



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 8 OF 2003

BETWEEN

**KUWINDA RURINJA CO. LTD
APPELLANT**

AND

**KUWINDA HOLDINGS LTD. 1ST
RESPONDENT**

**COLIN DAVIES 2ND
RESPONDENT**

**JOINT LIQUIDATORS OF NDUMBERI FARMERS CO. LTD. (IN LIQUIDATION)..... 3RD
RESPONDENT**

**SIMON KIMANI 4TH
RESPONDENT**

**NYAWIRA KARIUKI 5TH
RESPONDENT**

**SAMUEL MUCHOKI 6TH
RESPONDENT**

**CULUMBANIS MLURE NGUGI 7TH
RESPONDENT**

**DAVID KIGURU 8TH
RESPONDENT**

**WAIRIMU KARIUKI 9TH
RESPONDENT**

**MWAURA WAMUTI MUTHEE..... 10TH
RESPONDENT**

**MBUGU NGIGI 11TH
RESPONDENT**

FRANCIS NDUNG'U 12TH
RESPONDENT

NJERI MBUGUA 13TH
RESPONDENT

G. R. MUTHURI 14TH
RESPONDENT

(Application to take additional evidence from the ruling of the High Court of Kenya at Nairobi (Ole Keiwua, J.) dated 5th December 1997

in

HCCC No. 5262 of 1988 (OS)

RULING OF THE COURT

The application

1. By notice of motion dated 6th June 2011 presented under rules 29 and 42 of the rules of this Court, the appellant seeks orders that:

- a. This Court do at the hearing of the appeal take additional evidence contained in the affidavit of Mr. Joseph Mwangi Kiarie sworn on 6th June 2011 supporting the application.
- b. That the proceedings and judgment in Chief Magistrates Court at Nairobi, Criminal Case No. 1193 of 1997 annexed to the said affidavit of Mr. Joseph Mwangi Kiarie be deemed part of the record of appeal.

2. The application is supported by the affidavit and supplementary affidavit of Joseph Mwangi Kiarie sworn on 6th June 2011 and 17th October 2012 respectively. The 3rd respondent supports the application.

3. The 1st and 2nd respondents oppose the application. In that regard there is a replying affidavit and supplementary affidavit sworn by the 2nd respondent on 17th August 2011 and 2nd November 2012 respectively. We were informed from the bar that the 6th, 7th, 9th to 13th respondents are all deceased.

Background to the application

4. In 1988 the appellant filed suit, High Court Civil Suit No. 5261 of 1988 in Nairobi, against the 3rd respondent seeking an order for specific performance of an agreement for sale entered into in 1985 with respect to properties known as L. R. No's 10262 and 11694 and for delivery of title.

5. A defence was filed in that suit in which the 3rd respondent admitted having offered the property for sale but contended that the appellant was unable to pay the purchase price.

6. Based on a consent letter filed in court on 2nd October 1996 the High Court ordered, inter alia:

“1) That HCCC No. 3070 of 1989, HCCC No. 5261 of 1988 and HCCC No. 5262 of 1988 (OS) be

consolidated for the purpose of recording this consent order.

2) That specific performance of the Agreement for sale dated 31st October 1988 be ordered and that the transfer of L.R. No. 10262 and L.R. 11694 by Ndumberi Farmers Company Limited to Kuwinda Holdings Limited duly stamped and dated 14th November 1988 do proceed to registration.

3) That Ndumberi Farmers Co. Ltd. do provide the purchaser with a rate clearance and land rent certificate and all other requirements necessary to transfer.

4) That thereafter, the parcel of land measuring 2.5 acres together with the buildings known as the 'KIJIJI' situated on the South West Corner of L.R. No.1 0262 be excised from the Title by way of sub division and that a transfer be executed by Kuwinda Holdings Limited to Kuwinda Rurinja Company or its nominees for a Consideration of Kshs.10.00 (Kenya Shillings ten only) within ten (10)days of receipt of subdivisitional consent and separate deed plan of the excisable portion which scheme will be undertaken and paid for by Kuwinda Holdings Ltd.

5.

6. That upon successful registration, Mr. Colin Davis and/or Kuwinda Holdings do pay to Ndumberi Farmers Company Limited:-

i) Kshs. 3,150,000/= in respect of the agreement for sale dated 31/10/88.

ii) Kshs. 350,000.00/= belonging to Kuwinda Holdings Limited but deposited in court vide cheque number 184780 drawn on the Kenya Commercial Bank by Ndumberi Farmers Limited be released back to them.

iii) That a further Kshs. 4,700,000/= be paid in respect of all fixtures and fittings on the premises as of today's date. Total Kshs.8,200,000.00/= Kenya Shillings Eight Million and Two Hundred Thousand only).

7. That the performance by each party of their respective undertakings are not severable and are subject to withdrawal and closure and settlement of HCCC No. 5261 of 1988 and HCCC No. 5262 of 1988 (OS) and HCCC No. 3070 of 1989 and the vacation of all orders therein with all the respective parties bearing their own costs.”

7. That consent letter was signed by A F Gross advocate for the 1st and 2nd respondents, Kaai Mugambi and Company Advocates for the 3rd respondent and Muthuri & Company Advocates for the appellant, Simon Kimani and 9 others.

8. Thereafter the appellant filed an application to review and set aside the consent order recorded on 2nd October 1996. The appellant also sought orders for the cancellation of entries in the land register relating to L. R. No. 10262 and 11694 based on that consent order on the basis that the consent was fraudulently obtained and that Muthuri & Company advocates who purported to represent the appellant did not infact have the authority of the appellant to represent it least of all to enter into the consent.

9. That application for review was heard and dismissed by the High Court in a ruling by ole Keiwua J. (*as he then was*) dated 5th December 1997 giving rise to the present appeal.

10. It is against that background that the present application has been made for additional evidence to be taken to elucidate the question of the authority of the advocates who entered into consent on 2/10/1996 on behalf of the appellant.

Submissions by counsel

11. In support of the application, Dr. Kamau Kuria, S.C learned counsel for the appellant submitted that sufficient reason has been shown for admitting additional evidence and that the appellant has satisfied the requirements for the exercise of the Court's discretion in its favour in accordance with the decision of this Court in the case of **Wanje v Saikwa** [1984] K L R 275.
12. Dr. Kuria further submitted that the additional evidence required to be taken, being the proceedings and judgment in Chief Magistrates Court at Nairobi, Criminal Case No. 1193 of 1997, will elucidate the record of appeal in this matter with regard to the question whether the firm of Muthuri & Company Advocates which entered into a consent purporting to bind the appellant had the authority of the appellant to do so.
13. On the strength of the case of **Hon. Anthony Kanyike v Electoral Commission and others**, Civil Application No. 13 of 2006 of the Court of Appeal of Uganda, Dr. Kuria submitted that additional evidence should be admitted at the appellate stage for purposes of elucidating evidence already on record as pointed out above.
14. Learned counsel Mr. Mohammed Nyaoga, and Dr. Kariuki Muigua, for the 1st and 2nd respondents, submitted that this is not an appropriate case for the exercise of the Court's discretion under rule 29 of the rules of the Court.
15. Mr. Nyaoga submitted that the learned magistrate in the judgment in Nairobi, Criminal Case No. 1193 of 1997 steered clear of the civil dispute. He submitted that considering that the standard of proof required in criminal proceedings is different from the standard of proof in civil proceedings, it cannot be argued that the outcome in the criminal case would have affected the outcome in the civil case in the High Court.
16. Mr. Nyaoga further submitted that what the appellant is effectively seeking to do, which is not permissible, is to introduce evidence to fill gaps or patch up weaknesses and to contradict evidence in the High Court, as opposed to presenting additional evidence. Contradictory material disguised as additional evidence, Mr. Nyaoga argued, should not be admitted at this stage.
17. He stated that the matters that the appellant is seeking to introduce are irrelevant to the decision of the High Court and to the extent that some matters may be relevant, the High Court considered the same. He submitted that to allow the application would set a bad precedent.
18. Ms. V. M. Wambua, learned counsel for the 3rd respondent associated herself fully with the submissions by Dr. Kuria and urged the Court to allow the application.
19. In his brief reply Dr. Kuria submitted that no dangerous precedent would be set. On the contrary, Dr. Kuria submitted, a good precedent in keeping with the decision of the Court of Appeal of Uganda in the case of **Hon. Anthony Kanyike v. Electoral Commission and others** will be made.
20. He submitted that the record of appeal is incomplete without the proceedings and judgment in Chief Magistrates Court at Nairobi, Criminal Case No. 1193 of 1997 and that consistent with the overriding objective of the Court under Sections 3A and 3B of the Appellate Jurisdiction Act, the application should be allowed.

Our Decision

21. We have considered the application, the affidavits, the submissions by learned counsel and the authorities cited.
22. The relevant part of rule 29 of the rules of this Court provides:

“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)...

(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.

(2) When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent.”

(3).....

(4)... ..

23. 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 **Wanje v Saikwa**. It is necessary to quote at length from that judgment 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.”

24. After making reference to **Mulla on Code of Civil Procedure**, 13th Edition, 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.”

25. Applying those principles to the application before us, we wish to pause this question to ourselves, has the appellant satisfied the prerequisites for the exercise of the Court’s discretion in its favour?

26. The first prerequisite is that the appellant must show that the evidence could not have been obtained with reasonable diligence for use at the trial.

27. The decision of the High Court that is challenged in this appeal was given on 5th December 1997. The proceedings in Chief Magistrates Court at Nairobi, Criminal Case No. 1193 of 1997 were

conducted between May 1997 and October 1999. The judgment in that case was delivered on 3rd November 1999.

28. Accordingly the proceedings and the judgment in Criminal Case No. 1193 of 1997 could not have been obtained before the ruling and order that is impugned in this appeal which was given as we have said, on 5th December 1997. The first requirement is met.

29. The second consideration is whether the evidence is such that, if given, it would probably have an important influence on the result of the case. In other words, would the proceedings and judgment in Criminal Case No. 1193 of 1997 have influenced the impugned ruling?

30. We think those proceedings and ruling in Criminal Case No. 1193 of 1997 are relevant to the question of derivation of the authority of appellant's advocate who entered into the consent order on 2nd October 1996 that was the subject of the application for review. In our view therefore, it is probable that the proceedings and judgment in Criminal Case No. 1193 of 1997 would have influenced the outcome of the impugned ruling.

31. Finally we are unable to say that the proceedings and judgment Criminal Case No. 1193 of 1997 lack credibility.

32. For those reasons we allow prayer 2 of the application dated 6th June 2011 limited to the extent only that the proceedings and judgment in Criminal Case No. 1193 of 1997 annexed to the affidavit of Joseph Mwangi Kiarie sworn on 6th June 2011 be deemed part of the record. For the avoidance of doubt, the appellant shall file and serve on the respondents, within 14 days from the date of delivery of this ruling, a supplementary record consisting only of the proceedings and judgment in Criminal Case No. 1193 of 1997, and prayer 1 of the appellant's application dated 6th June 2011, to the extent that it seeks an order for the affidavit of Joseph Mwangi Kiarie to be part of the record is declined as that affidavit does much more than merely conveying the proceedings and judgment in Criminal Case No. 1193 of 1997.

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

Dated at Nairobi this 24th day of May 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR