



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.29 OF 2010

(Appeal from the Decree & Judgment of Hon. J. Kwena – PM

dated 22nd June 2010 in Kericho PMCCC No.114 OF 2009

FLORENCE AKINYI ODULA.....APPELLANT

VERSUS

AKAMBA PUBLIC ROAD SERVICES LTD

MUHIA NZWILI.....RESPONDENT

R U L I N G

Florence Akinyi Odula the Appellant, took out the Motion dated 2nd October 2012 in which she sought for leave to adduce additional evidence on appeal. Akamba Public Road Services Limited the Respondent opposed the Motion by relying on the replying affidavit of Mitchel J. B. Menezes. When the Motion came up for interpartes hearing, learned counsels recorded a consent order to have the Motion determined by written submissions.

I have considered the grounds set out on the face of the Motion and the facts deposed in the affidavits filed in support and against the Motion. I have also considered the rival written submissions. It is the submission of the Applicant that after she testified in court, the back pain she was suffering escalated prompting her to have her spine scanned. It was discovered that LT12 of the spine had an old burst fracture. It is her submission that she sustained the aforesaid injury as a result of the accident, the subject matter of this appeal. That injury had not been detected at the time of testifying before the trial court. The same was discovered after the judgment had been delivered in the subordinate court. For the above reason the Applicant beseeched this court to grant the order authorizing the Appellant to adduce additional evidence.

The Respondent opposed the application claiming that the same can only be sought before the trial court by way of review. It is also the Respondent's argument that the document sought to be produced is not a necessary document that will enable the Appellate Court pronounce judgment. The Respondent further argued that the evidence sought to be introduced on appeal do not relate to the accident, the subject matter of the appeal. The basis of the Motion is said to be Order 42 rule 27 (1) (b) of the Civil Procedure Rules which 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 –

(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 aforesaid provision allows the parties to the appeal to adduce additional evidence if the document to be produced or any witness to be examined to enable the court pronounces judgment or for any other substantial cause. The Court of Appeal has a near similar provision which gives the Court of Appeal the discretion to permit a party to adduce additional evidence vide rule 29 of the Court of Appeal Rules. The Court of Appeal in *Wanja –vs- Saikwa* [1984] 275 restated the principles to be considered before granting leave to adduce additional evidence *inter alia* as follows:

“2. The principles upon which an appellate court in civil case, will exercise its discretion in deciding whether or not to receive further evidence are:

- a. It must be shown that the evidence could not be obtained with reasonable diligence for use at the trial;
- b. The evidence must be such that, if given, it would probably have an important influence on the result of the case.
- c. The evidence is on the face of it credible.

3. The rule governing the admission of additional evidence does not entitle a party applying to bring in contradictory, as opposed to additional evidence, for to do so would mean the case would in effect be re-heard and retried as to the existing facts which cannot have been the intention of the rule.”

I will apply the above principles to this Motion. It is clear in my mind that the discovery of spine injury needed specialized medical personnel and facilities. I am convinced that the Applicant had applied due diligence to obtain the relevant medical document but the later document could not be obtained for the above reason. If the above medical evidence is adduced it will obviously assist this court pronounce the appropriate award. I find the Motion to be well founded. Pursuant to the provisions of Order 42 rule 28 of the Civil Procedure Rules I issue the following orders:

- i. That the trial court do take additional evidence from Dr. A. Odhiambo on the examination and findings he did on Florence Akinyi Odula on 21st June 2012 within 30 days from the date hereof.
- ii. The trial court to give its opinion on the evidence and forward the same to this court.

Costs of the Motion to abide the outcome of the appeal.

Dated, signed and delivered in open court at Kericho this 16th day of May 2014.

J. K. SERGON

JUDGE

In the presence of:

- N/A for Ochillo for Appellant/Applicant
- N/A for Respondent