



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 40 OF 2018

WALTER KILONZI.....APPELLANT

VERSUS

MAHENDI LAKHANI

a.k.a MAENDIMAHAMAD HABIBHAI LAHKANI.....RESPONDENT

(Being an Appeal from the whole decision and judgement of the Honourable Chief Magistrate Dr. Julie Oseko on the 7th day of August, 2018 in Malindi Cmcc No. 189 of 2016)

CORAM: Hon. Justice R. Nyakundi

Mr Otara Advocate for the Appellant

Mr Ole Kina Advocate for the Respondent

RULING

The Appellant appealed to this Court challenging the judgement of the trial court dated 7th August, 2018 in CMCC No. 189 of 2016 in the interim a Notice of Motion was filed dated 28th June, 2021 seeking an order for the appellant to be allowed to produce additional documentary evidence at the appeal stage.

In support of the application applicant avers that; -

- 1. That the Appellant herein has discovered crucial evidence necessary for just determination of this appeal.***
- 2. That the evidence sought to be adduced is payment receipt confirming that the claim herein had been fully settled.***
- 3. That the said payment receipts have all along been in custody of Merry Beach Limited whose directors are based in Italy.***
- 4. That the Appellant/Applicant was under a honest mistaken believe that there was a sum due and owing to the Respondent at the time of the trial of this suit in the lower court thus.***
- 5. That the Appellant/Applicant had no reason to doubt the Respondent who claimed that there was a sum of Kshs.900,000/= owing and due and thus entered into a consent on the payment of the said sum of Kshs.900,000/=.***
- 6. That the Appellant/Applicant had previously done many transactions with the Respondent and had thus build trust and confidence upon the Respondent.***
- 7. That the total contractual sum was Kshs.8,898,300/= out which sum the Appellant/Applicant was under a mistaken believe that there was a balance of Kshs.900,000/= still owing.***
- 8. That the Appellant/Applicant has now found all the payment receipts totalling to a sum of Kshs.8,898,300/=.***
- 9. That the said alleged balance has since attracted a lot of interest.***
- 10. That the Appellant/Applicant expected the Respondent to avail its accounts showing the balance of Kshs.900,000/=.***

11. That for justice to be done in this matter, it would be fair, just and reasonable that the Appellant/Applicant be allowed to demonstrate payment in full.

12. That the Orders sought herein above do not prejudice the Respondent in any manner whatsoever.

In addition the applicant on oath swore an affidavit to broadly explain the reasons why this Court should exercise discretion in his favor. On the part of the Respondent a replying affidavit to oppose the applicants motion sets out the objections; -

a) That my understanding of the application is that the appellant is seeking to supply information that was all along in the possession of his employer Merry Beach Ltd. What is clear is that the evidence was available all along, but the appellant failed to produce it.

b) That further to the above, the appellant has not demonstrated that he was prevented by any sufficient reason from tendering the evidence otherwise in his possession, during the trial. It will be recalled that the appellant was the accountant and company secretary of Merry Beach Limited.

c) Further to the above, the appellant has not demonstrated that the evidence sought to be tendered could not have been obtained with diligence for use in the trial. The suit herein was filed on 25th August, 2016. The case was heard between 14/04/2018 and 29/05/2018. Judgement was read on 7th August, 2018 and the appeal filed on 5th September, 2018. It is not explained why those records were never obtained in all this time.

d) That further to the above the appellant admitted drawing and signing the impugned agreement and the trial court made a specific finding that the agreement was signed by the parties and the original was accepted in evidence.

e) That is clear to me that the appellant is seeking to supply evidence on appeal that he failed to provide during the trial to patch up and strengthen his case. This, my advocate on record advises me, is not permissible.

f) That issue of the reconciliation of accounts was raised by the appellant in his statement dated 16th of April, 2018. There was no suggestion at this stage that records were in Italy therefore this belated attempt to introduce the alleged receipt is an afterthought.

g) That I believe that there must be an end to litigation and permitting the retrial of this case on appeal based on evidence deliberately concealed from the trial Court would not advance the cause of justice.

Having considered the Notice of Motion and subsequent material for and against the application, it is now my singular duty to answer the question whether there is merit for the relief sought to be granted.

Determination

The anchor for admission of fresh evidence the appealing appeal is provided for under section 78 of the Civil Procedure Act. The policy considerations as laid down in by the Supreme Court of Canada in *Palmer V Palmer [1980] 30 DLR 212*;-

1. That the evidence should generally not be admitted if, by due diligence, it could have been adduced at the trial provided that the general principle will not be applied strictly a criminal case as is in civil cases.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

3. The evidence must be credible in the sense that it is reasonably capable of belief and

4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at the trial be expected to have affected the result through the statute provided for admission of new evidence to an existing appeal.

The discretion to be exercised should take into account the factors in palmer case but with a restriction of not re-opening a completely new trial which must be on new issues not pleaded in the plaint or defence. I think that is the point the judge in *Caswell V Toronto Railway Co.* to emphasize in the following passage; -

“A new trial is a hardship under any circumstances and when governed upon insufficient grounds is a very grave injustice, to take away from anyone that which has been fairly won, and to subject him to the delay and cost and the mental and physical strain of another trial as well as to the uncertainty of its outcome is something which fairly may be thought intolerable. New trials are of course occasionally necessary in order that justice may be done between the parties but they are contrary to the public interests and may fairly be described as necessary evils, when necessary. A strong case must therefore be presented before a new trial can be properly directed, so strong that even in some cases, where an injustice has been done to one of the parties at the trial, a new trial is not granted. Unless the error was pointedly objected to at the time and all through the practice upon application for new trials the like reluctance in granting new trials in everywhere evident.”

I bear in mind that admitting new evidence on appeal can be a tricky matter though an innovative feature of a fair trial, traditionally the compelling rights of the parties have already been adjudicated before the primary court. At the trial the parties presented evidence which was classified into two categories, testimony of the witnesses and documents where witnesses were examined and cross examined at the trial. At

the end of the trial the verdict was delivered and the judgement rendered to the winner. The aggrieved party has a constitutional right of appeal on the impugned judgement. The record of appeal contains a summary of the pleadings, the issue or issues joined thereon and the judgement of the Court. The appeal's court therefore decision is underpinned by the record of the lower court. Save only with special leave new or additional evidence which was never availed can be admitted.

In the instant case the evidence sought to be adduced by the appellant relates to the claim in Cmcc No. 189 of 2016 between the respondent as against the appellant. In the language of persuasion the applicant avers that the crucial evidence was just discovered. That the appellant all along was under a honest mistaken believe that there was a sum due and owing to the respondent. The fresh evidence regarding the appellants conduct is detailed in the affidavit filed in this matter.

In the context of exercising discretion for leave to adduce new evidence on appeal, the Supreme Court in *Mohamed Abdi Mohamed V Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR*. The following guidelines were given; -

- a) The additional evidence must be directly relevant to the matter before Court and be in the interest of justice.*
- b) It must be such that if given, it could influence or impact upon the result of the verdict although, it need not be decisive.*
- c) It is shown that it would 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) The evidence must be credible in the sense that it is capable of believe. Where the additional evidence disclosing a strong prima facie case of willful deception of the Court, 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.....*

Giving effect to the above principles it seems to me that in relation to the claim before the lower court a plaint was filed on 25th August, 2016 by the respondent seeking Kshs.1,349,909/=-, plus costs against the appellant to this appeal. The appellant, then adjournment filed a statement of defence dated 20th October, 2016. Thereafter at the close of the pleadings hearing commenced in earnest on the agreed issues to the claim. The Court's verdict on the issues was delivered on 7th August, 2018. I take cognizance that a party to a litigation has a right to have his or her case considered under whatever policy the Court sees fit to adopt provided that the adopted party is a lawful exercise of the discretion confirmed by the state and long-standing jurisprudential principles.

Precisely, the same is true of admission of new evidence on appeal. The due diligence principle as its commonly termed holds parties in a trial process accountable for any lapses, blunders, acts of omission or negligence perpetrated in the course of trial. The due diligence obligation particularly to litigants is to exercise due care and attention to detail of the real issues in the case and to identify evidence in support of the claim in advance before the commencement of a trial. Failure to discharge this public duty in the administration of justice renders the party in default accountable for the lapse.

On appraisal of the record and the relevant excerpts, I find no relevant circumstances pointed out by the appellant concerning the proceeding that were not considered by the trial court in the impugned decision. In this context, there has no sufficient ground established by the appellant that the evidence sought to be adduced could not be availed at the trial.

The other test which ought to be met by the appellant is why it took him over four years to come across that new and additional evidence since the filing and determination of the suit. Whether, the mechanism of admission of additional evidence on appeal under section 78 of the Civil Procedure Act that could have been a decisive factor in reaching the impugned decision is moot.

As a consequence, presumed lack of due diligence and the failure of it to satisfy the criteria of a decisive factor militates against the exercise of discretion to grant the reliefs in the Notice of Motion dated 25th June, 2021. The motion is lost with costs to the Respondent.

DATED, SIGNED AND DISPATCHED via email AT MALINDI ON 19TH DAY OF AUGUST 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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