



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E319 OF 2020

BEN OTIENO OWAGA

NOEL SHEUNDA NYONGESA

(BEN OTIENO OWAGA & NOEL SHEUNDA NYONGESA)

Suing as the administrator's ad-litem of the estate of

MICHELLE AITTAH OWAGA (DECEASED).....APPELLANTS

VERSUS

JUBILEE INSURANCE COMPANY LTD.....RESPONDENT

RULING

The applicant filed a Notice of Motion dated 26th July 2021 seeking the following orders;

1. That leave be granted to the appellants to adduce additional evidence in the form of;

a) Respondent's two emails dated 17th February 2021

b) Appellant' letters dated 18th and 19th February 2021 in response to the respondents said emails and proof of payment of taxed costs by the respondent in Nakuru HCCC No. 340 of 2012 annexed to the supporting affidavit and marked BOO-1 (a) (b) and (c)

2. That costs of this application be in the appeal.

The application was based on the grounds on the face of it and on the supporting affidavit of Ben Otieno Owaga. It was submitted that the appellants were the victims of a self-involving accident that occurred on 25th April 2010 at Chepsir area along the Kericho Nakuru highway. The accident vehicle was registered as UAG 226H and was insured by Jubilee Insurance Company, the respondent. After the accident the 1st and 2nd appellants obtained a *grant ad litem* over the estate of their deceased child Michelle Aittah Owaga who suffered fatal injuries from the accident. The vehicle was foreign registered and the appellants vide letters dated 1st November 2011, 19th January 2012, 2nd February 2012 and 20th February 2012 unsuccessfully sought to know from the respondent the identity of the respondent's insured to enable them to file a suit for compensation. The respondent did not respond to any of the letters despite being personally served.

The applicants proceeded to search the Ugandan Revenue Authority which disclosed the registered owner of the vehicle to be Kapkwata Sawmills Limited. The appellants then served the respondents with the relevant statutory notice and then proceeded to file Nakuru HCCC No. 340 of 2012 against Eliakim Owalla as the driver and Kapkwata Sawmills Limited as the registered owner. Judgement was entered in default after the defendant failed to enter appearance. The appellants vide letter 13th July 2018 notified the respondent of the Judgement and the respondent vide their email dated 9th August 2018 requested the respondent to hold the matter in abeyance.

The respondent did not settle the decretal sum and this forced the appellants to file a declaratory suit in Nairobi CMCC No. 9296 of 2018. The respondent moved the court by motion dated 1st April 2019 to set aside the judgment and by the affidavit sworn by the respondent legal officer, the respondent admitted that it was the insurer of the defendant. The application was thereafter dismissed and the respondent sought leave to amend their defence and to plead that Kapkwata Sawmills Limited was not their insured but Fidelity Timber and Hardware and that

Fidelity Timber was not sued in the parent suit. The magistrate granted the respondent leave to amend its defence and the applicants now seek to produce additional documents where the respondents admitted the claim and sought the bank details and KRA PIN from the appellant, a letter dated 17th February where the respondent stated that their liability was policy limited to Kshs. 2,000,000 and paid taxed costs of Ksh 347,519 that were certified in the parent suit.

It was the appellant's submission that the evidence sought to be submitted are all admissible and relevant to the conclusive determination of this appeal as they disclose the deceptive nature of the respondent and that their admission of liability to the appellants. In support counsel for the appellant cited **Attorney General v Torino Enterprises Limited [2019] eKLR** where the court they cited **Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR** where the Supreme Court laid guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:

- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;**
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;**
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;**
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;**
- (e) the evidence must be credible in the sense that it is capable of belief;**
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;**
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;**
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;**
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.**
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.**
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.**

The application was opposed by the replying affidavit of Patience Mirara dated 1st October 2021. It was indicated that the documents or letters sought to be introduced by the appellant were expressly based on a without prejudice basis. The respondents offer to settle the appellants claim at Kshs 2,000,000 was rejected by the appellant as evidenced in their letters dated 19th and 18th February 2021.

Counsel for the respondent argued that the appeal herein concerns amendment of pleadings. He reiterated it was the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR** that laid guidelines for admission of additional evidence before the appellate courts in Kenya. That the applicant must therefore substantively comply with the guidelines and the application herein has failed this test.

Analysis and determination

The application under consideration is one for leave of the Court to adduce additional evidence on appeal. Therefore, **Section 78 of the Civil Procedure Act and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010** is the legal foundational basis of the application. For ease of reference the section states as follows:-

“(1) Subject to conditions and limitations as may be prescribed, a appellate court shall have power –

- a) to determine a case finally;**
- b) to remand a case;**
- c) to frame issues and refer them for trial;**
- d) to take additional evidence or to require the evidence to be taken;**

e) to order a new trial.

2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 provide as follows: -

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if

a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

The appellants have sought leave to adduce additional evidence that they feel is relevant to the conclusive determination of this appeal as it is alleged to disclose the deceptive nature of the respondent. The respondent on the other hand is of the view that the appellants did not meet the conditions to warrant granting of the said orders.

The affidavit sworn by Ben Otieno Owanga annexed the evidence to be adduced. These documents include the respondents' two emails dated 17th February 2021 and the appellant's letters dated 18th and 19th February 2021 that are in response to the respondent's emails. The appellants have not shown that the evidence could not be obtained for use at the trial or was not within their knowledge.

The appeal herein emanates from the trial court's ruling delivered on 30th October, 2020 allowing the respondent to amend its defence. The effect of the amendment is to allow the respondent plead that it did not insure the defendant who was sued in Nakuru HCCC No.340 of 2012. The suit before the trial court has not been heard. The additional evidence seems to be in support of the main appeal in relation to the issue of amendment. The appeal is yet to be heard. Before the trial court, the plaint dated 18th October, 2018 seeks the following prayers:-

(1) Declaration that the defendant being the insurer of the suit motor vehicle is statutorily obliged and/or bound to settle the decree dated 12th October 2017 issued in Nakuru HCCC 340 of 2012.

(2) Kshs. 4,116,000/-

I do take cognizance of the appellant's position that the respondent is being brought to the proceedings on the contention that it insured Kapweta Saw Mills Limited. The prayers being sought in CMCC 9296 of 2018 specifically point to the fact that the respondent insured the accident vehicle. The issues are yet to be determined in a full trial and the trial court simply exercised its discretion and allowed the respondent to amend its defence. Whether the respondent insured Kapweta Saw Mills or not will be determined during the hearing. Whether the respondent insured the accident vehicle or not will also be determined after a full hearing.

The provisions of Section 78 of the Civil Procedure Act envisages a situation where the case before the trial court was fully heard and determined. The applicant in such an application would be seeking leave of the court to adduce additional evidence that was not produced during the hearing. What transpired before the trial court was an application to amend the defence. The trial court could not have insisted on the appellants' contention that the respondent admitted the liability having insured Kapweta Saw Mills. That evidence can be adduced during the hearing. The appellants will be at liberty to produce such evidence. The evidence which is the subject of the current application has not been locked out by the trial court. The applicant seems to be apprehensive that if a new insured is introduced then the claim may be time barred. The record shows that the appellants obtained registration records of the accident vehicle from Uganda and that would be part of their evidence before the trial court. The plaintiffs/appellants would equally be in a position to amend their plaint and plead on the aspect of admission by the defendant. All in all, I am satisfied that the evidence which is intended to be adduced in the appeal has not been locked out by the trial court. The appeal relates to a ruling and no evidence has been adduced for the court to consider the aspects of additional evidence. Due to the nature of the pending appeal, I cannot expound on the matter further as some of the issues touch on the main appeal.

I do find that the application dated 26th July 2021 lacks merit and the same is disallowed. Costs shall follow the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH, 2022

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S.J. CHITEMBWE

JUDGE