IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Hancox JA, Chesoni & Nyarangi Ag JJA)

CIVIL APPEAL NO. 72 OF 1982

BETWEEN

WANJE...APPELLANT

AND

A.K.SAIKWA..RESPONDENT

(Appeal from the High Court at Mombasa, Schofield J)

RULING

Hancox JA This application under rule 29(1) to admit or to direct the admission of evidence additional to that which was adduced before the High Court was made at the eleventh hour as the appeal was called on for hearing. Leave was only given to bring the application at that stage because a new advocate, Mr Mburu, had just been handed the brief (Messrs MM Kupalia & Co of Malindi having acted for the ninety-four appellants, and former defendants, from the inception of the proceedings in the High Court), and stated from the Bar that it was his opinion that "very many" matters of fact had been omitted by the witnesses before the court of trial. Mr Mburu added that his case on the appeal would be "quite spurious" without these facts. He stated with engaging frankness that he was unable to advance any good reason as to why the evidence proposed had not been adduced at the trial, as there was ample opportunity to do so, a matter emphasized by Mr Kamere in his submissions on behalf of the respondents. Mr Kamere, not unnaturally, objected to the application and to the further delay thereby entailed, the matter having dragged on, to the prejudice of his clients, he said, for a considerable period of time.

When the application was brought before the court however, it transpired that much of the factual material contained in the supporting affidavit of Joshua Mashaka, the third appellant, and the third original plaintiff, had already appeared in the evidence recorded by Schofield J, from whose decision granting the declarations sought by the respondents, and evicting the appellants from the land at LR 384 (11) Mombasa mainland, the substantive appeal is brought.

Having compared the material in the supporting affidavit with the evidence recorded it is clear that the vast majority of the material in the former is not new evidence. Moreover in some instances, as Mr Kamere pointed out, the proposed evidence is contrary to that which was said below; for instance, Gibson Kayungi Mwagadi, as second defence witness, said that the first respondent, A K Saikwa, agreed to sell his share to the appellants, while in paragraph 21 of the affidavit Mr Saikwa it is said that he was one of those who told them to leave immediately. Another example is that Hussein Dairy never objected to the appellants' continued occupation (paragraph 13) which is contrary to Mashaka's own evidence. Again, paragraph 18 says that the appellants would insist on alternative land, but the evidence shows that they would have been unlikely to accept this, at least unless they were compensated for the trees they had planted. The rule does not entitle the party applying to bring in contradictory, as opposed to additional, evidence, for to do so would mean that the case would in effect be reheard and retried as to the existing facts, which cannot have been the intention behind the rule.

Leaving aside the matters of antecedent history and of argument contained in Mashaka's affidavit, I can detect only two matters which can reasonably be said to be additional to that which was said below; first, the paragraph relating to the efforts of the late Mr Ngala on the appellants' behalf, following which a valuation was obtained at Kshs 200 per acre, and secondly the sign boards said to have been erected on the land, stating it had been acquired compulsorily by the government for use by the prisons department. This is of course in support of the allegation of cheating in paragraph 22. Since the first respondent is a former Commissioner of Prisons and the second respondent a retired Senior Assistant Commissioner of Prisons, it would seem that, if such notices were erected, it would give a misleading impression to the occupiers. It would inhibit their attempts to forestall the Land Control Board consent to the sale to the respondents by buying the land themselves, to their efforts to collect money for which reference is made in the evidence. To that extent pressure would have been exerted on them.

Is there a likelihood that the foregoing would have affected the result of the case" In my opinion not. It would probably have shown the respondents in an unmeritorious light and thus made possible negotiations during the suit. But I am not persuaded either that these proposed instances of additional evidence, if ordered to be taken, would be likely to affect the result of the suit, or that such evidence was not available by the exercise of reasonable diligence before and during the trial, (indeed the contrary would appear to be the case).

Both these conditions have in my opinion to be established by the applicant before he can succeed under rule 29(1)(a). In *Cooley v Edwards* [1982] New Law Journal, page 247, the English Court of Appeal, in dealing with the more restrictive provisions of RSC order 59 rule 10(2), said:

"It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court's decision."

I consider that the same test should be applied under our rules, for otherwise it would open the door to litigants to leave until an appeal all sorts of material which should properly have been considered by the court of trial. For these reasons I would dismiss the first prayer in the notice of motion.

I come now to the second prayer, to which the affidavit of Mr Mburu is directed. This is seeking re-appraisal of the evidence taken at the hearing, for the purpose of a finding that the appellants have acquired rights by adverse possession under the Limitation of Actions Act, cap 22, to section 7 of which Mr Mburu drew our attention, emphasising the words "if" the right of action "first accrued to some person through whom he claims." This suggests the possibility of aggregating periods of adverse possession, inasmuch as if the appellants held the land unlawfully during the ownership of Hussein Dairy, they might be able to establish the twelve years period necessary for adverse possession under

sections 13 and 17. As the learned judge said in his admirably clear judgment the question of adverse possession was not pleaded, but it is included in the memorandum of appeal. Indeed it forms the basis thereof. The judge made specific findings that the licences formerly granted lapsed on the transfer to Hussein Diary, and that the appellants were there “against the wishes” of Hussein Dairy, but held that adverse possession had nevertheless not been established. I would only mention in this connection the court’s recent decision in *Sisto Wambugu v Kamau Njuguna*, Civil Appeal No 10 of 1982, in which the questions of occupation by virtue of a contract and of adverse possession were considered in relation to one another.

For my part I consider it would be premature at this stage to embark upon a re-appraisal of the evidence, as the appeal has not yet been heard and, in particular, the respondents have not been heard on that part of the application. Whether this court should re-appraise the evidence or not is a matter which should be argued at the hearing of the appeal. I would therefore adjourn that part of the motion until then. The appeal could not be heard on the day allotted because of this application, and could not be heard thereafter, as the sessions terminated. Unfortunately it will not now be heard for another 5½ months, assuming it is included in the July sessions; resulting in justice being further delayed, to the prejudice of one or other of the sets of parties. As May LJ recently said in *Dwyer v Rodrick* LG November 23, 1983:

> “Delayed justice runs the substantial risk of becoming injustice for one side or another.”

As regards the costs of that part of the application which I would dismiss, I consider there can be no question but that the respondents should have the costs thereof and I would so order. I would finally observe that certain necessary exhibits such as, for example, the licences, have not been included in the record of appeal, as required by rule 85(1)(f) of the court’s rules.

Chesoni Ag JA. On September 24, 1982, Schofield, Ag JA, as he then was, gave judgment for the respondents against the appellants in a land dispute suit. He declared that the appellants were not entitled to enter and reside upon the respondents’ land or cause or permit others to enter and or reside upon the same; ordered eviction of the appellants and awarded the respondents damages at the rate of Kshs 1,000 per year beginning from 1975 and ending in 1982, the total of which he fixed at Kshs 7,000. The appellants appealed against the whole of that decision.

At the trial the appellants, who were then defendants were represented by Messrs MM Kupalia & Co advocates, but in this court Mr Mburu appeared for them, and, it was him who applied to us for leave to adduce additional or further evidence under rule 29(1) of the Court of Appeal Rules. The reasons for and the circumstances under which the application was made have been set out by my learned brother Hancox, JA in his judgment which I have had the advantage of reading in draft and I agree with it.

Rule 29(1)(a) gives this court power on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, in its discretion, for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. I have been unable to locate reported or unreported local case law on the subject of receiving further evidence in a civil case. In criminal cases the principles applied were laid down in *Elgood v Regina* [1968] EA 274 by the former East African Court of Appeal, which decision is still good law in Kenya. I agree with Hancox, JA that the English RSC order 59 rule 10(2) which deals with the same subject is more restrictive than the provisions of our rule 29(1). The English provisions restrict the appellate court to receiving further evidence only on questions of fact, whereas the Kenyan rule does not confine the court as to the area on which further evidence may be received, but our rule requires the applicant to establish sufficient reason for receipt of such further evidence, and in my opinion this court can exercise the discretion to receive further evidence only after

sufficient reason has been shown.

In my opinion, notwithstanding the above differences, between the English provisions and our rule 29(1) 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.

Ladd v Marshall, *ibid*, was approved in *Skone v Skone* [1971] 1 WLR 812. As it is correctly stated in *Mulla on Code of Civil Procedure*, 13th Edn Volume 11 page 1606, in a commentary on a similar Indian rule, 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 has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in 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 to 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.

The additional evidence it is sought to adduce is set out in the affidavit of Joshua Mashaka, who testified in the High Court at the trial. What the deponent has sworn to in paragraph 2 to 18 inclusive was said in one way or another at the trial and if it was not it was evidence that could have been obtained with reasonable diligence. Again this same witness or any other for the appellants could have told the trial court what Joshua said in paragraph 19 to 27 inclusive. For example what is alleged in paragraph 19 about sign boards stating that the land had been required by the government for use by the prisons department could have been said before or after the following in examination-in-chief at the trial;

"After a short time we started seeing prisoners coming to collect some of the crops, mangoes, coconuts, cassava."

The same witness could have then narrated how the appellants discovered that they had been cheated about acquisition of the land by government. On the other hand even if what is stated in Joshua's affidavit were to be admitted as fresh evidence eg that the late HO R G Ngala was helping the appellants to purchase the land before he died and that the respondents used their positions and influence in government to get the land, such evidence would not in law influence the result of the case in any way at all. Indeed, the allegation of use of the name of the government, and, in particular the prisons department, to acquire the suit land by the respondents most of who were senior prison officers, if true, is deprecable. In my opinion what the appellants have tried to do is to have a second bite at the cherry, and, if possible, make out a fresh case on appeal based on adverse possession. But they still say that they were allowed to stay on the suit land by the previous owners at a monthly rent of Kshs 3 per

person. Mr Mburu said they were tenants-at-will. They may have been that or licencees. Whatever they were, it is doubtful whether any of those two status would help them advance a case for adverse possession as time would run only after they cease to be tenants at will or licencees. I do not find the proposed additional evidence needful. The applicants/appellants have not fulfilled the conditions which justify the receipt of fresh evidence on appeal. As to re-appraisal of the evidence I agree with Hancox JA that that must await the hearing of the appeal, when the power conferred under rule 29(1)(a) of the rules of this court may be exercised. No re-appraisal can meaningfully be made without first hearing the parties' full submissions.

The litigation in this matter started in 1981 and the lives of over 94 families are in suspense. The respondents cannot develop the land as they wish. It is, in the circumstances, in the interest of justice, for the appeal to be disposed of as early as possible. For the reasons given I would dismiss the Notice of Motion with costs.

Nyarangi Ag JA: Just before the hearing of the appeal, Mr Mburu for the appellants moved the court pursuant to rule 29(1) to direct that additional evidence be taken.

The court has power to so direct for sufficient reason. Mr Mburu's ground for making the application was that many facts had emerged which had been overlooked by the witnesses who testified before the High Court. Mr Mburu observed that without the additional evidence the appeal was hopeless. He gave no reason why the evidence sought to be adduced was not given at the trial. A different advocate appeared for the appellants before the High Court.

Mr Kamere resisted the application. He argued that it had not been shown that the evidence the subject matter of the application was not available at the time of the trial and that many of the averments in the appellants' supporting affidavit were given during the trial. The affidavit of Joshua Mashaka, one of the appellants, is replete with matters already on record in one form or another. There are however a few matters which contradict the evidence on record. The contradictory matters are of no value to the appellants' case.

The effort by the late Ngala on behalf of the appellants and the notices put up to the effect that the government had acquired the land were not mentioned to the trial judge. It could be said that the notices had the effect of warning the appellants not to press their claim any further. But the appellants were in possession of that information and should have volunteered it for what it was worth.

In civil cases, leave is granted under rule 29 if the evidence could not have been obtained for use at the trial with reasonable diligence, will probably influence the result and is on the face of it credible: *Karmali Tarmohamed v I H Lakhani* [1958] EA p 567. An application under rule 29(1) has to satisfy the conditions stated above. Here the appellants would have easily obtained the information on the late Ngala's efforts and on the notices erected within the land. In any case even if there was additional evidence on the two matters, the result of the decision would not be affected.

I agree with the view of Hancox JA whose judgment I have had the benefit of reading that no re-appraisal of the evidence can properly be undertaken at this stage. The court will have to be addressed on the evidence and the respondent heard in reply before the evidence can be re-appraised. I agree that the part of the motion seeking a re-appraisal of the evidence be adjourned until the hearing of the appeal. I would dismiss the application to adduce additional evidence.

I agree with the order proposed by Hancox JA on costs.

Dated and Delivered at Nairobi this 23rd day of February 1984.

A.R.W.HANCOX

....

JUDGE OF APPEAL

Z.R.CHESONI

....

AG.JUDGE OF APPEAL

J.O.NYARANGI

....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer