



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL 36 OF 2002**

**NECTOR LIYAI CHIVOLI.....APPELLANTS**

**MACJAMES CHIVOLI LIYAI**

**~VRS~**

**HUDSON NALWANG'A.....RESPONDENT**

**RULING**

The applicants, Nector Liyai and MacJames Chivoli Liyai in their application dated 13<sup>th</sup> October, 2008 brought under section 78 (1) (d) of the Civil Procedure Act seeks for an order that this court be pleased to take additional evidence or to require additional evidence to be taken. The grounds relied on in the supporting affidavit are that the appeal has been admitted and record of appeal has been admitted and record of appeal prepared and filed. There is need to adduce additional evidence to the effect that the 1<sup>st</sup> Applicant had conducted a marriage with another spouse before he started cohabiting with the Respondent's daughter. Further, it requires to be proved that the Respondent's daughter was married elsewhere before cohabiting with the 1<sup>st</sup> Applicant. The evidence intended to be adduced was not available at the time the case was being heard in the lower court. In the prevailing circumstances, the Applicants are not bound to pay dowry to the Respondent.

The application was vehemently opposed by the Respondent relying on grounds of opposition filed in court on 11<sup>th</sup> May, 2009. The Respondent avers that it will not be proper for the Respondent to sneak in new evidence in the appeal and is only allowed to bring in matters of law. The application is *functus officio* and lacks merit calling for dismissal.

Mr. Onchiri represented the Applicant while Mr. Kituyi appeared for the Respondent.

The counsel for the Applicants submitted that the Applicant married to someone else under the African Christian Marriage and Divorce Act, Cap 151 and had misplaced the certificate which is now available. It has come to the Applicant's knowledge that the respondent's daughter was married to someone else before cohabiting with the applicant. It is therefore necessary to seek an order of this court to allow that additional evidence in the appeal which is very critical. If the said evidence was available earlier, the 2<sup>nd</sup> Appellant would have been excused from paying dowry for another woman. The applicant relied on two authorities in support of admitting additional evidence on appeal.

Mr. Kituyi in opposing the application, contended that the application is brought under section 78 of the Civil Procedure Act in total disregard of Order XLI rule 22 and 23 which provides for the procedure

of admitting additional evidence. He said if the new evidence is admitted at this stage it is going to prejudice the Respondent. The document purported to produce has an official stamp without a date. The Applicant has not shown due diligence in his application.

Briefly, the facts leading to this application are that the Respondent successfully sued the Appellants in Sirisia District Magistrate's court for payment of dowry for his late daughter. The District Magistrate entered judgment in favour of the Respondent against both Defendants jointly. The appellants were aggrieved by the said decision and appealed in this court seeking to quash it.

The application is brought under section 78 of the Civil Procedure Act which is a general provision relating to appeals. Order XLI rules 22 and 23 deal with admission of additional evidence by the first appeal court giving only two categories under which such evidence may be admitted being:

- a) *evidence rejected by trial court*
- b) *documents or witness that the appeal court may require to be produced or examined respectively.*

The facts supporting this application are different and do not fall in any of the two categories. The relevant section to this application is section 78 which provides:

*“subject to such conditions and limitations as may be prescribed, an appellate court shall have power:*

- a) *to determine a case finally;*
- b) *to remand a case;*
- c) *to frame issues and refer them for trial;*
- d) *to take additional evidence or to require the evidence to be taken;”*

The applicant has therefore used the correct provisions of the law in bringing this application.

The main reason given by the applicant for failing to produce the certificate of marriage in the lower court is that the document was not available. I have perused the annexed document. It is a marriage certificate issued under the African Christian marriage and divorce Act. It shows that on 7/08/1999 marriage between the 1<sup>st</sup> Applicant, Nicktor L. Chivoli and Ruth Salano took place at Webuye Glory Church in Bungoma District, Western Province. It bears an official stamp but no date appears on the stamp; the issue of the date was raised by Mr. Kituyi. It is therefore not possible to know the date of issue.

I have perused the supporting affidavits of the Applicants. The 1<sup>st</sup> Applicant avers that the said certificate was not available during the hearing of the case in the lower court since he had misplaced it. The 1<sup>st</sup> Applicant is presenting to this court a document to prove a legal marriage. Such a marriage is required to be registered with the Registrar of Marriages. If one misplaces a certificate, a copy of it or any other evidence to confirm such a marriage would be available from the Registrar of Marriages. The 1<sup>st</sup> Applicant has not explained why he failed to obtain such evidence to produce during the hearing of the case. It is said that the Applicants were not represented by an advocate in the lower court. The Applicants were fully aware of the case against them and they fully participated in the proceedings. The 1<sup>st</sup> Applicant knew that he had conducted a legal marriage with another party earlier. It was common knowledge that this issue was relevant to his case given its nature. Even if the certificate was not available and assuming he did not know where to obtain a copy or other evidence to produce it in court, the 1<sup>st</sup> applicant would have adduced oral evidence in court during his defence. This would have given this court a good ground to admit the said marriage certificate if it was traced after the lower court was determined.

In paragraph 5 of the 1<sup>st</sup> Applicant's affidavit he avers that he learnt later that prior to his cohabitation with the Petitioner's daughter, she had been married elsewhere. The lower court record shows that the 1<sup>st</sup> Applicant indeed cross-examined the Respondent on this issue which was admitted. This is therefore not new evidence and ought to have been a part of the 1<sup>st</sup> applicant's evidence in the lower court.

In the applicants' authority of MUMIAS SUGAR CO. LTD VS ONIANGO HCCA NO.22 OF 2001 at Kakamega, the court held that a first appeal court has power to admit additional evidence or require such evidence to be taken only on the Applicant satisfying three conditions:

- a) *that the evidence could not be obtained with reasonable diligence at the trial;*
- b) *would probably have an important influence on the result of the case, though it needs not be decisive;*
- c) *the evidence must be apparently credible, though it needs not be incontrovertible.*

In the application before me, the applicants have failed to show that such evidence could not be obtained with reasonable diligence in the lower court. As I have pointed out above, secondary evidence would have been obtained from the Registrar of Marriages if the first Applicant had misplaced the original certificate.

I have pointed out that the annexed copy of the certificate has an official stamp with no date. This makes the date of issue unascertainable and puts the authenticity of the document in question. The said evidence has, therefore, not satisfied the condition of credibility.

I find that the application has no merit and I dismiss it with costs to the Respondent.

Dated, Delivered and signed at Bungoma

this 17th day of June 2009 .

**F. MUCHEMI**

**JUDGE**