REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 22 of 2001

MUMIAS SUGAR CO. LTD.....APPELLANT

VERSUS

ZAKAYO SAKWA ONIANGO.....RESPONDENT

R U L I N G

The Appellant, Mumias Sugar Co. Ltd, made an application on 26.2.2002 seeking orders that further evidence be taken regarding ownership of motor vehicle registration number KAC 103M. The application was by Notice of Motion premised on Order L Rule 1 of the civil Procedure Rules and section 78 (1)(d) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. The grounds on which it was made were stated in the body of the application and included in a statement that the appeal arose from "a running down cum industrial accident" in which it was alleged that the Respondent, Zakayo Sakwa Oniango, fell off motor vehicle registration number KAC 103 M and sustained injuries when "according to a copy of records obtained from the office of the Registrar of Motor Vehicles, the said motor vehicle at the material time belonged to Enforcer Alarms Limited of Mombasa and not to the appellant." The application was supported by an affidavit sworn by one Meshack Raboso Guto, the Company Secretary of the Appellant company, who claimed to be competent to swear the affidavit but did not indicate that he had authority to do so.

The Appellant had on 25.4.2001 lodged the appeal herein against the judgment delivered on 27.3.2001 in Mumias Resident Magistrate Court Civil case No. 46 of 2000 by N.B.K. Nyamatenganda, a Senior Resident Magistrate. In the appeal, the Appellant challenged the decision and judgment of the lower court on the grounds, inter alia, that the evidence adduced in the trial did not establish negligence on the part of the Appellant, that there was no evidence to show that the vehicle (KAC 103 M) belonged to the Appellant, and that the finding of negligence on the part of the Appellant "*was biased, unjust and totally unsupported and has resulted in a miscarriage of justice…..*" *The said deponent deposed that AON Minet Insurance Brokers Limited were the Appellant's Brokers and that the Appellant had notified it "at the very earliest that motor vehicle Reg. KAC 103 M did not belong to the Appellant." In the said affidavit, Meshack Raboso Guto further averred that "it was only after judgment had been delivered (in Mumias SRMCC No. 46 of 2000) against the appellant that the said brokers wrote to the appellant's insurers, Kenindia Assurance Co. Ltd., a letter copied to the appellant attaching a copy of the records of motor vehicle registration number KAC 103 M."* The letter by AON Minet Insurance Brokers Ltd to Kenindia Assurance Co. Ltd was dated 12.1.2002 and the certificate by the Registrar of Motor Vehicles

was dated 22.11.2001. The deponent averred further that it was "*not possible to place the evidence relating to the ownership of the said motor vehicle before the trial court." The said deponent further contended in the affidavit that the said evidence "will alter the result of the case as the appellant need to be condemned to pay damages to the respondent it did not own the motor vehicle involved in the alleged accident."*

Mr. Nyikuli, Advocate, who argued the application on 8.2.2005 on behalf of the Appellant submitted that the appellant's supporting affidavit to the application showed that the Appellant had done its best to get the evidence in time but was unable to do so. He cited ***MZEE WANJIE VS A.K. SAKWA (1982-88) KAR 462*** to buttress the proposition that the Appellant's application had merit.

I have perused the application and given due consideration to the averments in the affidavit of Meshack Raboso Guto and the submissions of Mr. Nyikuli.

The Appellant was represented by an advocate throughout in the lower court and it filed defence to the claim on 6.3.2000 in which it did not deny or refute ownership of the said motor vehicle reg. No. KAC 103 M. Its pleading in the defence proceeded implicitly on the footing that the motor vehicle belonged to it. The Respondent on his part was not explicit in its pleading in the plaint that the motor vehicle was registered in the name of the Appellant. But the plaint, read in the context of the claim by the Respondent, left no doubt that the latter implied that he was injured in course of his employment with the Appellant when he fell from lorry registration No. KAC 103 M *belonging to the latter*.

In its defence, the Appellant denied the claim but did not refute that it owned the said lorry. The Appellant by its pleading led the Respondent to believe that it did not dispute that the lorry (KAC 103 M) was owned by it. Indeed the pleadings and the evidence at the trial proceeded on that footing. Moreover, during the trial the Appellant did not call any evidence to rebut the Respondent/Plaintiff's evidence and if it had known about the ownership of KAC 103 M not a single question was put to the Respondent in cross examination regarding ownership. The Respondent did not have to prove ownership of the lorry because that was not an issue.

Quite clearly, under Order VI Rule 9(1) of the Civil Procedure Rules, "any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under Rule 10 of Order VI operates as a denial of it." A traverse is defined by Rule 9(2) of order VI as a denial or a statement of non-admission either expressly or by necessary implication. Rule 9(3) of Order IV is explicit about denial. It stipulates that….." every allegation of fact in a plaint or counter claim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counter claim and a general denial of such allegations or a general statement of non-admission of them shall not be a sufficient traverse of them."

