



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 31 OF 2020

AMOS TUNJE BARISA.....APPELLANT

VERSUS

LAWRENCE MWACHAI GAMBO.....RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate Hon. D. Sitati

in SPMCC No. 136 of 2020 Kilifi delivered on the 8th July 2018)

Coram: Hon. Justice R. Nyakundi

S. M. Kimani Advocates for the Appellant

K. Lughanje Advocates for the respondent

RULING

This is a notice of motion failed in Court on 27.7.2020 brought pursuant to Section 1A & 3A of the Civil Procedure Act, Order 42 Rule 22, 27 and 28 and order 51 Rule 31 of the Civil Procedure Rules seeking leave of the Court to adduce additional both viva voce and documentary evidence. The notice of motion is supported with an affidavit of **Diana Mwachai** and substantive grounds on the face of it.

The respondent in his replying affidavit opposes the application and deposes that the appellants are aware of their weak case which they initiated to Court by the so called additional evidence.

Based on the above motion and affidavit evidence, the door is open for the Court to make a finding on the issue.

Determination

On granting leave of the Court to a party to adduce additional evidence the Court is clouded with unfettered discretion in terms of Section 1A and 3A of the Civil Procedure Act. In **Ladd v Marshall {1954} 1 WLR 1491** **Dermining L. J.** noted:

“First, it must be shown that the evidence could not have been observed with reasonable defence for use at the trial, secondly the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible. The evidence must be such that as is presumably to be believed or in other words it must be apparently credible though it need not be incontrovertible.”

The jurisprudence emerging from our jurisdiction is illustrated in **Mzee Wanje & others v Saikwa & others {1976 – 1985} EA 364 CAK** fortifies the legal position as follows:

“It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the Courts decision. I consider that the same test should be applied to our rules for otherwise, it would open the door to litigants. Leave until an appeal all sorts of material which should properly have been considered by the Court of trial.”

Further, in **Hon. Bangirana Kawoya v National Council for Higher Education Misc. Application No. 8 of 2013** expounded on the circumstances that would justify admission of additional evidence either on appeal or at the trial Court. The Court stated the threshold to be:

“(i). Discovery of new and important matters of evidence which, after the exercise of due diligence were 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.

(ii). It must be evidence relevant to the issues.

(iii). It must be evidence which is credible in the issue that it is capable of belief.

(iv). The evidence must be such that, if given, it could probably have inference on the result of the case, although it need not be decisive.

(v). The affidavit in support of an application to admit additional evidence should have attached to it, proof of evidence sought to be given

(vi). The application to admit additional evidence must be brought within undue delay.”

In the present application as indicated in the affidavit of **Diana Mwachai**, she has information largely of the deceased final resting place. That in respect of both needs of himself and the young siblings its necessary for the evidence to be adduced which in a substantial degree would assist the final outcome of the appeal. From the distillation of the record its undisputed fact of the appeal that parties are contesting the last respects and burial site in respect of the deceased. Within the context of this appeal the place of inter the deceased body was a contested issue before the trial Court.

It has been pointed out by the appellant that domain of the evidence they are likely to adduce has everything to do with fact that shod wishes were largely ignored by the respondents.

So what is the best method and approach the Court may take and exercise discretionary over the matter? The dictum cited above illustrates the philosophy behind grant or denial of leave to adduce additional evidence in a subject matter under review by the Court. In respect to the cogency of the evidence proposed to be admitted, the circumstances are more exacting to introduce such evidence even on appeal.

The upshot therefore is the notice of motion dated 24.7.2020 is hereby allowed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE