



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & M'INOTI, J.J.A)

CIVIL APPEAL (APPLICATION) NO 211 OF 2014

BETWEEN

ELIZABETH CHEPKOECH SALAT.....APPLICANT

AND

JOSEPHINE CHESANG CHEPKWONY SALAT.....RESPONDENT

(being an application to take additional evidence from the appellant in the appeal of the judgment and decree of the High Court of Kenya at Nairobi (Kimaru, J.) delivered on the 4th February 2011)

in

Succession Cause No 299 of 1992 consolidated with HCCC Misc No 44 of 2005 (OS)

RULING OF THE COURT

This is an application by way of Notice of Motion by ***Elizabeth Chepkoech Salat*** (hereinafter referred to as the applicant). The applicant seeks principally to introduce new evidence in order to initiate a new trial on that specific evidence.

In support of the application, the applicant swore an affidavit on the 28th January 2014. The facts as can be gleaned from this affidavit are that she and the respondent were once married to the late Isaac Kipkorir Arap Salat until his death on 29th November 1987. Since then, the widows have not been able to settle a succession dispute that arose between the two houses and as a result, they filed a succession cause in the High Court of Kenya at Nairobi, which was decided by Kimaru, J. on 4th February 2011. In that decision, the learned judge made a determination on the distribution of the property. The applicant was dissatisfied with the decision and therefore preferred an appeal to this Court. She also filed an application for stay of execution of the decree of the High Court, in which she annexed valuation reports of some of the distributed property.

The applicant further avers that at the time of the filing of the record of appeal now before the Court, her advocate cited all the documents, including those that were filed in support of the application for stay of execution; these are the documents she now seeks to adduce as additional evidence. She avers that this was an inadvertent inclusion, which was only discovered when the respondent raised the issue in her

submission. The applicant now contends that these documents are necessary for the full and substantive determination of the subject appeal.

The respondent opposes the application by way of the replying affidavit sworn on the 18th February 2014. Her position is that the present application is an abuse of the court process and has been brought only to delay the hearing of the substantive appeal. She also contends that the applicant has not satisfied the conditions for the grant of the orders sought, that is, first that the applicant has not shown that this evidence could not have been obtained with reasonable diligence during the trial; secondly that the evidence is credible; and thirdly, that the evidence would have an important influence in the result of the appeal.

During the hearing, Mr. Wandabwa, for the applicant, submitted that the principles to be considered by this Court in admitting additional evidence had been demonstrated. He submitted that under normal circumstances, these considerations must be taken into account, but the present proceedings, which stem out of a succession dispute, are not normal proceedings. He also submitted that under the Law of Succession Act, it is only necessary to place the beneficiaries and the assets in question before the trial court, and there is no burden to bring a valuation of the properties before the court.

Mr. Wandabwa further submitted that the distribution by the trial court was done unfairly, and the additional evidence would serve to clearly show this; and that there was no amount of due diligence which would have prompted the applicant to introduce these documents earlier. Learned counsel's final submission was that the documents would heavily tilt the appeal, and that there would be no prejudice caused to the respondent if the documents are available for consideration by this Court.

Mr. Okoth, learned counsel for the respondent, argued that this application is merely an afterthought by the appellant. He submitted that the documents, such as the letter that the applicant now seeks to introduce, have been in the possession for the applicant all along, and it is unclear why these documents were not brought before the trial court.

Learned counsel argued further that the properties that were distributed by the trial court were eight (8) in number, but those in respect of which the applicant now seeks to introduce valuation reports are only three (3), showing that there is no good faith in the application. He therefore argued that the evidence sought to be presented before the Court is unacceptable.

We have considered the application and the able submissions of learned counsel for the parties herein. In our understanding, the applicant is seeking to benefit from the discretionary power of this Court. Such power must be exercised judiciously and in accordance with the law. In doing so, we must bear in mind that justice tasks and addresses itself to both sides of the coin. That is a consideration we must bear in mind as we undertake the determination of this application.

Under Rule 29(1)(b) of this Court's Rules, upon which this application is premised, 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:-

...

(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.”

It is settled that to succeed in an application brought under rule 29 of the Court of Appeal Rules, the applicant must show that the evidence sought to be introduced could not have been obtained before or during the hearing, and that the evidence will most likely have an effect on the end result of the suit.

This principle was asserted as far back as in ***Karmali Tarmohamed & Another Vs. I.H. Lakhani & Company***[1958] EA 567 where the predecessor to this Court, cited with approval the decision of the

English court in Ladd v Marshall [1954] 1 WLR 1489 , and 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.”

This holding was upheld by this Court in Wanje v Saikwa [1984] KLR 275 where the Court held that:

“The Court of Appeal, under rule 29 (1) of the Court of Appeal Rules, has the power to take additional evidence in an appeal from the decision of a superior court acting in exercise of its original jurisdiction, or to direct that additional evidence be taken by the trial court;

The principles upon which an appellate court in civil case will exercise its discretion in deciding whether or not to receive further evidence are:

- a. ***it must be shown that the evidence could not have been obtained by 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;***
- c. ***the evidence on the face of it is credible.”***

In the subsequent decision of this Court in the Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu [1985] KLR 127, this Court held, inter alia, that:

“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 common sense or a sense of justice.”

In granting prayers under this rule, the Court will be exercising unfettered discretion, as was found by the Court in John Wagura Ikiki & 3 Others v Lee Gachuiga Muthoga [2011] eKLR (Civil Appeal (Application) No. 196 of 2009)that:

“The discretion of the court is therefore not unfettered since the applicant must demonstrate “sufficient reason”. “Sufficient reason” as stated by the predecessor of this Court “may not be as stringent a requirement as “special reason” but adequate reason must still be shown before this Court can exercise its discretion” – see the Commissioner of Transport v The Attorney General of Uganda & Anor. [1959] EA 329 at page 333.”

These are the principles that we must now bear in mind as we determine whether the evidence contained in the record of appeal, and having not been adduced during the trial, can now fall for consideration by this Court as additional evidence.

The most important consideration, in our view, is the efforts of the applicant to adduce this evidence before the trial court.

It is common ground that all three properties that are the subject of the valuation herein were at all times occupied by the applicant and her dependants to the exclusion of the respondent and the other beneficiaries, and therefore, nothing prevented the applicant from conducting a valuation at any time

during the pendency of the trial before the High Court. It is also undisputed that the matter commenced way back in 1992. The proceedings have been pending in court since then, and the substantive appeal is now pending hearing before this Court.

We do not understand why this belated valuation was not undertaken at some point before the determination of the dispute in 2011. With respect, we think that the primary motivation to introduce the additional evidence is not good faith, but is really an attempt to delay and complicate the conclusion of the dispute, which to our minds belongs in the archives registry of the justice system. We think that the attempt to procure additional evidence is not justified in the peculiar circumstances of this case.

The valuation reports in question are dated the 12th May 2011. This was about two months after the delivery of the judgment of the High Court. There was therefore never any effort by the applicant to produce valuation reports before the High Court with a view to guiding it on making a determination on the dispute before it. The applicant could well have undertaken these valuations before the close of the trial proceedings. She has not explained why she did not take such a course. We are of a similar view regarding the letter which the applicant claims was authored by the deceased. This is a letter that has been in the applicant's possession since the death of her husband. She had it all along during the course of the trial. Again, it is unclear why she failed to adduce it if she felt that it would aid her cause. We must reiterate that it is the duty of the applicant to demonstrate to this Court that the additional evidence sought to be adduced was not available during the trial.

We also note that the applicant seeks to introduce this evidence as a means to show that the distribution done by the trial court was skewed against her, yet the valuation reports are in respect of only three out of eight properties in the distribution list. The totality of our findings is that this application cannot be allowed, and it is hereby dismissed. The costs of this application will be borne by the applicant.

Dated and delivered at Nairobi this 6th day of June 2014

M. WARSAME

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JUDGE OF APPEAL

D. MUSINGA

.....

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

mwk.

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR