REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 19 OF 2019

JAMES KIARIE KIBOBI.....APPELLANT/APPLICANT

VERSUS

DANIEL ONGERI.....1ST RESPONDENT

MIRIAM ONGERI.....2ND RESPONDENT

R U L I N G

1. Before me is an application filed on 12th September, 2019 by the Appellant, **James Kiarie Kibobi** and expressed to be brought under Order 42 Rule 27 of the Civil Procedure Rules inter alia. The Appellant sought that the court be pleased to take additional evidence from M/s Razor Loss Assessors at the hearing of the instant appeal and to be pleased to admit as evidence the report by the said assessors filed on record on 25th June, 2014.The application is based on the key ground that it is imperative that the Appellant produces the proposed additional evidence as it will assist the court in determining the issues in the appeal.

2. In his affidavit sworn to support the motion, the Appellant deposed that on 12th May, 2009 the Respondents' motor vehicle registration number **KBC 430G** veered off the road and proceeded to knock down his curio shop and as a result, his shop and trading stock were extensively damaged; that a loss adjustment assessor assessed his losses and prepared a report; that the said assessor was not able to travel from Mombasa to Nairobi to testify in this regard and to produce his report ; that as a result, the trial court dismissed his claim for Kshs. 442,000/=. He urged the court to allow him an opportunity to adduce the assessor's evidence else he stands to suffer prejudice.

3. The motion was opposed through the replying affidavit sworn by the Respondents' counsel, **Caroline Wanjiru Githae**. She deposed that on several occasions and finally on 5/7/2018, the trial court granted a last adjournment to the Appellant to procure the attendance of the assessor and that he failed to do the so at the hearing on 13/11/2018, as a consequence of which the trial court proceeded to close the Appellant's case. It was her contention that the Appellant was effectively seeking to re-open his case through the back door having wasted the numerous opportunities given to him to call the loss assessor to testify. She also pointed out that the Appellant never appealed the lower court's decision to close his case and that the Court's time is a limited resource to be spent efficiently.

4. The application was canvassed through oral arguments. For the Appellant it was submitted that due to strict timelines in the lower court, the Appellant was unable to procure the assessor's attendance during week when the matter came up for hearing. It was argued that the Applicant stands to suffer prejudice if not allowed to adduce additional evidence by way of the assessor's report which at any rate did not substantially vary from the report by the Respondents' assessor. Counsel asserted that the Appellant only needed to establish proper cause to justify the orders sought, and emphasising that the proposed evidence will enable the court to arrive at a fair decision and that no prejudice will be suffered by the Respondents. Reliance was placed on among others, the decision of the Court of Appeal in **Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd and 13 Others, Civil Appeal (Application) No. 8 of 2003; [2013] e KLR**

5. For his part, counsel for the Respondents submitted that the suit had come up for hearing on five occasions before the trial court and that the assessor was always absent; that it would be prejudicial to keep the Respondents in limbo; that this court was not in a position to receive additional evidence as the Respondents would have to cross-examine the assessor, and besides had not produced the report by the Respondents' assessor. Counsel asserted that the additional evidence was not new or important ; that the said evidence was always in the Appellant's possession and that the Appellant ought to demonstrate the importance and impact of the proposed additional evidence to the outcome of the appeal, which in this case has not been shown. The court was therefore urged to dismiss the motion.

6. The court has considered the material canvassed in respect of the motion. The motion is premised on the provisions of Section 78(1)(d) of the Civil Procedure Act and Order 42 rule 27 of the Civil Procedure Rules, the latter which provides 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 reason for its admission".

7. In the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] e KLR** the Supreme Court considered jurisprudence from various jurisdictions on the question of adduction of additional evidence on appeal and eventually collated several principles. The court delivered itself as follows:

"[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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".

8. There is no dispute that the evidence that the Appellant seeks to adduce on this appeal is directly relevant to this cause and would perhaps influence the outcome of the appeal. A perusal of the memorandum of appeal, reveals that the bulk of the grounds therein relate to the lower court's denial of the Appellant's claim for compensation in respect of his allegedly damaged stock. The assessor's report proposed to be introduced speaks to that failed claim. That evidence was in existence and in the Appellant's possession since 2009.

9. The record of the lower court indicates that the parties having recorded a consent judgment on liability subject to proof of special damages on 30/11/17, (some seven years since the filing of the suit) had proceeded with the evidence of Appellant, but which was bogged down by an objection concerning some of the Appellant's documents that the Respondents had had no notice of, and eventually hearing was adjourned to 15/2/18. On that date, the Appellant's counsel was indisposed and the court, noting the age of the case granted the last adjournment.

10. On the next scheduled hearing date, 5/4/18, the trial court could not reach the matter and directed that it be heard on 5/7/2018. Neither the Appellant nor the assessor who prepared the loss assessment report were present. The Appellant's application for adjournment was strongly resisted by the Respondents' advocate citing previous adjournments at the Appellant's request. Whereupon the court ruled;

"Indeed I gave the Plaintiff a last adjournment on 15/2/18. I have not been told the details of the urgent matter the Plaintiff was to attend to. However, purely on account of the fact that the Plaintiff was ready to proceed on 5/4/18 when the court adjourned the matter, I shall allow the Plaintiff one more indulgence. Adjournment is allowed. Hearing on 26/7/18."

11. Unfortunately, on that date, the case could not be reached but the Appellant sought summons for the assessor identified as Youticas (Euticus) Nyutu Mbugua, which request was granted. A new hearing date was set for 30.8.018 when parties fixed a further date by consent. On the said further date i.e 13.11.18 the Appellant resumed his testimony and was duly cross-examined. At the end of which his counsel sought a "last adjournment. She informed the court that the assessor was "supposed" to attend the court to produce his report, having been

notified of the hearing date, but had a different assignment in Malindi having moved his operations from Nairobi to Mombasa. Once more, the Respondents' advocate, citing previous orders of the court opposed the application.

12. The trial court noting the age of the dispute, the history of adjournments and the persistent absence of the assessor at the trial concluded its brief ruling by stating:

> **"Today the assessor is still not here. It is said he had another assignment. We have not been told what the assignment is about and why it had to take priority over attending court especially in the given circumstances.**
>
> **This court has several cases selected to come up in the coming weeks which have to be concluded before the close of this year. There is no room for adjournment in these cases.**
>
> **Above all, I am not persuaded that an adjournment is merited and the application is denied."**

13. With that, the Appellant closed his case. It is therefore disingenuous given that clear history for the Appellant to imply that the directive by the Chief justice that cases filed in 2010 be concluded is to blame for his failure to adduce his evidence allegedly because the date given *"was not convenient for the assessor to travel to court."* The Appellant had had several opportunities to call the assessor to produce his report prior to the last date on which the court finally declined further adjournment. Until this moment, there is no evidence tendered to show that the assessor had ever been served with summons to attend the trial court or indeed material to prove that he had relocated from Nairobi to Mombasa, which at any rate cannot be justification for his repeated non-attendance.

14. It is apparent from the judgment of the lower court that the Appellant's claim for compensation in respect of damaged stock failed because he did not tender the assessment report or receipts to prove the cost of acquiring the stock allegedly destroyed. Thus, this present application appears to be tailored to close gaps in the Appellant's case in the lower court when he every opportunity, had he been diligent, to tender the subject evidence before the trial court. Whether or not the Respondents would be able to cross-examine the assessor if the application were allowed, they would clearly be prejudiced for two reasons. Firstly, the cause of action arose in 2009 and re-opening the case will mean additional costs and delay, not to mention the burden on the Respondents to counter the proposed evidence through witnesses who may not be readily available.

15. Secondly, the Respondents did not adduce any loss assessment report in the lower court. The Appellant has reiterated that the assessment reports on the two sides were not dissimilar. That is neither here nor there. The Respondents do not have an assessor's report among their material evidence at the trial. In **Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd and 13 Others, Civil Appeal (Application) No. 8 of 2003; [2013] e KLR** the Court of Appeal cited the following passage from **Mulla** on **The Code of Civil Procedure 13th Edn. Vol.11** at **page 1606** concerning the rule of procedure governing the taking of additional evidence on appeal:

> **"This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who was unsuccessful at the trial to patch up the weak points in his case and fill omissions in the court of appeal. <u>The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties make out a fresh case or to improve their case by calling further evidence. If follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence"</u>** .(emphasis added).

See also **Wanje v A.K. Saikwa (1984) e KLR.**

16. This court is not satisfied that the proposed evidence is needful for the purpose of determining the appeal or that the Appellant has brought his case within the applicable principles. All that the Appellant appears to seek is a chance to improve his case so that his claim in respect of damaged stock, defeated in the lower court is resuscitated and adjudged afresh on this appeal. The application is not merited and is hereby dismissed with costs.

SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF OCTOBER 2020

C. MEOLI

<u>JUDGE</u>