



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, MWILU & J. MOHAMMED, J.J.A.

CIVIL APPEAL (APPLICATION) NO. 300 OF 2010

BETWEEN

SAMURU GITUTO FARMERS

CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

CHIEF MAGISTRATE'S COURT AT THIKA

THE REGISTRAR OF TITLES

THE ATTORNEY GENERAL

JOHN MBAU

MONICA WAMBUI

JOSEPH KARUMBA

HANNAH MARUGU

SIMON NGUGI KAMAU

PAUL WANYOIKE

JOAN NJERI

BONIFACE MWANA

FRANCIS MAINA

COMMISSIONER OF CO-OPERATIVE DEVELOPMENT

FRANCIS NDUNGU MWAURA

PETER NDUATI MBAU

(An application to adduce additional evidence from the judgment & order of the High Court of Kenya at Nairobi (Wendoh, J) dated 19th April, 2010

in

HC CONST APPLN NO. 30 OF 2009)

RULING OF THE COURT

1. The applicant, SAMURU GITUTO FARMERS CO-OPERATIVE SOCIETY LIMITED, filed a Notice of Motion under Rules 29 and 42 of the Court of Appeal Rules and Section 3A, 3B of the Appellate Jurisdiction Act. The applicant seeks leave of this Court to take additional evidence as part of the record during the hearing of the appeal herein. The applicant has filed several grounds in support of its application, the main ones being that the additional evidence was not within the applicant’s knowledge at the time of filing the appeal and that the additional evidence is necessary for the just and proper determination of its appeal.

2. The brief facts discernable from the record that is before us are as follows: The applicant Society claims to be the owner of land parcel No 10743 within

Thika Municipality [the suit property], which was in the process of being transferred to a third party. Initially, the applicant had charged the said title to Co-operative Bank of Kenya Limited [the Bank], but after repaying the loan owed to the Bank, the title documents were released to Gitonga Muriuki Advocates.

The applicant claimed that a group of people who were not officials of the applicant and who had been enjoined in Thika CMC 792/06 sought to change the applicant's leadership. In the said suit, the applicant society had sought for an order of injunction against the 1st to 13th respondents herein and a representative of the Commissioner of Co-operative Development barring them from replacing them as signatories in the bank account domiciled at Thika. The said orders were granted after a hearing on 26th October, 2006 and the matter was fixed for formal proof on 1st December, 2008 after an interlocutory judgment had been entered against the 1st to 13th respondents on account of failing to file a defence. However, the matter was not heard as the 14th, 15th and 16th respondents herein who were not parties to the initial suit had been enjoined after filing two applications on 19th August, 2008 and 29th August, 2008 and orders issued on 20th August, 2008 and 29th August, 2008 respectively by the learned Magistrate (Hon P.K. Kariuki). Subsequently, the 13th respondent filed an application dated 12th September, 2008 seeking to have the said ex-parte orders set aside but the said application was dismissed by the learned Magistrate (Hon Wachira) on 9th November, 2008.

3. The applicant claimed that although the matter was not heard on 1st December, 2008, the 14th, 15th and 16th respondents were enjoined to the proceedings and ex-parte orders granted by Hon Kariuki. It is for the foregoing reasons that the applicant moved to the High Court vide an Originating Notice of Motion dated 19th January, 2009, seeking the intervention and supervision of the lower court to protect its rights. The applicant contended that the dismissal of the application dated 12th September, 2008, the joinder of the 14th to 16th respondents without leave of the court, the granting of the orders ex-parte without hearing parties inter partes constituted misconduct and miscarriage of justice on the part of the lower court.

4. The matter was heard by Wendoh, J who by a judgment dated 19th April 2010, dismissed the applicant's Originating Notice of Motion. The learned Judge observed that the applicant had filed an appeal HCA No. 696/08 seeking to set aside or quash the orders dated 19th February, 2008 in CMC No. 792/06, which appeal had not yet been determined. The learned Judge opined that the result of the said

appeal will have the same effect as the orders that were being sought by the applicant. Further, the learned Judge observed that the applicant had also filed a Judicial Review application No. 815/08 seeking a stay to stop the Commissioner of Lands, Director of Housing, Chief Land Registrar and the Commissioner of Co-operatives from dealing with suit No L.R No. 10743 and also to bar them from recognizing the 14th ,15th and 16th respondents as the legal owners of the suit property. For the foregoing reasons, the learned judge found no good reason to allow the orders sought by the applicant.

5. Aggrieved by the said decision, the applicant filed an appeal to this Court, and the present application. At the hearing of the present motion, learned counsel Mr G.K Muriuki, appeared for the applicant while learned counsel Ms Mary Nyamichaba, appeared for the 13th respondent; learned counsel Miss Kariuki, held brief for Mr Karanja learned counsel for 14th to 16th respondents;

Mr Ndung'u, learned counsel, held brief for Mr Muhoro learned counsel for the 14th to 16th respondents; learned counsel Mr Odongo, for the intended interested party, Makindi Banks Limited and learned counsel Mr Onyiso, for the 1st , 2nd and 3rd respondents.

6. Mr Muriuki submitted that the application seeks to adduce additional evidence. He stated that the main reason why the said documents constituting the additional evidence were not filed with the record of appeal was because they were not in the possession or within the knowledge of the applicant. He submitted that they have annexed to the present motion the additional evidence that the applicant seeks to adduce. Counsel pointed out that a transfer of the suit property was done notwithstanding the orders of Nyamu, JA dated 9th February, 2009. He urged us to allow the application for the sake of the applicant's over 3000 poor members and order that the intended additional evidence form part of record of appeal filed on the 19th November, 2010.

7. The application was not opposed by the respondents.

8. We have considered the present application, the grounds in support thereof, the able submissions by counsel and the law. The application is essentially seeking leave of this Court to adduce additional evidence during the hearing of this appeal. The principles on which this Court exercises its discretionary power in determining whether or not to admit additional evidence under rule 29 of the rules of the Court were expressed by Chesoni, Ag JA (as he then was) in the case of MZEE WANJIE & 93 OTHERS V A.K. SAIKWA & 2 OTHERS, (1982-88) 1 KAR 462 at p 465, where the learned Judge 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 page 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.”

After making reference to “Mulla on Code of Civil Procedure, (13th Edn), p 1606, the learned Judge went on to say:

“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 was unsuccessful at the trial to patch up the weak points in his case and fill omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling 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 the parties

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.”

9. Applying these principles to the application, before this Court can grant leave to a party to call additional evidence under Rule 29, the three conditions must be met: it must be shown, firstly, that the evidence sought to be adduced could not have been obtained by reasonable diligence before or during the hearing of the suit in the High Court, secondly, that the new evidence sought to be adduced would be likely to affect the outcome of the suit and thirdly, that the additional evidence is apparently credible.

10. The key issue in this application is whether the applicant has met any of the above principles to justify this Court exercising its discretion in its favour. In the present application, the applicant has been able to show that the intended additional evidence was not within its possession or knowledge at the time of filing of the record or at the High Court. The second consideration as to whether the intended additional evidence would likely have an important influence on the result of the appeal. To this end, the applicant has argued that the 13th, 14th, 15th, and 16th respondent have already transferred the suit property which is the subject of the appeal and the new evidence sought to be adduced would likely have affected the outcome of the suit. Applying the laid down principles to the application, we therefore find that for the determination of the appeal, the intended additional evidence sought to be introduced is relevant and apparently credible being documentary evidence. Furthermore, the respondents have conceded to the applicant adducing the said additional evidence.

11. For those reasons, and in the circumstances of this application, we allow the notice of motion dated 29th January, 2016. The applicant shall file and serve on the respondents, within 14 days from the date hereof, a supplementary record comprising the documents listed in prayer number 1 [one] of the notice of motion.

12. The costs of the application shall abide by the outcome of the appeal.

Dated and delivered at Nairobi this 1st day of July, 2016.

E. M. GITHINJI

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR