IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 195 OF 2002

(CORAM: KARANJA, MUSINGA & KIAGE JJ.A)

BETWEEN

WALTER JOE MBURU .....APPLICANT/APPELLANT

AND

ABDUL SHAKOOR SHEIKH (As administrator of the estate of

SHEIKH FAZAL NOORDINILAHI .....1st RESPONDENT

OPUS INVESTMENTS LTD.....2nd RESPONDENT

NATIONAL SOCIAL SECURITY FUND.....3rd RESPONDENT

THE COMMISSIONER OF LANDS

AND REGISTRAR OF TITLES …….……..…… 4TH RESPONDENT

(An Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Ransley, J.) dated 14th March, 2002

in

HCCC NO. 1191 of 1999)

****

RULING OF THE COURT

On 17th August 2012, which was precisely a decade and a fortnight after the appeal herein was filed in this Court, the appellant/applicant lodged a notice of motion under **rules 29, 30 and 31** of the Rules of Court by which he sought the following orders;

> ***"1. THAT the registrar or deputy registrar be directed to rectify the decree dated 4th March 2002 and issued on 22nd July 2002 to conform with the ruling of honourable PJ Ransley dated 14th March 2012 the subject matter of this appeal.***
>
> ***2. The notice [of] appeal filed on the 19th March 2012 be deemed to have been properly filed.***

3. THAT additional evidence be taken."

The grounds on which the motion is premised appear on its face and are to the effect that;

1. The notice of appeal though filed timeously was not endorsed by the registrar.

2. It has come to the applicant's attention that the transactions leading to the suit of the High Court have been the subject of an investigation by the Ethics and Anti-Corruption Commission ('the commission') and its report ought to be received in evidence.

3. No prejudice would be occasioned to the respondents by the order which will ensure a merit-based determination of the appeal.

The application is supported by the applicant's affidavit sworn on 16th August 2012. In it **Walter Joe Mburu** swore at paragraph 8 that he had learnt that the Commission had been investigating the transaction pertaining to the parcel of land known as LR 209/324 and "the said Commission [was] on the verge of producing a report on its findings." He averred that the anticipated report would be most relevant to the proper determination of the appeal herein and so "the Court ought to take cognizance of the said report and receive the same as additional evidence or otherwise require viva voce evidence on the same from officers of the said Commission…."

The applicant then swore at paragraph 10 that;

"..since the said report has not been availed and is in the process of compilation I shall pray for leave to file the same by way of a supplementary affidavit once the report has been prepared and availed."

In response to that application, the 3rd respondent filed grounds of opposition dated 30th November 2012 in the following terms;

"1. The application is scandalous, frivolous and vexatious and is otherwise an abuse of the court process.

2. The appellant/Applicant has not justified why additional evidence should be taken. It is trite law that to justify the reception of fresh evidence, three conditions must be fulfilled:

(a) It must be shown that the evidence could not have been obtained with reasonable diligence.

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case; and

(c) The evidence need not be decisive- it must be such as is presumably to be believed i.e. it must be apparently credible though it need not be incontrovertible.

3. No evidence was adduced before the court in the first instance and there is in fact no additional evidence to be adduced since the Ethics and Anti-Corruption Commission has not completed its investigations or compiled a report in respect of the suit premises.

4. Although the Ethics and Anti-Corruption Commission's report could not have been obtained with reasonable diligence the appellant/applicant's suit against the 3rd respondent was dismissed on the grounds of limitation and therefore any evidence, whether or not having an important influence on the result of the case would be of no consequence.

5. The record of appeal is still defective and deserving to be struck off as it lacks the entire record of the High Court and the appeal was filed out of time without prior leave of court.

6. The application is belated an afterthought and cannot be entertained this late in the day.

7. Any other grounds to be adduced at the hearing hereof."

That respondent also filed an affidavit sworn by **Carol Rakoma Odera**, its legal officer, on 29th November 2012 which was essentially in the same terms as the grounds of opposition. At paragraph 13, **Ms. Odera** averred as follows;

"THAT the instant application is premised on a non-existent report and therefore it follows there is no additional evidence as such neither can the applicant pre-empt any such report."

During a court appearance on 7th May 2013, the applicant did informally apply and was granted leave to file a supplementary affidavit. The applicant accordingly swore a supplementary affidavit on 21st May 2013 attaching some two letters, which the applicant calls reports, from the Commission to the applicant's advocates. The letters were dated 5th September 2012 and 3rd May 2013.

The applicant swears that the two letters reveal *"anomalies, blant illegalities and outright fraud in the purported transfer"* of the suit property. To the applicant, it is crystal clear from the letters that the transactions between the 1st, 2nd and 3rd respondents as pertains the suit property are in law null and void and to no effect. He therefore believes the two letters to be material to the just determination of the appeal against the High Court's striking out of the applicant's suit as against the 3rd respondent for being time-barred.

To that supplementary affidavit the 3rd respondent filed a further replying affidavit in which the same **Caroline Rakama** dismissed the two letters from the Commission as being irrelevant and baseless. She swore that they were not reports *strictu sensu* being merely letters and were, in any case, self-limiting, preliminary, cautionary and skeletal in nature. Moreover, swore the deponent, the two documents had no grounding in law in a purely private civil claim.

In what marks the chequered path of this application as some unimpressive ping-pong of filings that merely clog the path to the merit–based determination of the pending appeal, the applicant swore on 10th February 2014 and filed on 12th February 2014 a further supplementary affidavit in which he deposed to numerous other matters. We did not find evidence from the record that leave was obtained before that filing was made. Be that as it may, that was the state of the parties' filings when the motion came for hearing before us on 19th January 2015.

Arguing the application, **Mr. Odhiambo** learned counsel for the applicant, presented the case as set out in the motion and the affidavits. He sought rectification of the High Court decree to conform with the ruling of the High Court which struck out the suit as against the 3rd respondent only and not the entire suit as shown in the "decree." We think that the document in question should be an order and not a decree. On additional evidence, counsel urged that there was new information not previously available and this is in the form of the letters we have already referred to. He cited in aid this Court's decision in **THE ADMINISTRATOR HH AGA KHAN PLATINUM JUBILEE HOSPITAL Vs. MUNYAMBU** [1985] KLR 127

Mr. Ngugi, learned counsel for the 3rd respondent, intimated to us that he was not opposed to prayers 1 and 2 of the application. We set out those prayers at the beginning of this ruling. He however fully resisted the prayer for the reception of additional evidence. Counsel submitted that;

"The so-called evidence is two letters the last of which is a self-defeating document in which the Commission declares that it has nothing to do with the matters in question."

He referred the Court to the brief letter from the Commission dated 3rd May 2013 the last paragraph whereof reads;

> ***"It is therefore imperative to establish the persons who are alleged to have perpetrated the fraud. This can only be well established by the Criminal Investigations Department (CID) upon investigation. The Commission's mandate is limited to investigating matters where there is loss or damage to public property and where public officers are involved."***

Mr. Njagi concluded his submissions by stating that under **rule 29 (1) (b)** this Court has the discretion to order the taking evidence additional to what was placed before the High Court. He posited that as the suit against the 3rd respondent was struck out on a point of law namely limitation, without any evidence being taken, an application under **rule 29 (1) (b)** cannot properly lie.

Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court's discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.

That aside, the application must also fail on a consideration of its merits. The principles upon which additional evidence may be taken are uncontested. They are well spelt out in the case law cited by the rival parties before us. In the **AGA KHAN Vs. MUNYAMBU** case (supra) cited by counsel for the applicant, it was held that;

> ***"1. In exercising its discretion to grant leave to adduce additional evidence under Rule 29(1) (b) of the Court of Appeal Rules, 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 that case Kneller, JA. had expressed the view, with which we respectfully agree, that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage. The same principles were propounded in the cases cited by the 3rd respondent, namely; **WANJE Vs. SAIKWA** [1984] KLR 275 and **JOGINDER AUTO SERVICES LTD Vs. SHAFFIQUE & ANOTHER** [2001] KLR 97, with the latter emphasizing the discretionary character of the **rule 29(1)** powers of the Court.

We agree with the 3rd respondent that where a matter is decided on a point of law without any evidence having been tendered, an application for adduction of additional evidence cannot ordinarily lie for there is no evidence to add to. Were it the case that the applicant herein was seeking to show by some evidence that the claim dismissed for being time-barred was in fact within time, it might have been different. Here however, the applicant is seeking to introduce totally different material unrelated to the straight point on which his suit against the 3rd respondent was dismissed.

As to the evidence itself, it seems plain that its credibility is very much in doubt. What the applicant calls investigative reports are mere letters. The letters show that investigations need to be done. Nothing in them is conclusive. They are exploratory or tentative at best. Their reception would not advance the applicant's case an inch, as their probative value is nil. They would not influence the outcome of the appeal one way or the other. They do not meet the threshold under **rule 29(1) (b)** of the Court of Appeal Rules.

We are of the respectful but firm view therefore that while prayers (1) and (2) are uncontested and are hereby granted, the application for the taking of additional evidence must fail and it is accordingly dismissed with costs to the 3rd respondent.

We direct that this very old appeal be fixed for hearing as is on priority basis.

Dated and delivered at Nairobi this 20th day of March, 2015.

W. KARANJA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR