



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 73 OF 2015

BETWEEN

WILFRED KEGONYE BABU APPLICANT

AND

HENRY MOSE ONUKO RESPONDENT

(An Application to take additional evidence on Appeal from the judgment of the High Court of Kenya at Kisii, (Musinga, J.) dated 26th November, 2010

in

H.C.C.C. NO. 120 OF 1999)

RULING OF THE COURT

1. This is an application under **Rule 29(1) (b)** of the **Court of Appeal Rules** for leave to adduce additional evidence in the form of production of certain documents. The application is made by **Wilfred Kegonye Babu**, the legal representative of **Babu Siko** also known as **Malothe Babu Siko**.

2. By an originating summons dated 4th May, 1999, **Henry Mose Onuko** (*respondent*) claimed that he was entitled to three (3) acres of land known as **Plot No. 460 Nyansiongo Settlement Scheme** registered in the name of Babu Siko by adverse possession. By the supporting affidavit, the respondent claimed *inter alia* that in January, 1980, Babu Siko sold to him three acres from his land then known as **Plot No. 73 Nyansiongo Settlement Scheme**, that the land was subsequently sub-divided into two parcels – **Numbers 318 and 319**, that Plot No. 318 was subsequently sub-divided into three portions **Nos. 458, 459 and 460**, that the respondent has always been in occupation of parcel No. 460 since 1980 which he had developed. The defendant in the suit - Babu Siko deponed in the replying affidavit, *inter alia*, that he was the registered owner of Plot No. 318 Nyansiongo Settlement Scheme, that he had never applied to sub-divide the land; that although he was the registered owner of sub-division No. 460, the sub-division and the subsequent creation of Parcel No. 460 was obtained by fraud and was therefore null and void.

3. Before the suit was heard, Babu Siko filed a further replying affidavit which contained a counter-claim

against the **Nyamira District Land Registrar** and the **Attorney General**. By the counter-claim, Babu Siko averred that the act of sub-dividing his land Parcel No. 318 into three portions by the District Land Registrar to create Parcels No. 458, 459 and 460 without his consent was null and void. The relief sought in the counter-claim was possession and damages. By an order dated 20th May, 2008, the High Court converted the originating summons to a plaint and the replying affidavit as defence and counter-claim. However, the record does not show that the District Land Registrar and the Attorney General entered appearance.

4. The principles on which the Court of Appeal exercises its discretion under Rule 29 (1) (b) of the Court of Appeal Rules to grant leave to adduce additional evidence were stated in **The Administrator, HH The Aga Khan Platinum Jubilee Hospital V. Munyambu [1985] KLR 128** thus:

“The Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible.”

In **Karmah Tarmohamed and Another V. H. Lakhan & Company [1958] EA 567**, the predecessor of this Court held:

“Except on ground of fraud or surprise, the general rule is that an appellate 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.”

5. The main ground of the application is stated in paragraph (d) of the application as follows:

“That the respondent obtained a confirmed grant of Letters of Administration fraudulently and further knowingly and fraudulent uttered a forged Transfer documents purporting that the same was executed by Kisii Law Courts on behalf of the late Taratio Siko as a result fraudulently sub-divided land parcel No. Nyansiongo Settlement Scheme/318 into 3 and the resultant parcels which are in issue in the appeal and the evidence was by then not available during trial.”

The applicant has described in the supporting affidavit the circumstances under which land title No. Nyansiongo Settlement Scheme/318 was sub- divided into three portions. He states in particular that he has perused succession cause file **No. 7 of 1996** at Kisii High Court Registry and discovered that **Annah Nyabonyi Oigo (Annah)** had fraudulently included the land of the applicant’s deceased’s father as part of the estate of Taratio Oigo Siko. In paragraph 13 of the supporting affidavit, the applicant has specified the four documents that he wants included in the appeal record as additional evidence. These are, a certificate of confirmation of grant in High Court Kisii Succession Cause No. 7 of 1996 dated 29th April, 1998, issued to Annah in respect of the estate of Taratio Oigo Siko, and affidavit to support the petition of grant of letters of administration intestate in the same cause; summons for annulment of the grant dated 25th April, 2013 filed by the applicant which seeks to annul the grant of letters of administration in High Court Succession Cause No. 7 of 1996 on the grounds *inter alia*

(a) “land parcel No. Nyansiongo Settlement Scheme/459 was lawfully not part of the estate of Taratio Oigo Siko”

The respondent in that application is Annah. The last document is a charge sheet allegedly prepared by the District Criminal Investigations Office in about 2013 alleging that Annah committed offences of perjury by stating in court documents that parcel No. 459 was part of her husband’s estate and uttering a false document.

6. The applicant states in the supporting affidavit, amongst other things, that the evidence was not available at the time the High Court heard the suit, and that the additional evidence would have an important influence on the result of the appeal. The respondent states in the replying affidavit that there is

no new or additional evidence which would not have been obtained by reasonable diligence during trial and that the evidence sought to be adduced could not have affected the result or affect the appeal.

7. We have considered the application and the respective submission of counsel.

8. The appellant is a son and legal representative of Babu Siko who died on 14th January, 2012, after the judgment of the High Court was delivered on 23rd February, 2010. The deceased raised the issue of the unlawful sub- division of his land Nyansiongo Settlement Scheme/318, to create titles No. 458, 459 and 460. He claimed that the title was obtained by fraud. The respondent in this application called Annah as a witness (PW3). She testified, *inter alia*, that her deceased husband, Taratio Oigo, was a brother of Babu Siko and that she got title to parcel No. 459 after she obtained a decree; that the Executive Officer of the Court signed the documents which she took to Nyamira Lands Registry and got a title deed. The deceased Babu Siko testified at the trial. He stated that he learnt that his land had been sub- divided a year before. He gave his evidence on 19th October, 2009. So he must have known of the sub-division in about 2008. In his evidence in cross- examination he stated in respect of Annah:

“There is a case between me and Annah. She is staying on my land but I do not know if the court gave her any title deed.”

On 30th October, 2007, Mr. Bosire for Babu Siko applied for leave to join the Attorney General and the District Lands Registrar stating that new issues pertaining to the sub-division of land had arisen. Leave was duly given and a further affidavit containing a counter-claim was filed. The only defendants to the counter-claim were Nyamira District Lands Registrar and the Attorney General. As already stated, possession and damages were sought for unlawful sub-division of land title No. Nyansiongo Settlement Scheme/318 into three portions. Annah was not made a party to the counter-claim. Regarding the counter-claim, the High Court made a finding thus:

“As regards the 1st defendant’s claim for compensation as against the 2nd and 3rd defendants, it is evident that PW3 obtained an order of the Court that enabled her to procure registration of parcel No. 459 in her name as a result parcel No. 318 was lawfully sub-divided and 3 titles issued.”

9. It is clear from the foregoing that the fact of the sub-division of land title No. Nyansiongo Settlement Scheme/318 was disclosed by the respondent in the originating summons and in his evidence. Annah similarly disclosed that fact and referred to a court case and a decree. It is also evident that Babu Siko was aware of the sub-division and indeed filed a counter-claim. The firm of advocates representing the applicant is the same firm which represented Babu Osiko at the trial.

10. We are satisfied that the certificate of confirmation of the grant and the affidavit to support the petition for grant of letters of administration in respect of the estate of Taratio Oigo Siko being Court records were available and could have been obtained with reasonable diligence. The application for annulment of grant and the alleged charge sheet happened after the judgment and thus being *ex post facto* are inadmissible in the appeal.

11. Further, it is our finding that it is not probable that the four documents would have an important influence in the result of the appeal. The respondent’s claim was for adverse possession of a specific part of land measuring 3 acres. The initial possession arose from a contract for sale of land. Even after the sub- division, parcel No. 460 was registered in the name of Babu Siko. The documents sought to be introduced relate apparently to a dispute between the estate of Babu Siko and Annah relating to acquisition of land title Nyansiongo Settlement Scheme/459 - a sub-division of the original title No. 318. Annah was not a party in the adverse possession dispute. That dispute is distinct and of an entirely different character from the adverse possession claim, the subject matter of the appeal.

12. For the foregoing reasons, the application is dismissed with costs to the respondent.

Dated and Delivered at Kisumu this 23rd day of November, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR