



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 3 OF 2015

R. H. DEVANI LTD.....APPELLANT

VERSUS

PATRICK OMBATI ACHITA.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 23rd November 2018 was brought pursuant to the provisions of Article 159(2) of the Constitution of Kenya 2010, Sections 1A, 1B and 3A of the Civil Procedure Act No 3 of 1924 (sic), Order 42 Rule 27, 28 and 29 of the Civil Procedure Rules, 2010 and all other enabling provision of Law. Prayer No (1) was spent. It sought the following prayers:-

1. Spent.

2. THAT this Honorable Court be pleased to grant leave to the Applicant to adduce further evidence in this Appeal, to the effect that the Respondent herein was injured outside the course of his employment on a frolic and detour of his own.

3. THAT this Honorable Court be pleased to admit the further evidence in the form of further documents and witness affidavits annexed to the Application herein during the hearing of the substantive Appeal.

4. THAT the costs of this Application be in the Appeal.

2. Its Written Submissions were dated 1st February 2019 and filed on 4th April 2019 while those of the Respondent were dated 8th February 2019 and filed on 11th February 2019.

3. Parties asked this court to deliver its decision based on Written Submissions that they fully replied upon. The said Ruling is based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's Notice of Motion application was supported by the Affidavit of its Director, Nilesh Divani that was sworn on 23rd November 2018. Its Supplementary Affidavit was sworn by its Senior Plumber, Fredrick Mutua Kisilu, on 1st February 2019. It was filed on 4th February 2019.

5. It stated that Hon Obulutsa Ag. Chief Magistrate entered judgment in favour of the Respondent herein against it on 6th December 2014 in Nairobi **CMCC No 4757 of 2015 Patrick Ombati Achita Vs R. H. Devani Ltd** for a sum of Kshs 1,279,808/=. Its advocates in that case were M/S Nyaencha Waichari & Co Advocates.

6. It pointed out that the Respondent had also filed a similar suit **CMCC No 7499 of 17 Patrick Ombati Achita Vs R. H. Devani** which was defended by M/S Muma & Kanjama Advocates.

7. It averred that the Respondent withdrew **CMCC No 4757 of 2007 Patrick Ombati Achita Vs R. H. Devani Ltd** on 27th January 2010.

8. In respect of **CMCC No 7499 of 2017 Patrick Ombati Achita Vs R. H. Devani Ltd**, it stated that it applied for the dismissal of the suit

for want of prosecution, which application was allowed on 29th January 2014.

9. Upon application by the Respondent, **CMCC No. 4757 of 2007 Patrick Ombati Achita Vs R. H. Devani Ltd** was reinstated on 12th February 2014. It then instructed Ms Nyaencha Waichari & Co Advocates to obtain the documentation that was to be produced as its evidence in **CMCC No 7499 of 2017 Patrick Ombati Achita Vs R. H. Devani Ltd** that had been dismissed for want of prosecution.

10. It contended that it never heard from M/S Nyaencha Waichari & Co Advocates until 2nd November, 2014 when they informed it that the hearing would proceed the following day. It averred that its witness, Norman Nderitu, was told to testify despite him never having filed a Witness Statement. It said that the documents that were to be collected from M/S Muma & Kanjama Advocates were never filed in **CMCC No 4757 of 2007 Patrick Ombati Achita Vs R. H. Devani.**

11. It further asserted that it never heard about this matter until Judgment was delivered on 5th December 2014. It said that it then appointed M/S Muma & Kanjama Advocates to act for it and they came on record on 5th January 2015.

12. It was its contention that it had employed the Respondent as a casual worker sometime in 2013 and that because he did not possess any skills, he was assigned the mushroom section which was mainly involved in mixing soil.

13. It pointed out that on the material date of 11th August 2004 at lunch time, the Respondent fell from the roof and due to the fact that he had not been allocated any duties on the roof, he was suspected to have been stealing. It denied that the Respondent had been allocated the duty of repairing and/or examining the roof as he had contended.

14. It was emphatic that if it was allowed to submit its documents in support of its case, this court would be in a position to reach a just and fair determination of the matter.

15. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

16. In response to the present applicant, the Respondent swore his Replying Affidavit on 14th December 2018. It was filed on 17th December 2018.

17. He admitted having filed two (2) suits which he attributed to a communication breakdown with his advocates M/S Njeri Onyango & Co Advocates. He pointed out that the Appellant voluntarily opted to instruct two(2) different firms of advocates to represent it.

18. He was emphatic that no documents were filed in both cases and that there was no explanation why John Ambane and Frederick Mutua did not attend the hearing. It was his case that the Appellant had sufficient time to file its documentation but it never did and further, that its witness never filed any Witness Statement. It termed the present application as an afterthought that was aimed at adducing new evidence at the appellate stage. He said that the Appellant had an opportunity to ask for the re-opening of the case before judgment was delivered but it never did so.

19. He averred that the accident register was tailor made to suit the current application and suit because if the same existed, then nothing had prevented the Appellant from adducing it in evidence during the trial.

