



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 897 of 2003**

**PETER MANYARA NDUNGU.....1<sup>ST</sup> APPELLANT**

**BRITISH HIGH COMMISSION.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PATRICK MUGENDI MAGIRI.....RESPONDENT**

**R U L I N G**

1. By a Chamber Summons dated 25<sup>th</sup> September 2007, Patrick Mugendi Magiri the respondent herein, sought the following orders:

- (i) That the notice of change of advocates dated 7<sup>th</sup> June 2006 be struck out as no leave of either Court has been obtained for the change, as required by Order III Rule 9A.
- (ii) That this Honourable Court be pleased to allow the respondent to produce additional documentary evidence, for consideration by this Honourable Court during the course of the appeal.
- (iii) That costs be provided.

2. During the hearing of the application, the respondent did not pursue prayer No.1, but urged the Court to grant prayers No. 2 and 3. The application was brought under Order XLI Rules 22, 23 and 24 of the Civil Procedure Rules.

3. The grounds relied upon which are relevant to the prayer now being pursued, is the fact that the respondent/applicant seeks to introduce in evidence a letter dated 9<sup>th</sup> January, 2003 which was written by the 2<sup>nd</sup> appellant's advocate, advising that the diplomatic immunity will not be relied on in connection with the motor accident.

4. Mr. K.H. Osmond, the applicant's advocate has sworn an affidavit in support of the application, in which he depones that he received the letter after the preliminary objection with regard to the competence of the suit on the grounds of diplomatic immunity had been heard. It was for that reason that the counsel was unable to introduce the letter in evidence. A copy of the letter has been exhibited.

5. Mrs. Githae who appeared for Peter Manyara Ndungu and British High Commission, who are the appellants, urged the Court to disallow the application, maintaining that under Order XLI Rule 22(1) of the Civil Procedure Rules, the applicant cannot move the Court for the orders sought, but it is only the Court which can make such orders if it is satisfied that additional evidence is necessary.

6. I have considered the application before me. The circumstances under which additional evidence may be adduced in an appellate Court are stated under Order XLI Rule 22 as follows:

“22 (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 whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(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.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

7. There has been no allegation made before this Court that the lower Court refused to admit evidence which it ought to have admitted. Therefore Order XLI Rule 22(1)(a) of the Civil Procedure Rules does not arise. With regard to Rule 22(1)(b) of the same order, the applicant needed to convince this Court that the additional evidence sought to be introduced is necessary to enable this Court dispose of this appeal.

8. From the information availed to this Court, I am not convinced that additional evidence ought to be allowed. Firstly the letter dated 9<sup>th</sup> January, 2003 that is sought to be introduced as new evidence, was written by the 2<sup>nd</sup> appellant’s counsel to the 2<sup>nd</sup> appellant. It was privileged communication between an advocate and his client, and cannot therefore be adduced in evidence unless the privilege has been waived. The Court has not been convinced that there has been any such waiver.

9. Secondly, although the letter dated 9<sup>th</sup> January, 2003 was not available at the time when the preliminary objection was argued, it is evident that as at 23<sup>rd</sup> October, 2003 when the hearing of the suit proceeded in the lower Court, the letter was available and the applicant therefore had an opportunity to avail the evidence to the Court. The record of the lower Court does not reveal any attempts to produce the letter, and no reason has been offered for this failure.

10. Thirdly, the respondent/applicant has not filed any cross appeal. The respondent cannot, therefore, purport to call additional evidence when it is not in fact prosecuting any appeal.

11. For the above reasons, I find no merit in this application and do therefore dismiss it with costs.

**Dated and delivered this 28<sup>th</sup> day of July, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mrs. Githae for the appellant/respondent

Advocate for the respondent/applicant, absent