



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

ELC APPEAL NO. 72 OF 2018

TOM AKOYO MBIRIKA.....1ST PLAINTIFF/APPLICANT

VIOLET MUKABI JORAM.....2ND PLAINTIFF/APPLICANT

=VERSUS =

SHAMSHI KASSAM HOLDINGS.....DEFENDANT

(Being an appeal from the Judgment of Hon. P. Muholi (SRM) delivered on 16/11/2018,

in Nairobi Milimani Commercial Courts CMCC No. 380 of 2014)

RULING

1. By an application dated 2/12/2021, the appellant sought leave to adduce further evidence. The application is supported by an affidavit sworn on 2/12/2021 by Tom Akoyo Mbirika the 1st Appellant/ Applicant herein on his own behalf and on behalf of the 2nd Appellant/Applicant.

2. The grounds in support are, that the evidence that the appellant intend to adduce could not be obtained because the investigating officer frustrated the process of obtaining this evidence.

3. The appellant’s application to adduce further evidence is premised on the fact that the additional evidence is not an afterthought since the officer who investigated the matter in criminal case number 1680 of 2009 never availed the report that was crucial which should have been used in CMCC No. 380 of 2014. The report which was critical was unavailable at the trial.

4. That if the report of the document examiner was admitted it would have enabled the Honorable Magistrate in CMCC No. 380 of 2014 to arrive at a different decision.

5. Further the appellants state they were not in possession of that evidence since it was in the hands of the police who investigated CR Case No. 1680 of 2009 and who refused to allow the appellant access to the document examiner’s report even after writing letters to DPP and NPS, the letters are dated 1/08/2018 and 9/10/2018.

6. The respondent opposes the motion through a replying affidavit sworn on 23/02/2022 and the respondent state that in the judgment delivered on 16/11/2018 it was found that the appellant owed licensee fees to the respondent.

7. Further that the intended document to be adduced as evidence by the appellant has no significance and or relevance as to influence the outcome of the appeal since the defense and counterclaim sufficiently stated the case of the parties and the trial court found that the appellant owed licensee fees to the respondent.

8. The respondent content that the appeal should flow from the decree from the lower court and not be expanded in a way that makes for a fresh case in the appeal. Further that Order 42 rule 27 of the Civil Procedure Rules (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).....

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”

9. He further contended that for new evidence to be admitted an applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial. He stated that the applicants are leveling accusation against the respondents for their own failure to obtain the necessary evidence.

10. He contends that the letters to DCI were written post the judgment date and that order 2 being sought is an afterthought since it is neither in the defense nor the counter-claim. Further that the appellants never requested the trial court to issue summons to the documents examiner to produce the report dated 10/12/2010.

11. The respondent contends that the new evidence being sought will contradict the evidence of the respondent as presented by the report of the examiner produced before the trial court and it may amount to rehearing of the case afresh and this will aide the appellants who have not been diligent to fill up their gaps in the trial and this appeal serves to delay the enjoyment of the judgment obtained by the respondent in his favour.

12. The appellants have submitted on the frustrations they went through in the hands of the investigating officer. They attached the letters of complaint they wrote to DCI. They submit that even before the judgment in the lower court they had written to DPP, DCI and the Inspector General of Police over the conduct of the investigating officer one Bernard Asirikwa who was in charge of the criminal case and the document examiner’s report

13. The appellants contend that during the hearing at the lower court, they did not have the report in their possession. They relied on the case of ***Attorney General v Torino Enterprises Limited [2019] eKLR***, where the Court of Appeal reiterated the principles set down by the Supreme Court in ***Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR***, which are:

a. The additional evidence must be directly relevant to the matter and be in the interest of justice.

b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive.

c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of or could not have been produced at the time of the suit.

d. It will remove any vagueness or doubt over the case and has direct bearing on the main issue of the suit.

e. Must be credible in the sense that it is capable of belief.

f. Must not be voluminous making it difficult or impossible for the other party to respond effectively.

g. Must be utilized for the purpose of removing lacunae and filing gaps in evidence.

h. Must not be aimed at making a fresh case in appeal, fill up omissions or patch up the weak points.

i. The court has to consider the proportionality, prejudice swift conduct of litigation by balancing the interests of justice.

14. The appellants submit that their application has met the threshold of the established principles although they are given at the discretion of the court. Further that the license document relied upon by the respondent at the trial court was a forgery as established by the document examiner, E.K Kenga who however was never called to produce the report during the criminal case hearing and the investigating officer frustrated the efforts of the appellant to get the document and this was reported to the DCI.

Analysis and Determination

15. Following the guidelines as given by the Supreme Court, it is the duty of the judge to consider and determine if the instant application fulfills the principles as laid out in the case of ***Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohammed & 3 Others (supra)***. Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of trial by the applicant.

16. In ***Republic vs Ali Babitu Kololo [2017] eKLR*** stated as follows:

“It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal”

17. In this matter, it has been submitted that the proposed additional evidence is relevant because it affects the validity of the license document relied upon by the respondent at the trial court in the case of CMCC 380 of 2014 is said to have been a forgery which was a subject matter also in Criminal Case No. 1680 of 2009. In both cases the document was not produced and neither was the maker called to give evidence. Founded on this submission, the appellant/applicant submitted that the additional evidence may influence or impact the verdict of this Court in this appeal. The respondent in opposing the application submitted that intended document to be adduced as evidence by the appellant has no significance and or relevance as to influence the outcome of the appeal since the defense and counterclaim sufficiently stated the case of the parties and the trial court found that the appellant owed licensee fees to the respondent.

18. The respondent content that the appeal should flow from the decree from the lower court and not be expanded in a way that makes for a fresh case in the appeal.

19. The appellants have explained that they tried to obtain the report on diverse dates but were frustrated by the investigating officer. This evidence was not rebutted by the respondent. The appellants wrote letters on 1/08/2018, 9/10/2018, 4/12/2018, 29/05/2019 and 18/06/2019 among others all in pursuit of seeking to have the examiner's report.

20. Whereas the respondent denies the relevance of the additional evidence being the report of the examiner, I believe that this report is critical and relevant to the appeal. I have perused the report and I note that the issue in this appeal is the authenticity of the lease agreement which the appellants contest that the signature used was a forgery.

21. The trial court in CMCC 380 of 2014 based its decision primarily on the licence agreement which is contested as not being genuine.

22. As to whether the proposed additional evidence could have been obtained after due diligence, the appellant/applicant submitted the additional evidence though he had knowledge of it but it was not in his control to produce it. It is not clear why the police took too long to hand over the report. The appellant only came only came to see the report after the judgment in the trial case of CMCC 380 of 2014. This report in my view was not information in the public space where one could take judicial notice of and obtain easily.

23. I have considered whether the proposed additional evidence could have been produced during the hearing after due diligence. It is my considered view that the report of the Examiner was with the police and could only have been produced with the cooperation of the police. A common citizen who has not support cannot obtain document from the police if they do not cooperate. This is not a unique case to the appellants here – this is the everyday story of Kenyans, and which is extremely disheartening. Let me hasten to add that the motto “Utumishi kwa Wote” seems to only serve a certain section on “wote” and not the Swahili word wote meaning everyone as we know it.

24. This case goes to illustrate what Kenyans go through in the hands of unprofessional and unethical officers charged with the responsibility of public service and they turn that hallowed position into an arena of frustrating Kenyans. What a shame. I will therefore exercise my discretion to admit as additional evidence the information sought from the document examiners by the appellants/applicants.

25. Under **Order 42 rule 27** the appellate court has powers to allow for the production of additional evidence at the hearing of the appeal in two instances: -

a) Where the trial court refused to admit evidence which ought to have been admitted and secondly where;

b) The appellate court requires any document to be produced or a witness to be examined or for other substantial cause.

26. It is my understanding the further evidence sought to be adduced could not have been adduced without the police releasing the report of the document examiner. Further the additional evidence to be adduced demonstrate and disclose a strong prima facie case

27. For the foregoing reasons, I allow prayer 1 and 2 of the Notice of Motion dated 2/12/2021. The Costs will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF MARCH 2022.

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MOGENI

JUDG

In the presence of:-

Mr. Munoko Advocate for the Appellant/Applicants

Ms. Yvonne Omolo h/b for Mr. Oyatta Advocate for the Respondent

Vincent Owuor..... Court Assistant