20. He therefore asked this court not to allow the present application.

LEGAL ANALYSIS

21. Section 78(1) of the Civil Procedure Act sets out the powers of an appellate court. It stipulates that:-

“Subject to such conditions and limitations as may be prescribed, an appellant court shall have power to –

(a) 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.”

22. Section 78(2) of the Civil Procedure Act further states that:-

“Subject to the aforesaid, any appellate court shall have the same powers as nearly as may be possible the same duties

conferred and imposed this Act on courts of original jurisdiction in respect of suits instituted therein.”

23. It is therefore undisputed that an appellate court can either take evidence itself or require the same to be taken. Further, it is trite law that additional evidence will not be adduced at the appellate stage unless certain circumstances have been met. It is not intended to give a party who had lost in trial a second bite at the cherry.

24. In the case of **Mzee Wanje & 93 others Vs. A. K. Saikwa & others (1982 – 1988) KAR 462**, the principles of admitting new evidence at the appellate stage were set out as follows:-

(a) It must be shown that the evidence could not have been obtained with reasonable diligence at trial.

(b) 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.

(c) The evidence must be apparently credible, though it need not be incontrovertible.

25. In deciding whether or not to allow an application seeking the production of additional evidence at the appellate stage, the court must be minded of the fact that litigation has to come to an end at some point to allow a successful litigant enjoy the fruits of his judgment but at the same time also keep at the back of its mind that at all given times a court should consider all evidence pertaining to a case so as to do substantive justice. It would be a sad day in justice not to deliver justice due to technicalities.

26. The suit was filed in the lower court on 4th May 2005. At the time, it was not a requirement for witness statements and documents to be attached to the plaint and defence as provided for in order 4 Rule 2 of the Civil Procedure Rule.

27. Order 3 Rule 2 of Civil Procedure Rule stipulates as follows:-

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

(a) the affidavit referred to under Order 4 rule 1(2);

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses excluding expert witnesses; and

(d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

28. Order 7 Rule 5 of the Civil Procedure Rule states that:-

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses;

and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

29. There was nothing in the proceedings to show that by the time the suit was coming up for hearing on 3rd November 2014 Pre-Trial Directions under Order 11 of the Civil Procedure Rules had been taken. It is at this point that the issue of the parties' documentation would have been addressed. Further, it was evident from the proceedings that witnesses gave oral evidence. There was no indication that they had filed any witness statements before hearing commenced.

30. There was clearly an omission on the part of the court in not having ascertained that Pre-Trial directions had been taken notwithstanding that the suit was filed way before the Civil Procedure Rule, 2010 came into effect. This is because by the time the suit was heard on 3rd November 2014, Order 11 of the Civil Procedure Rules had already been operationalised by all courts. It was no longer a new provision. It was a mandatory procedural requirement before a suit could be set down for hearing.

31. Notably, the proceedings in the lower court showed that this case was of one (1) party's word against the other. The Respondent testified that he was assigned the task of blowing holes in the roof that was leaking. On the other hand, the Appellants' sole witness, Norman Nderitu told the Trial Court that it was suspected that the Respondent wanted to steal. The Appellant wanted to adduce in evidence documents to prove that the Respondent was not assigned the duties on the roof on the material day as he had contended.

32. Whereas the evidence could have been adduced during trial, it was the considered view of this court that the evidence would be such that it would influence the outcome of the case if it was admitted and found to have controverted the opponents' case. This court decision was premised purely on the grounds that Pre-Trial Conference was not held as the Civil Procedure Rules mandated.

33. Purely in the interests of justice, this court was persuaded to find and hold that additional evidence could be given by the Appellant for purposes of resolving the real issue in question between it and the Respondent.

34. As can be seen hereinabove, this court can take the additional evidence itself or require the evidence to be taken. It can also determine a case finally, remand a case, frame issues and refer them for trial or order a retrial. Bearing in mind that the documents the Appellant wished to rely upon in support of its case have been challenged by the Respondent, it would be prudent that its evidence be subjected to cross-examination in the lower court.

DISPOSITION

35. Accordingly, the upshot of this court's Ruling was that the Appellant's Notice of Motion application dated and filed on 23rd November 2018 is merited and is hereby allowed in the following terms:-

1. THAT the lower court file be placed before the Chief Magistrate Milimani Commercial Courts for directions on 26th July 2019 with a view to allocating this matter to a magistrate other than the Trial Magistrate for purposes of taking of evidence regarding the documents the Appellant wished to rely upon to rebut the Respondent's case.

2. In view of the fact that the Appeal herein is pending hearing and determination, the evidence should be taken within thirty (30) days from the date of this Ruling and file returned to this court to facilitate the hearing and determination of the Appeal herein.

3. Matter to be mentioned on 27th July 2019 to confirm compliance and/or for further orders and/or directions.

4. Costs of the application will be in the cause.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of June 2019

J. KAMAU

JUDGE