REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 2 OF 2017

KIHUHA JAMES……..……...1ST APPELLANT

PETER CHEGE MBITHI.....2ND APPELLANT

VERSUS

MARGARET NJERI NGURE……..…..DEFENDANT

RULING

1. The Applicant here is the Respondent and Cross-Appellant in the Civil Appeal against the judgment rendered by the Learned Trial Magistrate in Thika CMCC No. 129 of 2012. In the lower Court, the Applicant was the Plaintiff. She succeeded in her suit and was awarded the sum of Kshs. 5,050,685/= as compensation for the injuries she allegedly sustained in a road traffic accident in which the Applicant was involved in. The vehicle was owned by the 1st Respondent who was the 1st Defendant in the suit.

2. The Respondents were aggrieved by the decision of the Learned Trial Magistrate and filed an appeal. The Applicant also filed a cross-appeal on the ground that the Applicant has now had to undergo specialised treatment at extra costs and that this is projected to be a lifelong process. The Applicant says in the Cross-appeal that the injuries suffered were so extensive that "pursuant to developments occurring after the delivery of the judgment delivered on 05/11/2014, the [Applicant] is required to seek specialised treatment at extra costs." She further says that the projected medical costs is expected to rise to more than Kshs. 8 Million.

3. To sustain the Cross-appeal, the Applicant filed the present Application. The Application has two substantive prayers:

a. That the Court be pleased to grant leave to the Applicant to produce fresh evidence at the hearing of the Appeal; and

b. That the Court does take into account the additional evidence which was not produced during the lower Court hearing.

4. The rationale and justification for the prayers are stated in grounds 6-11 on the face of the Notice of Motion as follows:

5. The Application is supported by a Supporting Affidavit sworn by the Applicant. In the Affidavit, the Applicant depones that she has been attending clinics since the date of the accident. During her visits of the clinics after the judgment was delivered, she depones, it was "discovered that my wounds were not healing as expected as a result of which [she] was referred to an orthopedic surgeon for specialized treatment." It was this orthopedic surgeon who, the Applicant depones, concluded that the Applicant will require lifelong medical attention owing to the degree of injuries she had sustained in the accident.

6. The Application is opposed. The General Manager, Claims Department of Directline Assurance Company Limited, the insurer of the 1st Appellant, Pauline Waruhiu filed a Replying Affidavit in opposition. In essence, the Appellant's position is that the new medical report sought to be adduced will not introduce any new evidence which is not covered in the two medical reports which are already on record. All the report will do, the Respondent/Appellant argues, is to "fix" the loopholes in the Applicant's case.

7. The Appellants point out that the Trial Court had the benefit of five medical reports two of which were prepared by orthopedic surgeons regarding the nature and extent of the injuries suffered by the Applicant and came up with its decision on quantum. A new medical report will not add any new evidence.

8. The Appellants argue that the real intention of the Application is to introduce and litigate at the appeal stage a new claim that was not in the original pleadings: a claim for future medical expenses. These, the Appellants argue, were neither pleaded nor proved at the trial.

9. In any event, the Appellants argue that the Applicant has not demonstrated that the intended additional evidence could not have been obtained with the exercise of reasonable diligence during trial.

10. The applicable law as regards the admission of additional evidence by an appellate court is Section **78 of the Civil Procedure Act which provides that: -**

> **(1) Subject to such condition 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.**
>
> **(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as ate conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.**

11. The "conditions and limitations" referred to in Section 78 of the Civil Procedure Act are enacted in Order 42 Rule 27 of the Civil Procedure Rules. The Rule 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.**
>
> **(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.**

12. Both the Applicant and the Appellant are agreed on the principles that have emerged from our decisional law on when the Court will accept additional evidence. Generally, appellate courts are very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The enunciation of the principles for adduction of new evidence on appeal set out in ***Tarmohamed & Another V Lakhani & CO (1958) EA 567*** **by the Court of Appeal in adopting the Judgment of Lord Denning in Ladd V Marshall (1954)1 WLR, 1489, is still considered the most accurate and succinct statement of the law. There, the Court of Appeal stated:**

> **Except in cases where the application for additional evidence is based on fraud or surprise,** *to justify reception of fresh evidence or a new trial, three 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.*

13. Both parties cited many cases on the issue including: **Governors Balloon Safaris Limited v Zacharia W. Baraza t/a Siuma Auctioneers [2016] eKLR; Sadrudin Sarrif Vs Tarlochan Singh S/OJwala Singh [1961] EA 72 and Wanje V Sakwa [1984] KLR 275; National Cereals & Produce Board v Erad Suppliers & General Contracts Limited [2014] eKLR; Joginder Auto Services Ltd v Mohammed Shaffique and another Civil Appeal (Application) No. Nai 210 of 2000 (2001) eKLR ;Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd Civil Appeal No. 8 of 2003.**

14. All these cases are in accord respecting the *three principles* that have emerged from our decisional law thus:

> a. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> b. Second, the evidence must be such that if tendered it would probably have an important influence on the result of the case, though it need not be decisive;
>
> c. Third, 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.

15. I will now apply these principles to the case at hand. Can it be said in any meaningful sense that the Applicant could not have obtained, with reasonable diligence, the evidence she now seeks to adduce on appeal? She says that it is only post-judgment that an orthopedic Surgeon concluded that she will need lifelong medical attention and that this diagnosis was new. I disagree. As the Respondents point out, the Applicant had been seen by at least five doctors some of whom had produced reports which were received in evidence. These reports indicate the percentage of permanent incapacity of the Applicant. It is obvious that at the time of examination each of the doctors had

considered the extent of injury suffered by the Applicant. It is disingenuous at best to claim that it is only post-judgment that a doctor "discovered" that the Applicant will need future medical attention.

16. With respect, this request to adduce further evidence appears to be an attempt to introduce an aspect of the case and a prayer that the Applicant had forgotten to include in her original suit: a claim for future medical costs. It is obvious that the Applicant did not include this prayer in her Plaint. What she included instead was a specific prayer for liquidated damages. What she now seeks is to introduce that prayer at the appellate stage. This would, in my view, be highly irregular and unfair to the Respondents. To illustrate this, it is probably sufficient to cite Chesoni JA as he then was who remarked in ***Wanjie &others v Sakwa & others(1984) KLR 275*** thus:

> 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 has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in 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 to make out a fresh case or to improve their case by calling further evidence. It follows *that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.*

17. Hancox JA as he then was, in the same case, helpfully added that "*the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.*

18. So it is here. Allowing the additional evidence that the Applicant seeks to adduce on appeal will facilitate to introduce a new prayer she had not sought at trial without justification.

19. In any event, given the presence of the other medical reports which were admitted in evidence, I am unsure that the Medical Report that the Applicant now wishes to introduce would be verdict-altering. I say so because, as observed above, doctors had already spoken about the permanent incapacity of the Applicant. Hence, the reason that the issue of future medical costs was not litigated could not have been because it was not on the table but because it was not one of the prayers the Applicant had in her Plaint.

20. Having reached these conclusions, it follows that the Notice of Motion dated 25/01/2017 and filed in Court on 30/01/2017 has no merit. The same is dismissed with costs.

21. Orders accordingly.

Dated and delivered at Kiambu this 31st day of July, 2017.

……

JOEL NGUGI

JUDGE