



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**CIVIL APPEAL NO. 134 OF 2018**

**KENYA MEDICAL RESEARCH FOUNDATION.....APPLICANT/APPELLANT**

**VERSUS**

**ERIC K. OMANJE t/a MANJE AUTO GARAGE.....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion application dated and evenly filed on 29/01/2020. It was filed by the Appellant. The application sought leave of this Court to adduce additional evidence on appeal.
2. The application was supported by the Affidavit of *Dr. Charles T. Muga* sworn on 16/01/2020.
3. *Erick K. Omanje*, the Respondent herein, opposed the application. He filed a Replying Affidavit which he swore on 11/03/2020.
4. The Applicant deponed that it could not lay hands on the evidence it proposed to adduce on appeal any time before the delivery of judgment despite due diligence. The Applicant further deponed that the intended additional evidence was so relevant as it proved that the Respondent was fully paid for services he rendered to the Applicant despite alleging otherwise.
5. It was also deponed that the Respondent's claim was based on fraud. This Court was called to act in the interest of justice and allow the application.
6. The Applicant submitted that **Section 78** of the **Civil Procedure Act, Order 42 Rules 27, 28 and 29** of the **Civil Procedure Rules** was the basis of the application. It contended that the said law donated jurisdiction to this Court to grant the orders sought.
7. The Applicant relied on **Diana Kethi Kilonzo vs. Independent Electoral & Boundaries Commission & 2 Others (2014) eKLR** and **Mohammed Abdi Mohamud vs. Ahmed Abdulahi Mohamad & 3 Others (2018) eKLR** in its submissions.
8. The Applicant urged this Court to allow the application.
9. The Respondent in opposition to the application deponed heavily on the history of the litigation before the trial court. He denied the allegation that the intended evidence was not available to the Applicant any time before the delivery of judgment. According to the Respondent the alleged evidence was always in possession of the Applicant and that the Applicant printed the evidence on 29/06/2018. That was way before the suit was determined on 23/08/2018. The Respondent wondered why the Applicant did not endeavour to avail the evidence before the trial court. He firmly stated that the Applicant was not truthful that it was not aware of the alleged evidence until after judgment.
10. The Respondent further wondered that despite receipt of the evidence on 29/06/2018 the Applicant went ahead long after delivery of judgment and recorded a consent on partial settlement of the claim. As a result, the Applicant paid the sum of Kshs. 929,466/20.
11. It was further deponed by the Respondent that the evidence intended to be adduced would not aid the Applicant in any way in the matter and was a way to delay the end of a litigation. According to the Respondent the intended evidence was in sharp contrast with the Applicant's position in its pleadings and the evidence and as such it would mean that the suit would have to be reheard. To the Respondent, the evidence was intended to remove lacunae and fill the evidential gaps in the Applicant's case. That will amount to a fresh case on appeal.
12. The Respondent reiterated the foregone in his submissions. Relying on **Emmanuel Otieno Kongili & Another vs. Jimmy Joseph O.**

Owuor (2011) eKLR, Wanje vs. Saikwa (1984) KLR 275 and Hadd vs. Marshall (1954) 3 ALL ER 745 he submitted that the application be disallowed.

13. As said, the application under consideration is one for leave of the Court to adduce additional evidence 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 I will reproduce the said provisions.

14. **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.**

15. **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.**

16. The arena of additional evidence on appeal was elaborately dealt with by the Supreme Court in Mohammed Abdi Mohamud vs. Ahmed Abdulahi Mohamad & 3 Others (supra). The Court laid down the following principles for allowing additional evidence: -

**79. .... We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya 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.”*

17. The Court of Appeal in a Five-Judge bench added its voice on the subject in Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others (2019) eKLR as follows: -

*12. This Court in discussing its power to admit additional evidence under Rule 29 (1) stated as follows in Republic –v- Ali Babitu Kololo (2017) eKLR*

*It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.*

From the foregone I must now determine if the application attained the legal threshold. One of the key considerations is the availability of the intended evidence. According to the Applicant the evidence was not in its possession until after the delivery of the judgment. The position was strenuously opposed.

18. The intended evidence was annexed to the application. The manner in which the evidence was introduced was however challenged. Be that as it may, the evidence was contained in a computer generated ledger book. The ledger book indicated that it was prepared by the Applicant. It also had the date and time when it was generated. It was 29/06/2018 at 11:24. By then the suit was still pending.

19. The Applicant did not give any reason in the supporting affidavit as to why the evidence was not produced at the trial court. However, an attempt was made by the Counsel for the Applicant in his written submissions to suggest the reason for the failure to adduce the evidence earlier.

20. The reason was hence tendered at the tail-end of the matter. It was also not on oath. The Applicant did not suggest the alleged justification but the Counsel. The Respondent was therefore not accorded an opportunity to respond to the alleged reason. In that case the reason is inadmissible as part of the application. It amounted to a Counsel adducing evidence from the bar. The manner in which the reason was tendered contravened the right of the Respondent to a fair hearing under **Article 50(1)** of the **Constitution**.

21. As such, I find and hold that the Applicant did not render any reason for not adducing the intended evidence before the trial court.

22. I will now ascertain whether the additional evidence sought to be adduced is directly relevant to the pending appeal and may influence the result of the verdict. The evidence was an accounts document. It was the Applicant's ledger book. It was prepared by the Applicant. It has several entries. It covers the Applicant's financial transactions over time.

23. The Respondent produced several exhibits in an attempt to prove his case. Some of the exhibits were the Applicant's service and repair request forms. The request forms were accompanied by the Respondent's invoices. On the other hand, the Applicant's ledger did not contain clear evidence relating to specific request forms and invoices. It is therefore not possible to ascertain whether the additional evidence will add any value to the Applicant's case.

24. Having carefully considered the nature of the additional evidence *vis-à-vis* the suit I am not persuaded that the additional evidence is likely to remove any vagueness or doubt over the case. In fact the converse is true. The evidence is likely to create confusion in the matter given that the sources of the information contained in the ledger book are not before Court. Likewise, the evidence does not disclose a *prima-facie* case of willful deception of the Court especially given that the parties recorded a consent on payment of some money way after the delivery of the judgment.

25. I further find that the endeavor to introduce additional evidence on appeal is an attempt by an unsuccessful litigant out to make a fresh case on appeal, fill up omissions and patch up weak points in the case. The totality of the foregone will result into delay in determination of the matter.

26. In overall, I find that the proposed additional evidence ought not to be allowed in the unique circumstances of this case.

27. For the foregone reasons, the Notice of Motion dated 29/01/2010 is unmerited. It is hereby dismissed with costs.

28. With a view of determining the main appeal which has been pending before Court since 2018, the Applicant shall file and serve the

Record of Appeal within 30 days.

29. This matter shall be fixed for directions on 21/10/2020.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 30<sup>th</sup> day of July 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered electronically through: -**

**1. [mail@siganga.co.ke](mailto:mail@siganga.co.ke)** for the firm of Messrs. Siganga & Company Advocates for the Appellant.

**2. [advocate685@gmail.com](mailto:advocate685@gmail.com)** for the firm of Messrs. Nelson Jura & Company Advocates for the Respondent.

**3. Parties are at liberty to obtain hard copies of the Judgment from the Registry upon payment of the requisite charges.**

**A. C. MRIMA**

**JUDGE**