V REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 28 OF 2018

HOLIDAY CARS TRAVEL & TOURS LIMITED........ APPELLANT

VERSUS

BLASIO ESHITEMI LUBANGA............................1ST RESPONDENT

G4S SECURITY SERVICES...................................2ND RESPONDENT

ISAAC WANJALA WANYONYI...........................3RD RESPONDENT

(An appeal arising from the judgment and decree of the Hon. MI Shimenga, Resident Magistrate (RM), in Butere PMCCC No. 34 of 2016 of 1st September 2018)

RULING

1. The appeal herein arises from a judgment that the trial court delivered on 1st March 2018, and not 1st September 2018 as reflected in the memorandum of appeal. The matter before the trial court was a personal injury claim, where the appellant was found liable and condemned to pay to the 1st respondent a sum of Kshs. 2, 825, 549.00 as damages. The appellant was aggrieved by the decision, hence this appeal.

2. What I am called upon to determine is not the appeal itself, but an interlocutory application dated 11th March 2019. It is brought at the instance of the 1st respondent, who was the plaintiff in the matter before the trial court. He seeks, in the main, that the appellate court admits additional evidence. There are also two secondary prayers, that, should the appellate court allow the additional evidence, the court ought to go on to direct how the evidence should be taken, and allow the 1st respondent to amend his plaint to introduce averments relating to the additional evidence.

3. The application is opposed by the appellant. It argues that the same is an attempt to create new evidence and to reopen the case. It avers that, should the evidence be admitted, it would not have opportunity cross-examine the 1st respondent. In any event, it argues, the 1st respondent should not be allowed to furnish more evidence at this stage, and that he has not cross-appealed.

4. The starting point in determining this application should be whether the High Court, sitting as an appellate court, has jurisdiction to take additional evidence. It would appear that it does have such power, given to it by section 78(1)(d) of the Civil Procedure Act, Cap 21, Laws of Kenya. The said provision states:

> "Subject to such condition and limitations as may be prescribed, an appellate court shall have power -
>
> a. …
>
> b. …
>
> c. …
>
> d. To take additional evidence or to require the evidence to be taken."

5. The Court of Appeal has severally pronounced itself on the nature of this power and how it is exercised. The Court of Appeal, being an appellate court, is one of the courts contemplated in section 78 of the Civil Procedure Act, but it largely exercises the power through rule 29(1)(b) of the Court of Appeal Rules, which is similarly worded with section 78(1)(d). Rule 29(1)(b) says:

"On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power –

a. …

b. in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner."

6. The said Court stated, in *Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Paul Fredrick Nelson* [2017] eKLR, that the law relating to the taking of additional evidence recognizes situations where a court may allow a party to introduce new evidence at appeal stage. It was pointed out that such evidence is introduced at the discretion of the court and for sufficient reason. Sufficiency of the reasons is measured by several factors, which include whether the evidence could have been obtained by reasonable diligence before and during the hearing at the trial court, whether the new evidence would probably have had an important influence on the result of the case if it was available at the time of trial, and whether the evidence was credible.

7. The Court of Appeal set out, in *Attorney General vs. Torino Enterprises Ltd* [2019] eKLR, what an appellate court, faced with an application for admission of additional evidence, should determine. It identified the criteria as follows:

a. If there is new additional evidence;

b. If the evidence could have been obtained by the appellant after reasonable diligence before and during hearing;

c. If there is probability the additional evidence would have an important influence on the result of the case; and

d. Whether there was sufficient reason to admit the additional evidence.

8. In *Mzee Wanje & 93 others vs. AK Saikwa* [1982-88] 1 KAR 462, [1984] KLR 275, the Court of Appeal cautioned that the appellate court, in exercise of its discretion to allow additional evidence, should guard against such evidence being used by an unsuccessful litigant to patch up the weak points in his case or to fill up omissions. Neither should it be used to make out a fresh case or to improve their case by calling further evidence.

9. I shall proceed to determine the application dated 11th March 2019 based on the guidelines set out by the Court of Appeal in the above decisions.

10. The first consideration is whether there was new additional evidence. The 1st respondent's case is that after delivery of the judgment, the subject of the instant appeal, on 1st March 2018, his leg was amputated sometime after the 26th November 2018. He avers that that is new evidence. To the extent that the said evidence was not before the trial court at the time it decided the matter, that would be new evidence that is additional to what was presented to the trial court. Could such evidence have been obtained by the 1st respondent after reasonable diligence before and during trial? I do not think so. It was simply not available. The 1st respondent's leg had not been amputated by the time of the trial and delivery of the impugned judgement. Would the evidence have had an important influence on the result of the case? Certainly, the fact that the amputation left the 1st respondent with only one lower limb would have had an important influence on the result of the case in terms of the amount of damages awardable in the circumstances. The evidence is no doubt credible.

11. Is there sufficient reason to admit the additional evidence? It would appear from the new additional evidence that the amputation arose directly from the injuries that the 1st respondent suffered on account of the events the subject of the suit before the trial court, and it would be prudent to admit such evidence so that the court can fully assess damages upon taking into account the totality of the 1st respondent's condition and circumstances directly linked to the subject accident.

12. The challenge, however, is that the 1st respondent is not the appellant in this cause. He has no appeal before me. He has not filed any pleadings in this cause. The orders being sought are interlocutory in nature. The application for the said orders cannot hang in the air. It must be founded or anchored on some pleading. In a cause at an appellate court such pleading would be either an appeal or cross-appeal. The 1st respondent has not filed either. His application, therefore, has no foundation; it hangs in the air. Consequently, the orders sought are not available.

13. In the end, I find and hold that the said application, dated 11th March 2019, is incompetent, and I hereby dismiss it, with costs.

DATED, SIGNED and DELIVERED at KAKAMEGA this 26th DAY OF September, 2019

W. MUSYOKA

JUDGE