



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 78 of 2005

RUTH NKATHA MANYARAAPPELLANT

V E R S U S

RICHARD THIAINE IKWINGA.....RESPONDENT

RULING

1. The Application dated 9.2.2007 is premised on Order XLI Rules 22, 23 and 24 and Order L of the Civil Procedure Rules as well as s.3 and s.3A of the Civil Procedure Rules and save for the prayer that costs be provided for, the substantive prayer is this:-

“The Honourable court be pleased to admit additional evidence by the Appellant.”

2. The grounds in support of the Application are these:-

“(a) That the Appellant’s petition for Divorce was grounded inte-alia on the ground that the Respondent had committed Adultery with FAITH KAIMURI but the Respondent denied it on oath during the hearing.

(b) That after committing perjury in 2005 the Respondent filed Tigania Children’s case No. 8 of 2006 in which he admitted having a child aged 2 ½ years with the said FAITH KAIMURI.

(c) That the fact of adultery between the Respondent and FAITH KAIMURI creates a substantial cause for admission of additional evidence”.

2. Before turning to my appreciation of the matter, order XLI Rules 22,23 and 24 provides as follows:-

“Rule 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 requires any document to be produced or any witness to be examined to enable it pronounce judgment, or for any other substantial cause,

(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.

Rule 23 Whenever additional evidence is allowed to be produced by the court to which the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

Rule 24 Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified”.

3. I quite agree with Mr. Anampiu for the Respondent that the requirement for additional evidence is a preserve of the Appellate court and not a party, hence the opening words to Rule 22 above; **“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”**. If this is the law I understand the applicant to be saying that subsequent to the judgment now on appeal, the Respondent instituted Tigania RM’s Court Children’s Case No. 8 of 2005 and in that case he stated that he had a 2 ½ year old child with one Faith Kaimuri meaning that he had committed adultery prior to Divorce Cause No. 1 of 2004 (Tigania RM’s Court). That because adultery was in issue during the divorce cause this new evidence should be admitted into the Appeal.
4. I have seen the Petition of Appeal dated 14.6.2004 and particularly paragraph 6 thereof where the applicant averred that the Respondent had **“committed acts of adultery and [had] children out of wedlock and is currently cohabiting with ESTHER MUKUBU MUCHIRI.”** The learned trial magistrate on the evidence before him dismissed this assertion as not proved. Ground 2 of the Memorandum of Appeal challenges that finding inter-alia and the applicant says that there was overwhelming evidence to prove the same. If this be so and even if the Application is properly before court, and it is not, why is there need to adduce further evidence? The applicant was confident when filing the appeal that he has enough evidence to prove adultery and I do not see what use any other evidence would serve especially since the alleged evidence only came to the fore after judgment and the proper remedy would be an application for review of judgment under Order XLIV Rule 1 of the Civil Procedure Rules and not an Application to adduce additional evidence. It is not my understanding that additional evidence is adduced on appeal for that purpose; in fact my understanding is that it is intended for the Appellate court to have an unclear piece of evidence to be clarified and not as is the case here to give one party an undue advantage by bringing clearly prejudicial evidence at the Appellate stage which evidence in fact came after the judgment.
5. It is my simple view that both within the meaning of Order XLI Rules 22 and the facts as I understand them, the Application dated 9.2.2007 is clearly misguided and is best dismissed with costs to the Respondent.
6. Orders accordingly.

Dated, signed and delivered in open court at Meru this 25th day of April 2007.

ISAAC LENAOLA

JUDGE

In The Presence Of

Mr. Rimita Advocate for the Appellant

N/A Advocate for the Respondent

ISAAC LENAOLA

JUDGE