REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 283 OF 2009

PAUL WARATHO & ANOTHER …..……APPELLANT/APPLICANT

VERSUS

BATA SHOE CO. LTD ……1ST RESPONDENT

EDISON SIGEI …… 2ND RESPONDENET

THE HON. ATTORNEY GENERAL ……3RD RESPONDENET

(Being an appeal from the entire Judgment and Decree of the Principal Magistrate's Court at Limuru (Hon. Murage) dated 21/5/09 in Limuru PMCC No. 166 of 2008)

RULING

The two appellants filed this appeal following the dismissal of their suit by the lower court. When the appeal came up for directions, the appellants were granted leave to file a supplementary record of appeal to include proceedings from the criminal court. A date was set for compliance but the appellants did not comply on the appointed date.

The appeal was dismissed for non appearance when it came up for hearing. However, following an application by the appellants the appeal was re admitted and a new hearing date given. Subsequently, the appellants filed the supplementary record of appeal which is dated 30th September, 2013. Although it was meant to present proceedings of the criminal court wherein the appellants were acquitted, the appellants included in that record fresh evidence in the form of notice of intention to sue the Attorney General and a letter from the Attorney General to the Commissioner of Police, which documents were not produced during the trial in the lower court.

The respondents are opposed to the production of these documents by way of supplementary record of appeal because they are fresh evidence prejudicial to them. Following the objections, all counsel on record have filed submissions and cited some authorities on the objection to the introduction of fresh evidence on appeal. Order 42 Rule 27 of the Civil Procedure Rules reads as follows,

> "**27. (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 –**
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> a. **the court from whose decree the appeal if 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 witnesses 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 reason for its admission."

It is the respondent's case that the appellants have failed to meet the conditions set out in Rule 27 (1) above. It is true that the two documents which have been disputed by the respondents were not tendered in evidence during the trial. It is also true that in the defence of the 2nd and 3rd respondents and in particular paragraph 9 it was pleaded as follows,

"No notice of intention to sue was issued as alleged or at all and the 2nd and 3rd defendants shall raise a preliminary objection to the effect that the suit does not comply with the mandatory provisions of section 13 (A) of the Government Proceedings Act Cap 40 Laws of Kenya."

The production of fresh evidence can only be allowed with the leave of the court to which the appeal has been preferred. Going by the provisions cited above, this can only be done at the discretion of the court.

There are several decided cases that have addressed this issue in the past. One such case is **Karmali Tarmohammed & Another Vs. I.H Lakhani & Company [1958] EA 567** the court at page 568 stated as follows,

"…..except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence will not have made it so available."

In the case of **Wanje Vs. Saikwa [1984] KLR 275** the court said as follows,

"..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 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 make out a fresh case or to improve their case by calling further evidence…."

Paragraph 10 of the plaint lodged in the lower court stated that demand and notice of intention to sue had been given to the respondents who however had failed, refused and or neglected to make good the appellants' claim. As I have already observed above, the 2nd and 3rd respondents denied receiving any notice from the plaintiffs now appellants.

The appellants through counsel have admitted that the two documents now in dispute were not produced in the lower court. They also admit that the two documents were readily available to the appellants during the trial and ought to have been produced but attribute the failure to do so on the oversight of the counsel handling the matter at the time.

The appellants through counsel also admit that the lower court which observed that there was non-compliance with the mandatory provision of Section 13(A) of the Government Proceeding Act aforesaid cannot be faulted. They plead however, that this was an omission, error or mistake by counsel which should not be visited upon the appellants.

That omission however does not mean that the document did not exist. On the contrary, the document had been served and received by the Attorney General's Chambers. In any case, the issue of Notice was never raised during the trial. In advancing the appellants' case counsel has cited the case of **Richard**

Ncharpi Leiyagu Vs. Independent Electoral and Boundaries Commission & Others [2013] eKLR.
In that decision the Court of Appeal cited the case of **Belinda Murai & Others Vs. Amoi Wainaina** where Madan JA said as follows,

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal a point of view which courts of appeal sometimes overrule."**

In another case cited in the same decision that of **Philip Chemowolo & Another Vs. Augustine Kubede [1982-88] 103** at **104** Apaloo JA (as he then was) stated as follows,

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error of default that cannot be put right by payment of costs. The court has is often said exist for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

A perusal of the notice said to have been addressed to the Attorney General shows that it was authored and dated by counsel for the appellants on 30th May, 2008. There is a stamp by the Attorney General showing that it was received on 13th June, 2008. On 26th June, 2008 the Senior Deputy Solicitor General on behalf of the Attorney General forwarded the said notice to the Commissioner of Police. A copy was transmitted to the appellant's advocate, who received it on 7th July, 2008. There is a stamp on this document confirming that position.

The plaint in the lower court was dated 16th July and filed on 31st July 2008. It was correct therefore, for the appellants to have pleaded in that plaint that Notice of Intention to Sue had been given. If the denial of the 2nd and 3rd respondents in their defence at paragraph 9 were to be put to test during the trial, the appellants would have carried the day.

That notwithstanding, the appellants' counsel had in their possession the two documents during the trial. There has been a candid admission by the appellants' counsel that it was a mistake on their part that that evidence was not tendered. If it had been tendered, the 2nd and 3rd respondents would not have been taken by surprise because they were aware of the two documents. I observe at this point that the decision of the lower court was not anchored on the absence of the two documents in evidence.

I am prepared to accept the admission of counsel that it was their mistake and that it should not be visited upon the appellants. In any case, Sections 1A and 1 B of the Civil Procedure Act are intended to meet the ends of Justice. I shall in the circumstances exercise the discretion of this court in favour of the appellants and order that the supplementary record of appeal be admitted, including the two disputed documents. The appeal shall now be listed for hearing on merit. The costs for these arguments shall be awarded to the respondents.

Dated, signed and delivered at Nairobi this 9th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE