



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 393 OF 2018**

**WASHINGTON ONYALO.....1<sup>ST</sup> APPELLANT**

**JARED OJWANG.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**AMIT SURENDRA RUPARELIA.....1<sup>ST</sup> RESPONDENT**

**NIMROD AFRICA LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the Notice of Motion dated 15<sup>th</sup> August 2019, the applicants urged the court to take or order the taking of additional evidence by way of oral testimonies from the Investigating Officer *P.C. Salat* and a civilian eye witness one *Julius Maina*. They also prayed that costs of the application be in the appeal.
2. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn on 15<sup>th</sup> August 2019 by the applicants' learned counsel *Mr. George Brian Akello*.
3. In the grounds anchoring the motion and in the supporting affidavit, the applicants contend that during the trial of the suit in the lower court, they made efforts to procure the attendance of the investigating officer and the civilian witness to no avail as *Julius Maina* could not be traced and *P.C. Salat* had been transferred from Embakasi Police Station to a different station; that had those two witnesses given evidence, the trial court may have reached a different decision on liability; that the applicants have now traced *P.C. Salat* who is ready to give evidence relating to the accident subject matter of the suit in the trial court and has indicated that he can trace the whereabouts of the civilian witness.
4. The application though duly served on the respondents together with a hearing notice was unopposed since the respondents did not file a response to the application and they did not attend the court on the date the application was scheduled for hearing. Hearing therefore proceeded *ex parte*.
5. In his oral submissions, learned counsel for the applicants *Mr. Akello* reiterated the depositions in his affidavit. In addition, he invited the court to note that the suit was dismissed on grounds that the police abstract had not been produced by the investigating officer and because no eye witness was available to testify.
6. Counsel further submitted that though the applicants have filed a certificate of search from the Registrar of Motor Vehicles, the trial court also dismissed their suit on grounds that the ownership of the motor vehicle causing the accident had not been proved. He urged the court to allow the application noting that it was not opposed.
7. I have carefully considered the application together with the depositions in the supporting affidavit, the annexures thereto as well as the submissions made by *Mr. Akello* alongside the persuasive authorities cited by the applicants.
8. While I agree with learned counsel that the application is not opposed, this fact by itself cannot be a basis for allowing the application. The lack of opposition to the motion notwithstanding, this court is duty bound to consider the merits or otherwise of the application.
9. The law allowing the taking or ordering production of additional evidence on appeal is contained in *Section 78 of the Civil Procedure Act* (the Act) and *Order 42 Rules 27-29 of the Civil Procedure Rules*. *Section 78 of the Act* is in the following terms:

**“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—**

**(a) to 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.”**

10. Order 42 Rule 27 of the Rules provides as follows:

**“(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.”**

The provisions of *Rules 28 and 29* only come into play when an appellate court has ordered the taking of additional evidence since they prescribe the mode of taking such additional evidence within the scope directed by the court.

11. Given the above, it is clear that an appellate court has power and discretion to order the production of additional evidence but this discretion must be exercised judiciously taking into account the facts and circumstances of each case.

12. In deciding whether or not to allow an application for production of additional evidence at the appellate stage, the court must bear in mind the long established legal principle that litigation must at some point come to an end in order to allow the successful litigant to enjoy the fruits of his or her judgment but the court must also be mindful of the fact that it exists to do justice to all parties to a dispute and where necessary, additional evidence may be allowed at the appeal stage if doing so will serve the ends of substantive justice.

13. The principles which guide a court in the exercise of its discretion in deciding whether or not to allow the production of additional evidence are reiterated in the cases of *R. H. Devani Ltd V Patrick Ombala Achita, (2019) eKLR*; *Fibre Link Ltd V Star Television Production Ltd, (2015) eKLR* and *P.M. Mbuthia V Francis Njuguna Kimani, [2019] eKLR* which were referenced by the applicant. They are 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.**

14. With the above principles in mind, I have looked at the pleadings in the lower court, the applicants' list of witnesses, the proceedings before the trial court and all the material placed before the trial court. I note that though *P.C. Salat* was not availed as a witness in the suit, *P.C. Hussein Mohammed* of Embakasi Traffic Base testified as PW1 and gave evidence regarding the circumstances in which the accident occurred as recorded in O.B. No. OB/18/18/16/4/14. PW1 also produced a police abstract confirming occurrence of the accident.

15. Though the applicants have exhibited a witness summons issued to *P.C. Salat* dated 17<sup>th</sup> August 2017, they have not demonstrated that any real effort was made to procure the attendance of *P.C. Salat* as a witness in support of their case during the trial. Even if the officer had been transferred from Embakasi Police Station to a different police station, if the applicants had exercised due diligence, they would have been able to trace him in his station of duty and have him summoned to give evidence in the trial court. They did not avail any evidence to establish that they made any attempts to establish the whereabouts of the said *P.C. Salat* during the trial.

16. Regarding the civilian witness, the plaintiff's list of witness dated 31<sup>st</sup> July 2018 did not show that the plaintiffs (applicants) intended to call *Julius Maina* as a witness in their case. The proposed witnesses named in that list were only *Washington Ongalo* and *Constable Salat* – the investigating officer.

17. In applications of this nature, the court should be careful not to deal with the merits of the appeal in order not to prejudice the hearing of the pending appeal. The court must also guard against the possibility of the application being used as an avenue of allowing parties to make a fresh case at the appeal stage or to sneak in evidence to redeem their case after failing to adduce such evidence before the trial court due to indolence or lack of diligence on their part.

18. In view of the foregoing, I am satisfied that the applicants have not proved sufficient cause to warrant the exercise of this court's discretion in their favour by ordering the production of the additional evidence sought in the application. I thus find that the Notice of

Motion dated 15<sup>th</sup> August 2019 lacks merit and it is hereby dismissed with no orders as to cost.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of December, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Akello for the applicants

No appearance for the respondents

Mr. Kibet: Court Assistant