



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO E008 OF 2020**

**BRYANSON COMPANY LIMITED.....APPELLANT**

**VERSUS**

**EPHY ANYANGO AUMA.....RESPONDENT**

**(Being an Appeal from the Judgment and decree of Hon P.N Gesora (CM)**

**delivered at Kisumu in Chief Magistrate's Court Case No 168 of 2020**

**on 10<sup>th</sup> September 2020)**

**RULING**

1. In his Notice of Motion dated 10<sup>th</sup> May 2021 and filed on 11<sup>th</sup> May 2021, the Appellant sought that he be granted leave to file additional evidence in support of his case.
2. Brian Otieno Lumumba, a Director of the 1<sup>st</sup> Appellant swore an Affidavit on 10<sup>th</sup> May 2021 in support of the said application. The Appellant averred that in the lower court, the Respondent obtained orders freezing its account and finally obtained judgment in her favour. It added that being dissatisfied with the said judgment, it preferred the appeal herein.
3. It was its contention that it had obtained documentation which it did not have during the hearing in the lower court, which could assist this court reach a fair determination of the Appeal herein. It stated that the main contention was in respect of when the activities that informed the alleged oral contract that the Respondent had with it took place.
4. It asserted that the evidence it sought to introduce was not new evidence introducing new facts but rather evidence that would assist this court to fairly determine the facts already before it. It averred that the additional evidence it sought to introduce was an inspection and acceptance committee report that showed when inspection works were done, which it argued were done shortly after the works were completed in February 2020 and when the approvals for payments were done by the County Government of Kisumu.
5. In opposition to the said application, the Respondent swore a Replying Affidavit on 18<sup>th</sup> June 2021. The same was filed on 21<sup>st</sup> June 2021. She averred that she entered into an implied contract with the Appellant in which she was to loan it a sum of Kshs 900,000/= to fund the execution of the contract number COK/37/2019/2020 between it and the County Government of Kisumu.
6. She added that the said amount was used to hire machines and engage requisite personnel to enable carrying out the work timeously, diligently and to completion. She stated that she specifically oversaw and engaged a total of one hundred and seventy (170) casual workers who she paid Kshs 420,000/=. She said that she also hired and paid for a machine to unclog the sewage and drainages at a cost of Kshs 480,000/=
7. She asserted that the Appellant received payment for the project from the County Government of Kisumu in May 2020 and the funds were wired to the account at Diamond Trust Bank Kisumu Branch No 0463935001.
8. She was emphatic that the Appellant had not explained or disclosed to this court how the evidence he sought to adduce would assist in its case, rebut her case or in any way influence the result of the case. She added that the Appellant had not shown that the said evidence could not be obtained and be adduced in the Trial Court at first instance.
9. She asserted that the Appellant was aware at the time of the hearing that the inspection took place for payment to be processed and it did

not inform the previous court of its attempt to procure the same. It was her case that therefore the present application was an afterthought which would greatly prejudice her case as she would not have the opportunity to re-open her case and tender fresh evidence.

10. The Appellant's Written Submissions were dated 22<sup>nd</sup> June 2021 and filed on 23<sup>rd</sup> June 2021 while those of the Respondent were dated 2<sup>nd</sup> July 2021 and filed on 6<sup>th</sup> July 2021. This Ruling is therefore based on the said parties' Written Submissions which both parties relied upon in their entirety.

### **LEGAL ANALYSIS**

11. The Appellant submitted that the document it was seeking to introduce to court was an Inspection Report dated 17<sup>th</sup> February 2020 which it obtained six (6) months after judgment of the lower court was entered.

12. It relied on Section 78 (1) (d) of the Civil Procedure Act and the case of **Tana and Athi River Development Authority vs County Government of Tana River & Another [2018] eKLR** where the court allowed additional evidence on grounds that the same was material to the just determination of the dispute.

13. On its part, the Respondent placed reliance on the Court of Appeal case, **Tarmohamed & Another vs Lakhani & Co (1958) EA 567** where in adopting the holding of Lord Denning in **Ladd vs Marshall (1954)1 WLR, 1489**, the Court of Appeal for Eastern Africa held that for additional evidence to be adduced on appeal, an applicant had to demonstrate that the evidence could not have been obtained with reasonable diligence at the time of trial, that the additional evidence would have an important influence on the case and that such evidence had to be apparently credible though it need not be incontrovertible.

14. She was emphatic that the Appellant was aware that there was an inspection of work that was done as is procedure before payment was done and that it was in a position to have obtained the Inspection Report before the conclusion of the case it had exercised reasonable diligence.

15. She pointed out that the issue was dealt with fully during trial and hence the said evidence was not important and would not assist this court in determining the case. She added that the impugned evidence did not carry any weight to convince the Appellant's case more than what was already on record and hence the Appellant would not be prejudiced if its application was not allowed. She averred that the Appellant would cause the matter to progress in circles yet litigation had to come to an end.

16. The applicable law as regards the admission of additional evidence by an appellate court is Section 78 of the Civil Procedure Act which provides that: -

**“(1) Subject to such condition and limitations as may be prescribed, an 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.”**

17. The procedural Rules that are hand maidens to Section 78 of the Civil Procedure above provide under Order 42 rule 27 of the Civil Procedure Rules that:-

**“(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 reasons for its admission.”**

18. Ordinarily, appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are

exceptional circumstances for the reason that litigation has to come to an end at a particular point.

19. Bearing in mind, the principles under which additional evidence can be adduced on appeal as was espoused in the case **Tarmohamed & Another vs Lakhani & Co** (Supra), this court came to the firm conclusion that the Appellant did not demonstrate that the evidence it wanted to adduce could not have been obtained with reasonable diligence for use at the trial. It merely stated that it obtained the Inspection Report six (6) months after the judgment of the lower court had been delivered without explaining what hurdles it faced causing it not to adduce it as evidence during trial.

20. Going further, the Appellant did not demonstrate that the additional evidence would have an important influence on the result of the case. It did not elucidate how this additional evidence would tilt the case in its favour. It only stated that the Inspection Report would assist this court into reaching a fair and final determination of the Appeal herein without explaining how it would do so.

21. The Appellant failed to demonstrate that there were exceptional circumstances to warrant this court to allow its present application. It was immaterial that the Inspection Report was credible because it failed to demonstrate how it would suffer prejudice in the event its present application was not allowed. Indeed, this was not a good case for the court to exercise its discretion to admit additional evidence at the appellate stage.

22. On the other hand, this court was persuaded to find and hold that it was in fact the Respondent who would suffer prejudice with the admission of the Inspection Report as litigation in a trial court has to come to an end leaving parties to proceed to the appellate court in the event they were dissatisfied with the decision of a trial court.

### **DISPOSITION**

23. For the foregoing reasons the upshot of this court's decision is that the Appellant's Notice of Motion application dated 10<sup>th</sup> May 2021 and filed on 11<sup>th</sup> May 2021 was not merited and the same be and is hereby dismissed with costs to the Respondent herein.

24. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021**

**J. KAMAU**

**JUDGE**