REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL APPEAL NO. 74 OF 2010

EMMANUEL OTIENO KONGILI

SOUTH NYANZA SUGAR CO. LTD …….…….....…..... APPELLANTS
-VERSUS-

JIMMY JOSEPH O. OWUOR……...…...……. RESPONDENT

RULING

Being an appeal from the Judgment and decree of Hon. G. Oduor Senior Resident Magistrate – Kisii, dated the 23rd March, 2010 in the Original Kisii CMC No. 229 of 2006.

By a Notice of Motion dated 22nd June, 2010 and filed in court on 24th June, 2010, expressed to be brought under order XLI rules 22(1) (a), 23 and 24 of the **Civil Procedure Rules** and **Other Enabling Provisions of the Law**, the applicant who is the respondent in this appeal seeks that he be allowed to produce additional documentary evidence in the nature of purchase receipts issued to him in the ordinary course of business. He further prayed that this court be pleased to take such additional evidence without calling any further oral evidence or referring the same to the trial court. He also prayed for costs.

The grounds in support of the application are that, the court from whose decree the appeal is preferred refused, after hearing evidence, to admit the documentary evidence being the receipts used for the purchase of the spare parts in Eldoret and Kisumu without calling the maker, which evidence ought to have been admitted in accordance with section 33(b) of the **Evidence Act.** That the evidence on the receipts had been taken and cross-examination conducted and the court therefore ought to have admitted the same direct so as to form part of the record. Finally, he contented that no prejudice would be occasioned to the cause of justice by allowing the evidence and considering the same in this appeal.

In the affidavit in support of the application, **Mr. George Shane Okoth,** learned counsel deponed that the respondent's suit in Chief magistrate's court at Kisii involved a claim for compensation for material damage suffered when his motor vehicle was involved in a road traffic accident. Among the exhibits sought to be produced by the respondent during the trial were 3 receipts issued to him in the ordinary course of business for the purchase of spare parts in shops in Eldoret and Kisii amounting to Kshs. 72,450/= and a receipt issued by the Automobile Association of Kenya for Kshs. 5,500/= for vehicle accident assessment. The same were however not produced in evidence as the trial court ruled that the makers of the same be called despite the provisions of section 33(b) of the **Evidence Act**.

The application was resisted through a replying affidavit sworn by **Mr. Samuel Odhiambo Kanyangi**, learned counsel. He stated that the application was an abuse of the court process because when the matter came up in the lower court for hearing, he had objected to the production of the documents without the calling of the makers on the grounds that it was imperative that the makers be availed to verify the authenticity of the receipts and secondly, there had not been any attempt to secure the

attendance in court the makers of the documents. Apparently the respondent had made an oral application to have the documents admitted in evidence without calling the makers because the receipts were issued in 2005 and it would have been difficult to secure the attendance of the makers. The court upheld the objection. The respondents neither appealed against the court's ruling nor was an application for review preferred.

The respondent again renewed his application on 20th August, 2009 and the same objection was raised by the appellant. Again the objection was sustained save for other documents which the trial court allowed. The ruling with regard to the production of the receipts annexed to the application having been made twice without the respondent preferring an appeal or review, the instant application was ***res judicata***. In view of the foregoing, taking of such additional evidence according to the appellant would greatly prejudice his appeal and the same shall be tantamount to introducing evidence through the back door.

When the application came up for interpartes hearing before me on 6th October, 2010, parties agreed to canvass the same by way of written submissions. The same were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

Order XLI rule 22 of the **Civil Procedure Rules** provides for production of additional evidence in the appellate court. However that power is not exercised willy nilly. The principles upon which an appellate court in civil cases will exercise such discretion and allow the reception of further evidence are:-

a. It must be shown that the evidence could not have been 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.

However, the rule does not entitle a party applying to bring in contradiction as opposed to additional evidence, for to do so would mean the case would in effect be reheard and retried as to the existing facts which cannot have been the intention of the rule. See **Wanje –vs- Saikwa (1984) KLR 275** and **Hadd –vs- Marshall (1954) 3 ALL E.R 745**. Further and as correctly submitted by the appellants, the rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case on appeal. There would be no end to litigation if the rule was to be used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given to the appellate court under this rule should be exercised very sparingly and with great circumspection.

It is common ground that the respondent made two applications to have the receipts sought herein to be introduced as additional evidence to be admitted evidence in the trial court without the makers being called to testify on them and produce them. It is also common ground that the reasons for the applications were that it would have been expensive to secure their attendance alternatively, the respondent contented that their attendance could not have been easy to procure. In objecting to the application, the appellants pointed out that the authenticity of the receipts could only be secured by attendance in court of the makers of the documents and secondly, there had been no attempt to secure the attendance of the said witnesses. The court on each occasion agreed with the appellants. As it is therefore the evidence was readily available and if the respondent had exercised reasonable diligence, he could easily have availed the makers of the documents in court. It was not enough for the respondent to merely stand up in court and orally apply to have the documents admitted in evidence without calling the makers on the grounds that it would be expensive or their attendance could not be easily secured. The respondent had not at all attempted to secure the attendance of these witnesses and failed. He made it appear that, merely because such witnesses were scattered in Eldoret, Kisumu and Nairobi respectively, it would be expensive if not impossible to secure their attendance. What a fallacy. He did not demonstrate any efforts he had

undertaken to avail such witnesses like issuance of witnesses summons without success. I do not therefore think that in the circumstances of this case the evidence of these witnesses could not have been secured had the respondent exercised reasonable diligence.

In applying for the admission of the evidence in the trial court the respondent premised his application on section 33(b) and 35, of the **Evidence Act**. This section allows into evidence statements or documents by persons who cannot be called as witnesses. However for such sections to be invoked it must be demonstrated that the maker of the statement or document is:-

- Dead

- Cannot be found;

- Incapable of giving evidence; or

- If his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

The respondent did not demonstrate or satisfy any of the above conditions. Much as the respondent purported to rely on the last prerequisite aforesaid there was no evidence other than the respondent's assertion from the bar that it would be expensive to secure the attendance of such witnesses. That bold statement could not have assisted the court to determine whether such an expense in the eyes of the court was unreasonable.

In any event, the issue of admissibility of the respondent's documents had been ruled on twice by the trial court. The respondent did not see the need to appeal against those rulings or indeed have them reviewed. This application therefore is an attempt by the respondents to have a ***"third bite of the same cherry"*** which is unacceptable. Indeed it is ***res judicata.*** Of course and as correctly submitted by the respondent, though the right of appeal against these rulings was available to the respondent, failure to mount such an appeal did not amount to a waiver of his right to apply for the additional evidence. However considering the circumstances of the case and the prayers as worded in the application, it is obvious to me that the respondent is merely seeking to go round the two rulings by the learned trial magistrate.

In the upshot, I find the application unmerited and is accordingly dismissed with costs.

Ruling dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE