



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, J.MOHAMMED & KANTAI, J.J.A)

CIVIL APPEAL (APPLICATION) NO 216 OF 2014

BETWEEN

STEPHEN BORO GITIHA.....APPLICANT

AND

NICHOLAS RUTHIRU GATOTO.....1ST RESPONDENT

NDARUGU MERCHANTS.....2ND RESPONDENT

RURAL URBAN CREDIT FINANCE (UNDER RECEIVERSHIP).....3RD RESPONDENT

(an application for additional evidence by way of affidavit in an appeal against the judgment and decree of the High Court of Kenya at Nairobi (Ogolla, J)

in

H.C.C.C No 4275 of 1994)

RULING OF THE COURT

The principles that guide this Court in allowing the introduction of additional evidence are well known. The power to take additional evidence is found at rule 29 (1) of this Court’s rules which provides as follows:

“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. to re-appraise the evidence and to draw inferences of fact; 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.”***

The principles upon which the Court will rely have been clearly set out in case law. In **Karmali Tarmohamed & Anor. Vs. I.H.Lakhani [1958] EA 567** the predecessor to this Court held that:

“(i) except on grounds 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.”

In *The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu* [1985] KLR 127 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. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront commonsense or a sense of justice.”

In the case of *Mzee Wanjie and 93 others v A.K. Saikwa* [1982-88] 1 KAR 462 this Court held inter alia as follows:-

“1. Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing.

2. It must also be shown that the new evidence would have been likely to have affected the result of the suit.”

And as was stated by this Court in *Joginder Auto Service Ltd v Mohammed Shaffique & Another* [2001] eKLR (Civil Appeal (Application) No. Nai. 210 of 2000)

“Rule 29(1)(b), of the Rules does not set out what constitutes sufficient reason. But this Court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence.... In summary these and several other cases decide that the power of the court and more particularly this Court, to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:

(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.

These are general principles, but we cannot say that they are the only ones. The relevant rule authorising the adduction of additional evidence uses a general phrase, namely, "sufficient reason."”

These are the principles we bear in mind as we embark on determining this application.

Stephen Boro Githia, the applicant herein and the respondents herein, are embroiled in a dispute over the property known as L.R. No Kiganjo/Kiamwangi/208. Nicholas Ruthiru Gatoto, the 1st respondent was advanced some money by the Rural Urban Credit Finance, the 3rd respondent, with the suit property as security. A dispute arose as to the amount of money owed. The 3rd respondent therefore sold the property to the applicant in a public auction.

The applicant now seeks to introduce two pieces of additional evidence long after determination of a claim surrounding the subject of the appeal has been determined. The first is a report by the Deputy Registrar of the High Court. This report was made at the behest of Ochieng, J. on 10th November 2014. It is clear from the report of the Deputy Registrar that it is not conclusive or definitive, but it is based on contested and disputed facts. It was prepared more than ten (10) months after the delivery of the judgment which is the subject of the appeal pending before this Court. It does not show in any way, neither would it be able to guide the Court, as to who is in actual possession of the property. In any case, this Court, in a ruling dated 6th February 2015, made a finding that the applicant herein had not controverted various assertions as to who was in actual possession of the property, and took that to be the correct position on the ground.

The probative value of the report is not clear as it was made specifically to enable the High Court determine the application dated 28th October 2014. It was meant to assist the High Court determine who was in actual and constructive possession of the suit property, and eventually the parties settled the application by way of a consent. It is clear in our minds that the applicant has not indicated in what way this report will influence the appeal or its outcome. It is also not clear how the report would assist this Court in resolving the dispute between the parties.

The second document that the applicant seeks to introduce is an affidavit sworn by Patrick Thoithi Kanyuira on 17th February 2015. This is the Official Receiver of the 3rd respondent herein. It was sworn well after the judgment had been delivered and cannot be said to contain averments or evidence that could not have been secured at the time of hearing before the High Court. The deponent has been a party to the proceedings between the parties, and could have given evidence at any time. More so, it cannot be said that the evidence was not available during the hearing in the High Court, and would not determine the direction of the dispute. In addition, the annexures to that affidavit are already part of the record of appeal, and it only seems to us that a reintroduction of the same would be serve no useful purpose other than to be repetitive. Our consideration of this affidavit evidence is that it does not meet the threshold of rule 29 (1) of the Court of Appeal Rules.

In conclusion, we have addressed our minds to both documents sought to be introduced as additional evidence by the applicant, the effect on the case of the parties, and whether or not the Court would derive any benefit from them in order to adjudicate the dispute effectively, efficiently and to the best interests of the parties. We arrive at the firm position that nothing turns on the said documents. The applicant will not be prejudiced, and neither will his case fail or succeed as a result of the failure to allow production and admission of the two documents. We therefore decline to exercise our discretion in favour of the applicant. The plea by the applicant fails and the application is dismissed with costs.

Dated and Delivered at Nairobi this 31st day of July, 2015

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

