



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, WAKI & AGANYANYA, JJA)
CIVIL APPEAL/APPLICATION NO 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 KUGURU.....8TH
RESPONDENT

WAIRIMU KARIUKI.....9TH
RESPONDENT

MWAURA WAMUTI MUTHEE.....10TH
RESPONDENT

MBUGU NGIGI.....11TH
RESPONDENT

FRANCIS NDUNGU.....12TH
RESPONDENT

NJERI MBUGUA.....13TH
RESPONDENT

G.R. MUTHURI.....14TH
RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Ole Keiwua J) dated 5th December 1997

in

H.C.C.C. NO 5261 of 1988)

RULING OF THE COURT

This is an application under **rules 29(1) (b), 31 and 42** of the Court of Appeal Rules. It seeks an order that additional evidence from the 1st and 2nd respondents in the appeal be taken.

The parties have been in and out of the Courts since 1986; and in the process have filed myriad applications which total more than a dozen. Some of these cases have landed in this Court.

The dispute concerns a piece of land measuring 25 acres or thereabouts comprised in L.R. Nos. 10262 and 11694 (hereinafter “ the suit land”) which had been purchased by the respondents from the appellants in the appeal on 23rd February 1985. After purchase, the respondents sub-divided the suit land into smaller portions and offered them for sale to interested parties who are now resident on the suit land. The purchasers have subsequently erected dwellings thereon of various structures and the cluster of houses has formed what is known within the City as Kijiji.

The applicants aver that pursuant to a consent order recorded in the superior court on 2nd October 1996 the suit land had been transferred to the appellant in the appeal and consequently the substratum of the appeal is gone; that over the years the ownership of the land has subsequently changed hands; that some of the respondents listed in the appeal are no longer interested in pursuing the appeal; and that some of the respondents are dead. Mr Nyaoga, learned counsel for the applicants contends that the evidence to be adduced was not available during the hearing of the suit and is not therefore reflected in the record of the appeal.

It is, also, Mr. Nyaoga’s further submission that the evidence to be adduced is crucial and will assist in the proper determination of the issues in the appeal.

However Dr. Kuria, learned counsel for the appellants in the appeal and the respondents in the application contends that the application is misconceived and falls outside the ambit and scope of **rule 29**.

Rule 29 (1) of the Court of Appeal Rules (**the Rules**), 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.”

In **Mzee Wanjie & 93 Others v Saikwa & Others (1982-88) 1 KAR.462**, which was applied in **Edgar Ogechi & 12 Others vs University of Eastern Africa, Baraton, (Civil Appeal (Application) 130 of 1997)** (unreported) and also in the old case of **Karmali Mohamed & Another v. Z.H. Lakhani & Company [1958] EA. 567** it was held 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.

The evidence the applicants wish to adduce as additional evidence will show in part that the 4th, 6th 7th 10th, 11th and 12th respondents in the appeal are deceased and no applications for substitution have been made to cause their legal representative to be made parties to the appeal. No doubt, if this is so, the appeal might have abated as against them since according to Mr Nyaoga, they died more than 12 months ago. As the review application, the subject matter of the appeal was heard and determined in 2002, the evidence sought to be adduced, that is the death of some of the respondents was then unobtainable even with reasonable diligence.

We are on our part satisfied that the evidence to be adduced is weighty and credible and it would definitely have an important influence or impact on the result of the appeal.

Further, our invocation of the overriding objective in the circumstances leads to the same conclusion.

For the foregoing reasons, we allow the application and permit the applicants to adduce additional evidence in this appeal. This will be done before the High Court of Kenya at Nairobi. Costs shall be in the appeal.

Dated and delivered at NAIROBI this 23rd day of September, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.