The trial of the case in the lower court commenced in August 2000. It was concluded on 27.3.2001 when judgment was delivered. The Appellant did not in the affidavit in support of the application disclose when the Appellant became aware that the lorry (KAC 103 M) was not owned by it, nor did the application show when the Appellant informed its Insurance brokers, AON Minet Insurance Brokers Ltd, of this fact. The letter by AON Minet Insurance Brokers Ltd (the Brokers) dated 12.1.2002 which was attached as annexure number "MRG 001" to the affidavit of Meshack Raboso Guto in support of the application shows that the brokers were informed by the Appellant that the latter did not own the lorry (KAC 103 M). That is a relevant fact the date of which the Appellant failed to disclose. In paragraph 4 of his affidavit, Meshack Raboso Guto swore that it was "only after judgment had been delivered against the Appellant that the said Brokers wrote to the Appellant's insurers, Kenindia Assurance Company Ltd., a letter copied to the appellant attacking a copy of the records of motor vehicle registration number KAC 103 M….." A careful scrutiny of the annextures to the deponent's affidavit shows that the brokers letter dated 12.1.2002, though copied to the Appellant, did not indicate that a copy of the Record of the Registrar of Motor Vehicles was attached to the copy of the letter to the Appellant. Such copy seems to have been received by the Insurers, Kenindia Assurance Co. Ltd, Kisumu Branch, on 14.1.2002 before Kenindia Assurance co. Ltd, Nairobi branch, had received the letter, annexture "MRG1" on 17.1.2002.

Annexture "MRG001" was for the attention of E.K. Otieno of the Appellant Company. If the annexture of the certificate of the Registrar of Motor Vehicles ("MRG 002") was forwarded to the Appellant as alleged by Meshack Raboso Guto in his affidavit, then it hardly likely that the handwritten endorsement "P/S forward to legal officer – Emily Otieno" by the G.M. on 23.11.2001 would have borne the date 23.11.2001.

It seems quite clear that the Appellant did not exhibit complete candour in its application regarding the date on which it became aware that it did not own the lorry KAC 103M. The only inference to be drawn from the Appellant's failure to come clean on this point was that the date was adverse to it. In any case, if the Appellant was desirous of establishing the ownership status of the lorry (KAE 103M), all it needed to do was to make a simple application either directly or through its advocates to the Registrar of Motor Vehicles requesting for the Record. No reason was given for the Appellant's failure to do so.

In the light of these circumstances, should the court grant the orders sought by the Appellant? Section 78(1) of the Civil Procedure Act, Cap 21, has vested in this court as an appellant court jurisdiction to, inter alia, take additional evidence or require such evidence to be taken subject to such conditions and limitations as may be prescribed. The policy of the court in this regard was expressed by the predecessor of the Court of Appeal, the then Court of Appeal for East Africa in the case of ***K. TARMOHAMED V. LAKHANI [1958] EA 367*** when it held that "except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available. The principles upon which an appellate court will admit fresh evidence where the application is not made on the grounds of fraud or surprise were stipulated by ***Lord Denning in LADD versus MARSHALL 91954) 1 W.L.R. 489*** **page 1491** (which was referred with approval in ***K.TARMOHAMED v. LAKHANI (1958)EA 567 as follows:***

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first,** it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **secondly**, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, **thirdly**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible."

The power to call additional evidence is required to be exercised very sparingly and with great caution. It has been held that this discretionary power should not be exercised so as to bring in contradictory evidence as opposed to additional evidence for to do so would in effect be to rehear and retry the case. It has been stated that the discretionary power of the court to call additional evidence is not intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case. It has been stated by legal scholars also that the rule does not authorize admission of evidence for the purpose of filling up lacuna and filling up gaps in evidence nor to enable a party to make out a fresh case in appeal. It seems a crucial point in determining whether the principle for the exercise of the power to permit additional evidence has been complied with that an applicant is able to demonstrate that such evidence could not have been obtained by reasonable diligence before and during the hearing and that it would have been likely to have affected the result of the suit. It is clear that if evidence which either was in possession of a party at the time of the trial or which by proper diligence might have been obtained is either not produced or was not procured, and the case is decided adversely to such party, no opportunity for producing that evidence ought to be given to such party.

In the instant case, I am satisfied that the Appellant did not demonstrate complete candour in its application and further that the nature of the evidence sought to be given could not, with due diligence, have been obtained before or during the trial. Moreover, under the rules of pleading, the Appellant had failed to traverse the implied allegation that the lorry was owned by it. In the words of *Birkett L.J. in Shedden v. Patrick and the Attorney General (L.R. 1 Sc and Div. 545*)cited *by Scrutton L.J. in Nash v Rachford Rural Council* (1917) 1 K.B. 393 "…. It was not shown …. that this evidence was not available at the time of the trial or could not by reasonable diligence have been procured."

In the result, I do not find merit in the Appellant's application. Moreover, the affidavit in its support was fatally defective. The deponent did not show he had authority to swear it. Accordingly, I hereby

dismiss the application with costs to the Respondent.

Dated at Kakamega this 11th day of March 2005

G.B.M. KARIUKI

J U D G E