



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.153 OF 2016

BRAMUEL AYUYA SHEM & AITA (suing as the legal representative of the estate of the late

NAHASHON AYUY ALISTA.....APPELLANT/APPLICANT

VERSUS

GOGAR FARM LIMITED.....RESPONDENT

(Being an Appeal against Judgment/Decree of Honourable R.Amwayi senior Resident magistrate delivered in Molo on the 9th November 2016 in Molo CMCC No. 316A of 2015)

RULING

1. This a ruling on the appellant's application dated 30th November 2018. It seeks the following orders:-

- i. That pending hearing and determination of this appeal this Honorable court be pleased to grant leave to the Applicant/Applicant to file additional documentary evidence.
- ii. That leave be granted to file supplementary record of appeal to include Traffic case proceedings for Molo Traffic Case No. 1616 of 2015.
- iii. That costs be in the cause.

2. Grounds on the face of the application are as follows:-

- i. That at the time the matter proceeded in Molo Court to conclusion before traffic case commenced as the traffic case was still under investigations
- ii. That after hearing of the traffic case the respondent's driver was convicted and fined kshs 100,000 for causing death by dangerous driving.
- iii. That traffic proceedings were not included in the record of appeal, which are paramount in aiding the court a just determination.

3. The application is supported by affidavit sworn by the appellant herein. The appellant in his averments restated grounds of appeal. He averred that at the time of hearing of civil claim in the lower court, the traffic matter was still under investigations and the court file could not be traced.

4. He averred that Traffic Case Number 616 of 2015 has been determined and respondent's driver found guilty and fined kshs.100,000 and at the time of filing appeal the traffic proceedings were not within the reach of appellant's counsel.

5. In response, the respondent filed replying affidavit sworn by **Ann Njoki Kinyua**, Senior Legal Officer, Pacis Insurance Co. Ltd on 20th March 2019. She averred that the application herein cannot come in the purview of **Order 42 Rule 27** as it is not this court that requires any documentary evidence to be produced or any witness to be examined but it is the appellant who requires additional documentary evidence and not court as envisaged in the above provision.

6. She further averred that the appellant has failed to demonstrate any substantial cause why he never produced the evidence in the lower court that he seeks to introduce now. Parties chose to proceed by way of written submissions.

7. Appellant submitted that the court has power to take additional evidence or to require evidence to be taken and cited the case of **Alex**

Kihongo Mukoma v Joseph Ngugi Mburu & 2 others [2017]eKLR in which the appellate court set out provisions of section 78 of civil procedure Act as follows:-

“subject to such conditions and limitations as may be prescribed, an appellate court shall have power-

a. To determine a case finally

b. ...

c. ...

d. to take additional evidence or require the evidence to be taken

e. To order a new trial.”

8. As to whether the appellant has met the conditions for new evidence to be allowed, he cited the case of **Joseph Mwangi Chacha V Ezra Odondi Ogot [2008] eKLR** where the court held that before new evidence is allowed, the applicant must show that additional evidence sought to be adduced on appeal could not have been obtained by reasonable diligence during the trial in the superior court and that such evidence had been available to the trial court, would have likely affected the result of the suit

9. Counsel for the appellant submitted that in page 77 of the proceedings, the trial magistrate concluded that the plaintiff had failed to prove ownership of the vehicle KAC 688B and the accident occurred due to negligence of the rider of motor cycle and the plaintiff ought to have sued them and not the vehicle.

10. Counsel for the appellant submitted that the documentary evidence intended to be filed is fresh evidence, which was not available during trial and will have an impact on the outcome of the appeal.

11. Respondent submitted that allowing additional evidence is a judicial discretion which should be exercised with immense caution and on a facet of sufficient justifiable reasons. Counsel cited the case of **Dorothy Nelima Wafula Vs Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR** where the court expressed that, under **Rule 29(1) (b)**, additional evidence will be introduced on appeal in the discretion of the court, for sufficient reasons.

12. He submitted that sufficient reasons has not been explained in the rules but courts have developed guidelines to be satisfied before it can exercise its discretion for instance to be shown that the evidence could not have been obtained by reasonable diligence before and during the hearing, two, that evidence would have important influence on the result of the case and three, that evidence sought to be adduced is credible.

13. Respondent further cited the case of **Mzee Wanje & 93 others Vs A.K Saikwa [1982-88]1KAR 462** where the court held that **Order 42 Rule 27** is not intended to enable a party who has been unsuccessful in the trial to patch weak points in his case and fill up omissions in the Appeal case; that it does not allow admission of new evidence for purposes of removing lacunae and filling gaps in evidence; that the appellate court must find the evidence needful; additional evidence should not be admitted to enable plaintiff make out a fresh case in the appeal; power given by the rule should be exercised sparingly and with great caution.

14. Respondent further cited the case of **David Kinyanjui & 2 others Vs Meshak Omari Monyoro Civil Appeal No.125 of 1993** where the court of appeal held that a conviction does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant.

15. In conclusion respondent submitted that in view of the fact that the issue of contributory negligence may still be alive if facts warrant it, there is no probability that additional evidence will have an important influence and impact on the result of the appeal since the issue of contributory negligence was alive in the lower court proceedings and immensely affected both liability and quantum which culminated in dismissal of plaintiff's case in the lower court. Respondent urged this court to dismiss the application.

ANALYSIS AND DETERMINATION

16. This court is mandated to reevaluate evidence adduced before the trial court and arrive at independent determination. There is no doubt the proceedings of traffic case were not available during the hearing as investigations were still going on. The claim herein arise from injuries sustained in the accident giving rise to traffic case. The traffic hearing was to establish who was to blame for the accident. Proceedings of traffic hearing is relevant and may have an impact in determination of this case. The trial court absolved the vehicle from blame of the accident yet the driver of the vehicle was convicted and fined for the accident. Proceedings leading to conviction could not be reasonably obtained, as investigations were not complete.

17. The application met conditions set out in the case of **Ladd Vs Marshall [1954] 1WLR.1489** in which the court of appeal of East Africa stated as follows:-

“Except in cases where the application for additional evidence is based on fraud or surprise, to justify reception of new evidence or new trial, these conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence 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.”

18. In my view addition document, which in this case are traffic case proceedings will assist this court in arriving at a fair, just and independent determination.

19. FINAL ORDERS

1. Application dated 30th November 2018 is allowed.
2. Applicant is granted leave to file supplementary record of appeal. The same to be filed and served within 14 days from today's date.
3. Costs in the cause.

Ruling dated, signed and delivered at Nakuru this 26th day of Sep. 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jeniffer Court Assistant

M/s Ogange Counsel for appellant

No appearance for Counsel for Respondent