



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL 37 OF 2008

REBECCA KWAMBOKA GETUBA.....APPELLANT

VERSUS

THE BOARD OF GOVERNORS OF KENYA POLYTECHNIC.....1ST RESPONDENT

AL SHIKELY TRANSPORTERS LTD.....2ND RESPONDENT

R U L I N G

The appellant Rebecca Kwamboka Getuba has moved this court under Order XLI Rules 22, 23 and 24 of the Civil Procedure Rules and Section 78(1) of the Civil Procedure Act, seeking orders that the appellant be granted leave to adduce additional evidence relating to the ownership of the motor vehicle Registration No. KAL 278U at the hearing of the appeal. The application is premised on the grounds:

- (a) That the results of the search of the motor vehicle were not available at the trial of the case.
- (b) That the results for the search are now available and ought to be placed before the court to enable it to do substantial justice to the case.
- (c) That the documents are admissible under Order XLI Rule 22(1) of the Civil Procedure Rules.
- (d) The additional evidence sought to be adduced could not have been obtained by reasonable diligence during the trial of the case in the subordinate court.
- (e) The evidence, had it been made available to the trial court, would have been likely to have affected the results of the suit.

The application is also supported by an affidavit sworn by the appellant's advocate Steven Waweru Mwangi, who depones that judgment was granted against the appellant on the grounds that the ownership of the motor vehicle No. KAL 278U had not been proved. The advocate explains that his attempts to obtain a search of the motor vehicle at the Motor Vehicle Registry, was frustrated by the fact that the vehicle's records could not be traced. The advocate maintains that the copy of the records at the registry of motor vehicles shows that the motor vehicle is indeed owned by the 1st respondent Kenya Polytechnic and therefore the additional evidence if allowed would have an important influence on the results of the case.

The application is opposed by the 1st respondent who has filed grounds of opposition contending

- (i) That the application is misconceived and bad in law.
- (ii) That the appellant has not adduced any evidence by way of exhibits to show that after the application of reasonable diligence they were unable to obtain the results of the search of motor vehicle number KAL 278U from the Kenya Revenue Authority.
- (iii) In the absence of reasonable explanation for the appellants failure to exercise and/or attempt to exercise reasonable diligence to obtain the copy of records of the motor vehicle aforesaid, leave sought by the appellant under Order XLI Rule 22(1) of the Civil Procedure Rules should be denied.
- (iv) The appellant has not established sufficient cause to enable this court allow him adduce additional evidence.
- (v) The proceedings in the trial court are of adversarial nature where one party emerges triumphant at the end and where litigation must come to an end.

In arguing the application, counsel for the appellant urged the court to be guided by the case of **Wanje vs Saikwa (1984) KLR 275** wherein it was held that the principal upon which an appellate court in civil case will exercise its discretion in deciding whether or not to receive further evidence are: -

- (a) It must be shown that the evidence could not be 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.

It was submitted that the further evidence sought to be adduced by way of copy of records from the Registrar of Motor Vehicle, shows evidence of ownership which is consistence with the evidence adduced by the appellant by way of a police abstract. The court was urged to find the case exceptional and exercise its discretion in the applicant's favour.

For the respondent it was submitted that under Order XLI Rule 22(1) of the Civil Procedure Rules, parties are only allowed to adduce additional evidence if the lower court refuses to accept such evidence. It was submitted that in this case no effort was made to adduce the evidence of the copy of records from the Registrar of the Motor Vehicles in the lower court. Counsel for the respondent relied on the same case **Wanje vs Saikwa (1984) KLR 275**. Counsel for the respondent maintained that the respondent denied the ownership of the motor vehicle in its pleadings and the burden was therefore upon the appellant to prove ownership of the motor vehicle. It was maintained that sufficient cause had not been shown to justify the adduction of additional evidence as the appellant only obtained copy of the record after the judgment.

The circumstances under which production of additional evidence can be allowed in an appellate court are set out under Order XLI Rule 22(1) of the Civil Procedure Rules which provides 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 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.”

In this case, the record does not reflect the applicant as having made any application to have the copy of records from the Registrar of Motor Vehicles produced in the lower court. Indeed, it is contended that the results of the search of the motor vehicle were not available at the trial of the case. However, no evidence has been availed to this court to show when the applicant first applied to the Registrar of Motor Vehicle for a copy of record for motor vehicle KAL 278U nor is there any evidence to confirm the contention by the applicant's advocate that the results of the search were not available. Indeed, there is nothing to demonstrate any good reason as to why the copy of the record from the Registrar of Motor Vehicle was not produced. It is evident from the pleadings that the issue of ownership of the motor vehicle KAL 278U was a contentious issue and the applicant was therefore under a responsibility to adduce evidence to prove his allegation that the 1st respondent was the registered owner of the motor vehicle. Although the 1st respondent did not call any evidence, a defence was filed and the applicant was under a responsibility to dislodge that defence. Indeed, the applicant's suit was dismissed by the lower court because of the failure to adduce the evidence now sought to be produced. While it is true that the additional evidence regarding the ownership of the motor vehicle would have an important influence on the results of the case, it will be prejudicial to the respondent as it will have the effect of allowing the applicant to specifically address the weakness of her case as pointed out in the judgment of the lower court by beefing up its case with evidence which it had failed to produce in the lower court for no apparent reason. I find that the applicant has not satisfied the provisions provided under Order XLI Rule 22(1) & (2) of the Civil Procedure Rule nor has she satisfied the principle upon which this court can exercise its discretion in allowing further evidence as set out in the case of *Wanje vs Saikwa* (Supra). There is therefore no justification to allow her application for adduction of additional evidence. Accordingly, the application is rejected. I make no orders as to costs.

Dated and delivered this 11th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Shumenga H/B for Waweru for the appellant

Ms Kimiri H/B for Wamae for the 1st respondent

Ms Makungu H/B for 2nd respondent