of the respective portions of the suit land, it is just that they, the respondents should compensate them and that the valuation report should be admitted.

The applications are opposed on the grounds contained in the replying affidavit and further affidavit of the 1st respondent.

He states that the applicants did not file a counter-claim claiming value of developments; that the developments undertaken on the respective pieces of land was framed as an issue at the trial but the applicants did not adduce evidence; that the evidence on the value of developments is an afterthought and that the 4th respondent - Moses Wambani Okwalo wants to protect the structures that he continued to build during the pendency of the appeal.

[11] The court has jurisdiction in an appeal under Rule 29 (1) (b):

“In its discretion, and for sufficient reasons, to take addition evidence or to direct that additional evidence be taken by the trial court or by a commission.”

The principles which guide the court in exercising its discretion to admit additional evidence are summarized in Joginder Auto Service v. Mohammed Shaffique & another, [2001] eKLR thus:

1. The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.

2. The evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive; and

3. The evidence must be apparently credible, although it need not be incontrovertible.”

In that case the court stated that those principles are not exhaustive.

[12] The appellants have referred to other provisions of the law including the provisions of Article 159 (2) of the Constitution which requires a court to administer justice without undue regard to technicalities of procedure and the provisions of the Civil Procedure Act and Rules.

They have in particular referred to Order 42 rule 27 (1) of Civil Procedure Act which provides:

“Parties to an appeal shall be entitled to produce additional evidence whether oral or documentary in court to which the appeal is referred; but if –

a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness examined.”

That rule obviously relates to the appeals filed in the High Court and does not apply to appeals before this Court. Nevertheless, paras. (a) and (b) of the rule 27 (1) of order 42 aforesaid lay down general principles for admission of additional evidence and thus constitute

“sufficient reason” under rule 29(1) (b) of the Court of Appeal Rules justifying admission of additional evidence.

[13] The additional evidence that the appellants seek to be admitted is the valuation report of LR. No. Bukhayo/Kisoko/740 and of the various sub-divisions thereof in possession of the respective appellants. The valuation report is dated 15th August, 2015 and was prepared after the delivery of the impugned judgment. That report could have been prepared and produced at the trial had the applicants’ exercised reasonable diligence.

The fact that each applicant had constructed on the respective portions of the suit land and were in possession was admitted. The real issue was whether Teresa Nyangweso had a valid title and whether the appellants were *bona fide* purchasers for value. Since the appellants had not made a counter-claim for compensation for the value and developments of the respective portions, it is not probable that the valuation report would have had an important influence on the case.

[14] Furthermore, from the nature of the dispute as outlined above and the issues framed, it is not probable that the Court would require evidence of the value of the respective sub-divisions in pronouncing judgment in the appeal. The value of the suit land and the sub-divisions thereof is a matter of fact which should be tested by cross-examination and giving the respondents an opportunity to present their own evidence of the values.

That requires a direction that the additional evidence be taken by the trial court. If that course is adopted it will unduly delay the hearing and the determination of the appeal.

Lastly, should the Court after hearing the appeal be inclined to grant compensation, it has the means under Rule 1 (2) and 31 of the Court of Appeal Rules to cause the value of the developments to be ascertained.

[15] In the premises, the appellants have not provided sufficient reasons for the reception of additional evidence.

[16] Regarding the prayer for the amendment of the memorandum of appeal to introduce additional grounds of appeal and additional relief, the Court has discretion to allow such amendment. The respondents do not say that the amendment will cause any prejudice and we do not see any.

In the circumstances of the case, we would allow the amendments sought.

[17] For the foregoing reasons:

- (i) **The application for the admission of additional evidence is dismissed.**
- (ii) **The application for amendment of the memorandum of appeal is allowed to the extent indicated in applications. The appellants shall file and serve an amended memorandum of appeal within 14 days from the date hereof.**
- (iii) **The costs of the applications shall be costs in the pending appeal.**

Orders accordingly.

DATED and Delivered at Kisumu this 25th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR