



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

Civil Appeal 65 of 2006

JAPHETH MWANGO CHACHA APPELLANT

VERSUS

EZRA ODONDI OGOL RESPONDENT

RULING

The respondent filed an application dated 6th November 2007. He sought leave to adduce additional documentary evidence during the hearing of the appeal. The application was supported by an affidavit sworn by the respondent. The respondent was the plaintiff in SRMCC.NO.103 of 2004 at Homa Bay and the appellant herein was the defendant. In that case the trial magistrate found that motor vehicle registration No.KAJ 708P which was sold to the respondent by the appellant was suspected to be stolen property and was therefore impounded by the police. The trial court ordered the appellant to refund to the respondent the purchase price of Kshs.600,000/=. During the trial of the aforesaid suit the appellant lodged a complaint against one Joseph Mwangi Ngige who was arrested and charged before the Nairobi Chief Magistrate in criminal case No.2691 of 2004 with the offence of obtaining money by false pretences that he would sell the aforesaid motor vehicle to the appellant. The said Joseph Mwangi was found guilty and convicted and the court ordered that the subject motor be released to its lawful owner, one Gabriel Githinji Kariuki.

The respondent now wishes to have the proceedings and judgment in the aforesaid Criminal Case No.2691 of 2004 produced as additional evidence in this appeal. The appellant opposed the said application and filed a statement of grounds of opposition. He stated, inter alia, that the application does not satisfy the conditions set out under **Order XL1 rule 22(1) (a) and (b) of the Civil Procedure Rules**. He further stated there was inordinate delay in bringing the respondent's application. In his view, the application was intended to defeat the cause of justice.

Mr. Ochwangi for the appellant cited the Court of Appeal decision in **CENEAST AIRLINES LTD VS KENYA SHELL LTD**, Civil Appeal 174 of 1999. In that application, the applicant sought to have additional evidence admitted at the hearing of the appeal. That evidence was a letter written to the applicant by the respondent. The application was filed under the provisions of **rule 29 of the Court of Appeal Rules**.

The application was objected to by the respondent and upon hearing the application, the High Court dismissed the same thus triggering the application before the Court of Appeal.

The court dismissed the appeal and held that the matters that were contained in the said letter had been placed before the High Court by way of an affidavit and counsel's submissions.

The court further held that the provisions of rule 29 of the Court of Appeal Rules had not been satisfied. It stated that before the court could permit the adduction of the additional evidence, an applicant must show:

- 1. That the additional evidence sought to be adduced on appeal could not have been obtained by reasonable diligence during the trial in the superior court; and**
- 2. that such evidence, had it been available to the trial court, would have been likely to have affected the result of the suit.**

I have considered the rival arguments by both parties. Rule 29 of the Court of Appeal Rules is very explicit as regards the conditions, which must be satisfied by an applicant before that court can allow admission of additional evidence at the hearing of an appeal. The position is different under the Civil Procedure Rules. **Order XL1 rule 22(1)** states as follows:

“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

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.”

In this appeal, the additional evidence that is sought to be adduced was not available during the hearing before the trial court. The judgment was delivered on 15th August 2006 whereas the judgment, which gave rise to this appeal, was delivered on 10th March 2006. The two matters related to motor vehicle registration No. KAJ 708P. It will be in the interest of justice that the proceedings and the judgment in Criminal Case No.2691 of 2004 before the Chief Magistrate’s Court at Nairobi be produced during the hearing of this appeal.

I do not agree with the appellant that the application by the respondent is calculated to delay or obstruct the cause of justice. To the contrary, I believe the additional evidence will expedite and illuminate the cause of justice. I also find that the respondent’s application was filed without delay.

I therefore allow the respondent's application for admission of additional evidence as sought. Since the proceedings and the judgment sought to be adduced have already been filed as exhibits in this application, there would be no need to file a supplementary record of appeal, the court will consider the said documents as duly filed.

The costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at KISII this 30th day of May, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Nyakundi HB for Mr. Bosire for the Applicant

Mr. Oguttu for the Respondent

D. MUSINGA

JUDGE.