REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Appeal 75 of 2008

(Appeal arising from BGM CM CC No.351 of 2006)

APA INSURANCE CO. LTD :::::::::::::::::: APPELLANT

~VRS~

WYCLIFFE WABWILE MAKOKHA :::::::::::::::::: RESPONDENT

RULING

This is a notice of motion dated 13/01/2010 brought by the Appellant, APA Insurance Co. Ltd under Order XLI Rule 22(1) and Order L Rule 1 of the Civil Procedure Act. The prayers sought are that the Applicant be allowed to adduce additional evidence in this appeal and

the court gives directions on how the additional evidence shall be taken.

The facts as contained in the supporting affidavit are that the lower court suit proceeded ex-parte and the Appellant had no chance to produce any evidence. It is the Appellant's wish to adduce additional documentary evidence which involve public documents. It is argued by Mr. Alwanga for the Applicant that the evidence is a key factor to determining this appeal and if the prayers are not allowed the Applicant's appeal will be prejudiced. The documents are annexed to the application which are the following:

I) Kenya Gazette Notice No.113 of 14th November, 2003.

II) Certificate of incorporation of NEWCO LOMITED dated 1st November 2002.

III) Certificate of change of name from Pan Africa Insurance to Pan Insurance Holdings Limited.

IV) Certificate of incorporation for Pan Africa General Insurance Limited.

V) Gazette Notice No.8126 and 7928.

The application was vehemently opposed by the Respondent relying on his grounds of opposition dated and filed on the 9th February 2010. Mr. Makokha argued the grounds submitting that the application is an afterthought and meant to delay the Plaintiff from enjoying the fruits of his judgment. He referred to this application as frivolous and an abuse of the due process of the court. Mr. Makokha contended that Order XLI does not permit adducing of additional evidence. And if it has to be allowed, the Applicant must satisfy the conditions laid down. These include proof of due diligence in obtaining the documents. It has not been disclosed when the said documents were obtained. The Respondent argues that since the directions were taken in this case, the Applicant can not drag the court backwards. The Applicant had a chance of adducing the evidence in the lower court but failed to do so.

I refer to the relevant provisions of the law. Section 78 (1) of the Civil Procedure Act provides that an appeal court has power to admit additional evidence or direct that such evidence be taken. Order XLI Rule 22 provides:

"(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 whom the decree the appeal is preferred has refused to admit evidence which ought to have been admitted;

(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 rule gives guidelines on when and how additional evidence may be taken. There was no attempt made by the Applicant to adduce the evidence in issue in the lower court. Even if the court heard the case ex-parte, the facts leading to that must be scrutinized. It is not disputed that the Appellant was duly served with the hearing notice but chose not to attend court during the hearing. The Appellant had some options assuming that the failure to attend court was inadvertent. The Appellant would have applied to re-open the case or set aside the ex-parte proceedings in order to adduce the evidence in support of its case. There was no such attempt. The Defendant proceeded to file submissions after the Respondent's case was closed. It can not therefore be said that the trial court refused to admit the evidence. The Defendant had the opportunity to tender the evidence but failed to make use of it.

I have looked at the grounds of appeal and the provisions of the law. This court may not required any additional evidence to determine any of the issues arising from the said grounds. This is pursuant to the provisions of Order XLI Rule 22 (1) (b). The Applicant has not satisfied any of the two requirements under Rule 22 which lays the basis of admitting additional evidence.

The other requirement is that the Applicant must prove that it did not have the evidence at hand during the hearing and that it had used due diligence to obtain it but failed. There is no such an averment in the Applicant's affidavit to show due diligence. Rule 22 prohibits the court from admitting additional evidence unless one or both the conditions under the rule are satisfied.

It is also a requirement that the evidence be credible. I have seen the evidence annexed which consists of public documents. The evidence is no doubt credible and this requirement is satisfied.

I find that the Applicant has failed to satisfy the three core requirements on admission of additional evidence. I was referred to the case of **MUMIAS SUGAR CO. LTD -VRS- ZAKAYO SAKWA ONIANGO Kakamega High Court Civil Appeal No.22 of 2001** where my brother Judge G.B.M Kariuki declined to admit additional evidence in an application with similar facts. The Honourable Judge said in his ruling:

"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 would not have made it so available."

In the same application, an English authority of **LADD -VS- MARSHALL [91954] 1 W.L.R 489 page 1491** was relied on where Lord Denning said:

"To justify the 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 others words, it must be apparently credible though it need not be incontrovertible."

I agree with Lord Denning that the power to call additional evidence is required to be exercised very sparingly and with great caution. The court should not exercise its discretionary power to bring in contradictory evidence as opposed to additional evidence for to do so would mean re-hearing and retrying the case. The situation facing the court herein cannot be described in better words than that a litigant

who has been unsuccessful can bring in fresh evidence to support his case which he never bothered to adduce in the trial court.

It is my finding that the application before me is not merited and I dismiss it with costs.

F. N. MUCHEMI
JUDGE

Ruling dated and delivered on the 8th day of June 2010 in the presence of Mr situma for kalya for the Appellants and the Respondent in person.

F. N. MUCHEMI
JUDGE