



**Holiday Cars Travel & Tours Ltd v Lubanga & 2 others (Civil Appeal
28 of 2018) [2022] KEHC 11065 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 28 OF 2018
WM MUSYOKA, J
JULY 22, 2022**

BETWEEN

HOLIDAY CARS TRAVEL & TOURS LTD APPELLANT

AND

BLASIO ESHITEMI LUBANGA 1ST RESPONDENT

G4S SECURITY SERVICES 2ND RESPONDENT

ISAAC WANJALA WANYONYI 3RD RESPONDENT

(Being an appeal against the judgment of Hon. MI Shimenga, Senior Resident Magistrate, delivered on the 1st March 2018 in Butere PMCCC No. 34 of 2016)

RULING

1. On 26th September 2019, I delivered a ruling herein, where I declined an application by the 1st respondent for leave file additional evidence, on the basis that the 1st respondent had not filed across-appeal.
2. The ruling on 26th September 2019 prompted the 1st respondent to file an application, dated 14th September 2020, for leave to file a cross- appeal out of time. I delivered a ruling on 19th March 2021 on the application, dated 14th September 2020, allowing the 1st respondent time to file the cross-appeal out of time.
3. The 1st respondent then filed an application, dated 13th September 2021, seeking that the orders of 27th September 2019, which dismissed the application, dated 11th March 2019 and be substituted with one order allowing the application. That was the application seeking leave to file additional evidence. The said application was compromised by the parties on 29th November 2021, meaning that there was now leave of the filing of additional evidence. The matter was then stood over to 16th February 2022 for the purpose of receiving supplementary record of appeal.



4. Come 16th February 2022, the parties were unable to agree on the way forward. Mr. Mukisu, for the 1st respondent, stated that he had filed a supplementary record of appeal and an amended plaintiff, and was ready to take additional evidence. Ms Luyali, for the appellant, protested that the amended plaintiff brought out new issues that the appellant had not consented to. She averred that that the appellant had only agreed on an amended plaintiff limited to introduction of injury leading to the amputation of their lower limb only. She submitted that there were new issues relating to loss of use of right arm, provision for costs of an artificial arm, loss of user and special damages. She averred that those issues did not arise at the trial court, and the appellant would not have opportunity to address them. She submitted that the parties may have to go back to the lower court to do the matter de nove. She avers that new evidence was being introduced. Mr. Mukisu pleaded that there was no mischief. He invited the court to direct on the taking of addition evidence.
5. The application dated 11th March 2019, which the appellant conceded to on 29th November, 2021, had sought the admission of additional evidence, leave to amend the plaintiff to introduce new averments relating to the added evidence and direction on how the additional evidence was to be taken. That was what the appellant conceded to, and it is on that basis that the 1st respondent amended its plaintiff, to accommodate introduction of the additional evidence. The appellant conceded to that, and it cannot now walk away from it.
6. It purported compliance with orders of 29th November 2021, the appellant has purported to file a 2nd amended plaintiff herein. Pleadings before an appellate court take the form of appeals and cross-appeals. There is no provision for the filing of plaintiffs on appeal. The plaintiff that the 1st respondent purports to amend and file here is that filed in Butere SPMCCC No. 34 of 2016. That amendment can only be done to the plaintiff in Butere SPMCCC No. 34 of 2016, for there is no plaintiff in this appeal cause is available for amendment. The document, headed 2nd amend plaintiff, filed herein on 15th February, 2022, is strange and alien and struck out and expunged from the record.
7. If the nature of additional evidence that the 1st respondent desires to place on record cannot be so placed without the original pleadings in Butere SPMCC No. 34 of 2016 being amended to allow for introduction of averments to support the additional evidence, then it would mean that the additional evidence can only be taken by the trial court in Butere SPMCC NO. 34 of 2016. This court can only take additional evidence, in affidavit form only where the pleadings at the trial court remain intact, for an appellate court ought not conduct a full-fledged trial on the issues.
8. The final directions on the matter of additional evidence are as follows: -
 - a. That the 2nd amended plaintiff filed herein is hereby struck out and shall be expunged from the record, let the 1st respondent file the same in Butere SPMCCC No. 34 of 2016;
 - b. That upon the filing of the said 2nd amended plaintiff in Butere SPMCCC No. 34 of 2016, let the trial court taking additional evidence, limited to the issues raised in the 2nd amended plaintiff within the next 90 days;
 - c. That the trial court shall not make any determinations on the basis of the additional evidence adduced, instead the 1st respondent shall place the proceedings, related to the additional evidence, before this appellant court, by way of a supplementary record of appeal, to be filed herein within 30 days of the completion of the taking of the additional evidence by the trial court;
 - d. That thereafter directions shall be taken on the disposal of the appeal herein;



- e. That this matter shall be mentioned after 90 days for monitoring, compliance and thereafter directions; and
- f. That the Deputy Registrar shall cause a certified copy of this order or an extracted order from this ruling served on the Head of Station, Butere Principal Magistrate's Court, for compliance.

9. It is so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JULY 2022

W M MUSYOKA

JUDGE

Ms Luyali, instructed by Makokha Wattang'a & Luyali Advocate for the appellant

Mr. Mukisu, instructed by Mukisu & company Advocates for the respondent

Mr. Erick Zalo, Court Assistant.

