



REPUBLIC OF KENYA



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**Moraa v Constance & another (Civil Appeal 15 of 2015 & 8 of 2016
(Consolidated)) [2022] KEHC 10227 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL 15 OF 2015 & 8 OF 2016 (CONSOLIDATED)**

**F GIKONYO, J
JUNE 29, 2022**

BETWEEN

ANNAH MORAA APPELLANT

AND

OKUMU CONSTANCE 1ST RESPONDENT

SAMMY MUTUNGA MAINGI 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion dated November 24, 2021 which seeks the following orders: -
 - i. spent
 - ii. That the Honourable Court do apply the slip rule in this case and correct an error on the face of the trial court's record.
 - iii. That in the alternative the court be pleased to grant the appellant leave to file and adduce further evidence.
 - iv. That costs be in the cause.
2. The application is based on the grounds set out in the application, the supporting affidavit as well as supplementary affidavit- both sworn by Rose Obaga on November 24, 2021 and February 17, 2022, respectively.
3. The respondents opposed the application through a replying affidavit sworn by Nancy Kasyoka on January 28, 2022.
4. The appeal was canvassed by way of oral and written submissions.



The appellant/applicant's submissions.

5. The applicant submitted that this court has jurisdiction and the powers to grant the prayers sought in the application.
6. The applicant further submitted that the medical report was produced as an exhibit but was not marked as an exhibit as was intended by both parties in the lower court.
7. According to the applicant, the medical report can be produced as 'new' evidence on appeal.
8. The applicant stated that the application was made promptly and therefore there was no inordinate delay.
9. The applicant has relied on the following;
 - i. Section 3 and 78 of the *C.P.A.*
 - ii. *Republic vs Abolfathi Mohammed & another* [2019] eKLR.
 - iii. *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR.
 - iv. Order 42 Rule 27 *C.P.R.*
 - v. *Mzee Wanjie & 93 others v A.K. Saikwa and others*[1982-88] 1 KAR 462
 - vi. *Raila Odinga & 5 others vs Independent Electoral and Boundaries Commission and 3 others* [2013]
 - vii. *Mohammed Abdi vs Ahmed Abdullahi's Mohamed and 3 others* [2018] eKLR.
 - viii. *Attorney General v Tonno Enterprises Limited* [2019] eKLR.
 - ix. *EO v COO* [2020] eKLR.

Respondents Submissions.

10. The respondents submitted that the appellant has not met the requisite standard for setting aside of a consent. The proceedings sought to be improved were taken by consent and the appellant was the one who dictated the terms of the consent to the court.
11. The respondents submitted that the prayer to adduce new evidence at this appellate stage is an afterthought and an attempt to patch up her case. The evidence was all along in possession of the appellant.
12. The respondents submitted that the slip rule does not apply in the circumstances of this case and that the terms of the consent as recorded on July 21, 2015 should not be reviewed or improved.
13. The respondents submitted that the slip rule grants this court powers to amend its own orders or judgment to give effect to its intention but does not grant an appellate court powers to amend or improve proceedings before the lower court to achieve what is claimed to be the intention of parties.
14. The respondents submitted that the appellant should not be granted leave to adduce additional/ evidence as the same does not amount to compelling evidence.
15. The respondents relied on the following authorities
 - i. Order 18 Rule 4 *C.P.R*



- ii. Section 99 *C.P.A.*
- iii. *Kibara Mercy Wairimu & 7 Others v Kenya School of Law & 4 others* [2020] eKLR.
- iv. *Bishop John Nduati vs IEBC & 4 others* [2018] eKLR.
- v. *Patrick Kilonzo v Teachers Services Commission* [2015] eKLR.
- vi. *Kericho Guest House Enterprises Limited v Kenya Breweries Limited* [2018] eKLR.
- vii. *SMN vs ZMS & 3 others* [2017] eKLR.
- viii. Board of Trustees National Social Security Fund.
- ix. *Mohammed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR.
- x. *Safe Cargo Limited v Embakasi Properties Limited & 2 other* [2019] eKLR.
- xi. *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR.

Analysis and Determination

Issues

16. I have considered the application, the supporting affidavit, the replying affidavit, the supplementary affidavit, written submissions made and the relevant provisions of the Law. I find two issues arise for determination;
- i. Whether there is an error or omission on the face of the record;
 - ii. If the answer in (i) is in the affirmative; Whether the error or omission should be corrected under the slip rule, or by way of additional evidence.

Slip rule

17. Slip rule is provided in Section 99 of the *Civil Procedure Act* as follows:
- “Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
18. Is the error herein capable of correction under the slip rule?
19. The applicant opines that the error here is apparent on the face of the record, which should be corrected by the court under slip rule. The error according to the applicant consists in the disputed production of the medical report herein.
20. In the sense of the law, an error apparent on the face of the record is an ‘...error or omission [which is]...self-evident and should not require an elaborate argument to be established’ (*National Bank of Kenyam Limited vs Ndungu Njau* [1997] eKLR).
21. Looking at the arguments before me, I find two dilemmas in the proposed application of the slip rule. One, I doubt the rule could be used as a means to produce evidence. Second, I doubt the slip rule could be applied by the appellate court in respect of a judgment of the trial court.
22. The record of the trial court holds the answer. The plaintiff tendered the medical report to the trial court as his exhibit. One counsel for the defendants agreed to its production. The other counsel for the



defendants objected to its production and gave his reasons. The trial court did not formally record its decision on the objection. Nevertheless, the trial court shows that on November 11, 2014 the medical report by Dr. Wangata Theophilus dated February 23, 2012 was marked as PMFI 10. At page 3 of the trial court's judgment, the trial court listed the documents the appellant had produced at no. 11 as P Exh 11- a medical report dated February 23, 2012 by Dr Theophilus Wangata. The plaintiff as well as the defendants referred to and relied upon the said report in their submissions. Therefore, according to the record, the trial court admitted the medical report as the plaintiff's exhibit.

23. On the basis of the foregoing incidents, the question whether the medical report was produced in evidence as the exhibit of the plaintiff does not arise. Perhaps, any feasible challenge would have been on whether the objection to its production was disallowed- which really is a matter for appeal (interlocutory).
24. The error or omission was then carried forward to the judgment. I do not find any element or claim of fraud or stealth on the part of the applicant or the trial court. It would be most unjust to block such essential evidence which is available to the court and was relied upon by the parties and the trial court. Thus, the court is satisfied that the error or omission was accidental and inadvertent slip on the part of the parties, and the learned magistrate when he recorded the medical report was produced as exhibit.
25. In the interest of justice, the omission or error may be corrected under Section 99 of the Civil Procedure Act (slip rule). But, the nature of the error or remedy sought should determine whether it is a simple error that could be corrected under the slip rule. Substantial matters say production of evidence or joinder of parties or amendments of cause of action etc. should never be handled under the slip rule.

Leave to file and adduce further evidence.

26. The applicant sought an alternative remedy: that the applicant be allowed to adduce the medical report as additional evidence in the appeal.
27. Is this method feasible given the holding of the court in respect of the medical report?
28. Section 78 of the Civil Procedure Act 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.
29. 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.
30. It bears repeating that, the record of the trial shows that the appellant tendered the medical report in issue as an exhibit. Mr. Leteipa agreed to its production. The other counsel objected to its production. The court seems to have accepted the medical report as exhibit and so recorded it. Parties also treated it as an exhibit and accordingly relied on it their submissions. Therefore, the exhibit was produced and so the question of producing it as additional evidence does not arise. I find this method inapplicable.

Conclusion and orders.

31. For the foregone reasons, the Notice of Motion dated November 24, 2021 is unnecessary. I dismiss it.
32. Nevertheless, in light of the circumstances of this case and the reason for dismissing the application, I order each party shall bear its own costs of this application. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
29TH DAY OF JUNE, 2022**

F. GIKONYO M.

JUDGE

