IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL(APPLICATION) NO. 50 OF 2016

BETWEEN

DOROTHY NELIMA WAFULA …….....…….APPELLANT/APPLICANT

AND

HELLEN NEKESA NIELSEN ……..……..……1ST RESPONDENT

PAUL FREDRICK NELSON ……..……..……2ND RESPONDENT

(Being an appeal against the Judgment of Hon. Mukunya, J. dated 15th June 2015

in

ELC. CIVIL CASE NO. 237 OF 2012)

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RULING OF THE COURT

The applicant, Dorothy Nelima and the 1st respondent, Hellen Nekesa Nielsen are sisters. The former was married to Johannes Fredrich Wilhelm Lowe, a German national who is since deceased (the deceased). Her sister, the 1st respondent is also married to a German, Paul Fredrick Nielsen, the 2nd respondent. They live in Germany but visit Kenya from time to time.

The dispute involves the ownership of ½ share of parcel of Land No. KWALE/DIANI BEACH BLOCK/372 (the property) on which stands some

cottages, and in which the respondents claim ½ share by way of purchase. It was the contention of the respondents that in 2003 it was agreed between the parties that the property would be transferred to the respondents upon payment of 50,000 Deutsche Marks (DM); that they paid 20,000 DM in cash and the balance by various installments; that at the time the deceased died the respondents had paid him in excess of the purchase price; that in the same year (2003) the property was transferred and registered in the names of the four, that is, the respondents, the applicant and the deceased as proprietors in common in equal shares of ¼ each; that in the month of September, 2012 the respondents were surprised to receive a mobile phone text message from the applicant telling them never to set foot on the property; that when they visited Kenya the following month (October, 2012) and went to the Lands offices to ascertain the status of the property, they noted from the register with dismay that on 26th August, 2008 the ownership

of the property had reverted to the deceased and the applicant.

The applicant, for her part, while acknowledging the fact that the respondents were registered with her and the deceased as owners common of the property, explained that this arrangement was intended to escape liability in an earlier matrimonial dispute between the deceased and one of his previous wives, Catherine Wanjiru; that in a scheme to avoid the sharing of the property with her, the deceased arranged to "*share*" it with the respondents as *"a gift";* that there was no consideration from the respondents whatsoever; that the alleged payments in DMere untrue as the currency had ceased to be in use in 2002; that on 28th August, 2008, with the consent of the parties, and presumably after the scheme had succeeded, the deceased caused the property to revert to himself and the applicant. The applicant informed the court below that she could not produce the consent to re-transfer the property and the title deed as they were lost and blamed this on a concerted effort by her siblings, including the 1st respondent, brother, Evans and sister, Emily, to benefit from the property.

The hearing was partly conducted in Mombasa and partly in Bungoma. Before the trial judge, Mukunya, J. was transferred to Bungoma, in a strange twist of procedure, he allowed the applicant to present her evidence before the respondents closed their case, as she was present in court and the respondents' last witness was not in attendance. It appears to us that the applicant was stood down in the course of cross-examination. The trial was to resume on 13th October, 2014, on which day the hearing was adjourned as Mr. Magolo, learned counsel then representing the applicant, was absent. When the matter came up again on 6th November, 2014 it transpired that Mukunya, J. had been transferred to Bungoma. By consent of Mr. Magolo who was on this day present, and Mr. Orenge learned counsel for the respondents, it was agreed that the case be transferred to Bungoma for further hearing.

In Bungoma on two separate occasions (25thand 26thNovember,2014) the hearing was adjourned when Mr. Magolo and the applicant failed to attend court. On 15thDecember, 2014 Mr. Magolo and the applicant once more failed to attend court despite service of the hearing notice, arguing in a letter to Mr. Orenge and the court, that the applicant was unable to travel to Bungoma on account of expense; that the respondents had not called their last witness; and insisting that the hearing ought to have been in Mombasa and not Bungoma. The learned Judge in a detailed ruling declined to adjourn the hearing noting that the applicant was bound by the consent to transfer the case to Bungoma and that the issue of expense was merely a lame excuse. The learned Judge then proceeded to receive the evidence of the Land Registrar, Kwale who had been summoned and was in attendance, at the end of whose testimony the respondents' case was closed. With the evidence of applicant half-way on record and without her witnesses, the learned Judge *suo motu* closed the applicant's case and reserved a date for judgment.

On 15thJune, 2015 the learned Judge rendered a judgment in favour of the respondents after considering the respondents' as well as the applicant's evidence. From the totality of that evidence he made a finding of fact that the property was agricultural land which required Land Control Board consent before any dealings; that there was no evidence that consent was sought and obtained before the property reverted to the applicant and the deceased; that there was no proof of payment of stamp duty or exemption from it; that it was conceded that the respondents were not in the country during the period it is alleged they gave consent for the property to revert to her and the deceased.

These factors led the learned Judge to conclude that the re-transfer of the property was irregular and contrary to the law. Consequently he ordered the cancellation of the title in the names of the two and directed the title to be restored to the four, the property be surveyed and the respondents' half share be transferred to them. He further ordered that the costs of survey be shared equally between the parties. Parties were to bear their own individual costs of the suit.

The applicant was aggrieved by that conclusion and lodged in this Court, Civil Appeal No. 50 of 2016. Before the appeal came up for hearing the applicant took out a motion for leave to adduce additional evidence. On the day the appeal came up for hearing Mr. Annan, learned counsel for the applicant asked us to, first dispose of this application before hearing the appeal. The practice being that such applications ought to be heard before hearing the appeal, we allowed it to be argued first since it had been served on

the respondents who had for their part filed a replying affidavit. That application is the subject of this ruling.

The application was brought pursuant to **rule 29(1) (b)** of the Court of Appeal Rules in which it is provided that:

> ***"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) ……; 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.***

Although under the provisions of **Article 164(3)** of the Constitution and **section 3(1)** of the Appellate Jurisdiction Act this Court's powers are limited to hearing of appeals, because, in the scheme of our law and procedure, parties are expected to present their evidence before the trial courts, rule **29 (1) (b)** aforesaid, however recognises that situations may arise making it imperative for a party to introduce new evidence even at an appeal stage.

We must, however reiterate two principles that are relevant here; that in civil cases the standard of proof is on a balance of probabilities, that is, the party bearing the burden of proof must demonstrate that his case is more probable than not. Accordingly the obligation is upon the litigant wishing the court to give judgment as to any legal right or liability dependent on the existence of a particular fact or facts to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. The second principle is that when a party has obtained a judgment in court with competent jurisdiction he is by law not to be deprived of it or delayed from enjoying it without firm and strong grounds.

Under **Rule 29 (1) (b)** additional evidence will be introduced on appeal in the discretion of the Court, **"for sufficient reason".** Though what constitutes *'sufficient reason'* is not explained in the rule, through judicial practice the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. All the authorities cited by both sides are unanimous on this. The often-cited cases in this regard include, **Mzee Wanje & 93 Others V A.K Saikwa** (1982-88) 1KAR 462, **Joginder Auto Service Ltd V Mohammed Shaffique** Civil Appeal (Application No. Nai. 210 of 2000, **Karmali Tarmohamed & Ano V. I. H Lakhani (1958)** EA 567, which are to the effect that, before the Court can permit additional evidence to be adduced under **rule 29,** it must be shown, one, that it could not have been obtained by reasonable diligence before and during the hearing; two, that the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible. It is agreed that these are only general principles and certainly not the only ones.

The Court in **Mzee Wanje** (supra) issued the following caution on the application of the rule;

> "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."

We may add to the foregoing that in dealing with an application for the introduction of additional

evidence at the appellate stage, the bench seized of application must not deal with the merit of the appeal as the appeal and the application are independent of each other.

Applying these principles and the caution to the facts in this dispute, of the 16 paragraphs of the affidavit in support of the application, only 6 are relevant for our consideration of the application along the guidelines set out in the preceding paragraphs. The rest of the grounds are a reproduction of the grounds of appeal, which must await that stage of appeal.

The additional evidence sought to be introduced is;

i. a letter dated **12th July,2002** from P.A Zimmerline, a surveyor/valuer responding to an inquiry from the deceased advising the latter that even in the case of a gift, he had to pay stamp duty of 4% of the value of the property,

ii. an affidavit sworn by Dr. Kibaba on **19th March,2016** to the effect that between 17thand 19th September, 2008 he, together with another doctor treated the 1st respondent who was bleeding heavily in the process of child birth at Mt. Elgon Hospital, and that the hospital bill of Kshs. 75,000 was paid by the applicant,

iii. an undated affidavit of Gilbert Kitiyo, a District Commissioner, Msambweni stating that the deceased and the applicant visited his office in 2008to express their desire for a consent to transfer the suit property from four people to themselves,

iv. an affidavit sworn on **11th April,2016** by Benedict Mzae Mwangada, an Assistant Land Registrar confirming that on 26th August,2008 he effected the re-transfer of the property to the deceased and the applicant,

v. evidence by way of a letter from Post Bank whose date and content are not clear, to confirm that DM had ceased to be in use as a legal tender during the period of the alleged purchase of the property by the respondents, and

vi. an affidavit by Stanley Wafula, the father to the applicant and the 1st respondent denying that funds allegedly sent by the 1st respondent was for his own medication and African herbal medicine for the 1st respondent and insisting that the funds were never part payment of the purchase price for the property.

In terms of the principles and strictures enunciated by the authorities in this area of the law, we are of the view that each of the above pieces of evidence were available at the time of the trial. However the applicant's case is unique in the sense that she was not heard fully in her evidence. Her case was prematurely closed before she could not call her witnesses. We note from the record that the only witnesses whose statements were filed in court were Peter Diester and Isaac Chebti (perhaps Chebii). Dr Zimmerline, Dr. Kibaba, Kitiyo, Mzae and Wafula were never in the plan as their statements were never filed or served. We reiterate what this Court said in **Mzee Wanje,** stated, that the procedure under **rule 29** was never intended to be used to patch up or fill in gaps in a party's case or to make out a fresh case at this stage after hearing evidence of the opposite side. It was intended for truly genuine cases where the additional evidence sought to be introduced could not be availed at the trial even with reasonable diligence.

We have enumerated the circumstances that led the learned Judge to close the case for the applicant before completing her testimony and calling her two witnesses. The manner in which he exercised the discretion in this regard has also been challenged in the appeal. We do not think we need to say anything more on that issue, save only to say that the threshold for the grant of leave to present additional evidence has not been reached.

In the result we dismiss the application and order that costs be in the appeal itself.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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