REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 50 OF 2003

BETWEEN

CATHOLIC DIOCESE OF MERU …… APPELLANT

AND

OBADIAH MWANGI NGUGI …… RESPONDENT

RULING OF THE COURT

The application that is before me is the amended Notice of Motion dated 12.10.2004 brought under Order 41 Rule 22(1) of the Civil Procedure Rules and all other enabling provisions of the law. The relevant sub-rule provides 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."**

The application seeks an order of this honourable court allowing additional evidence in the form of a copy of the records from the Registrar of Motor Vehicles to be produced.

The application is supported by four grounds on the face thereof namely that:-

(a) The record was not available at the time of the trial as the person who was sent to do search had indicated that the Registrar's file was not available.

(b) The documents showing ownership was police abstract which was produced as an exhibit.

(c) It is only just and fair to admit the same documents.

(d) The defendant/respondent will not be prejudiced by the production of the same.

In addition to the grounds above stated, the application is also supported by the affidavit of Charles Kariuki, advocate for the respondent/applicant. The gist of the contents of the said affidavit, which was sworn on 10.9.2004 is that despite efforts made on several occasions with the Registrar of Motor Vehicles in Nairobi, the applicant was not able to obtain the copy of records as the Registrar's file was said to be missing and therefore that the applicant was forced to proceed with its case without the requisite records to confirm that the respondent was the owner of the subject motor vehicle. Further, Mr. Kariuki has averred that since the copy records are now available, the applicant should be allowed to tender the same in evidence. Annexed to his

affidavit and marked “CKI” and “CK2” are the police abstract in respect of the accident and the copy of records respectively in respect of motor vehicle registration number KAM 247V.

The application is opposed on the grounds that the same is misconceived and mischievous. The replying affidavit was sworn by Kiautha Arithi advocate for the appellant and the grounds raised therein are that the applicant is not entitled to the orders sought since he was put on notice by the filing of the defence in which the defendant in the lower court denied ownership of the motor vehicle. Further that the issue of the copy of records was submitted upon in the written submissions in the lower court and that the applicant’s present application is a mere afterthought which should be rejected by the court. Annexed to the replying affidavit were the following copy documents:-

- Annexture ‘KAI’ – Memorandum of Appeal

- Annexture ‘KA2 (a)’ – Plaint

- Annexture ‘KA2 (b)’ – Statement of defence

- Annexture ‘KA3’ – Defendant’s submissions

During the hearing of the application which was canvassed before me on 12.4.2005, Mr. Kariuki for the applicant submitted that this court has the power under the provisions of Order 41 Rule 22(1) to admit the document sought to be brought and that this document is absolutely necessary as proof of ownership of the motor vehicle. Mr. Kariuki cited two cases:-

(a) Sadrudin Shariff V. Tarlochan Singh s/o Jwala Singh (1961) EA 72 and

(b) Edgar Ogechi & 12 others V. University of Eastern Africa Baraton – Civil Appeal No. 130 of 1997 (Court of Appeal at Nairobi).

Mr. Kariuki also submitted that the respondent would suffer no harm if the application is allowed.

Mr. Mwanzia who appeared for the respondent contended that ownership of the motor vehicle was not proved in the lower court and that the sole purpose of the applicant’s application is to re-empt the appeal which seeks to nullify the proceedings in the lower court. That in order for the applicant to succeed on his application, he must prove that the evidence sought to be introduced could not be traced with due diligence for use at the trial. Mr. Mwanzia cited the following authorities in support of the respondent’s case:-

(a) Wanje V. Saikwa (1984) KLR 275.

(b) Edgar Ogechi & 12 others V. university of Eastern Africa Baraton (above).

Mr. Mwanzia submitted that the applicant had not been diligent enough in his efforts to adduce the evidence that he now seeks to introduce; that there is no documentary evidence for example in the form of a letter to the Registrar of motor vehicles to show that indeed the applicant applied for the copy of records in good time before the hearing commenced on 3.2.2003; that further there is no independent affidavit sworn by Wilfred Muiruri, the process server, confirming that he indeed made trips to the Registrar of motor vehicles and how many such trips he made and the outcome of those trips. Mr. Mwanzia further submitted that the applicant failed to apply to court to compel the registrar of motor vehicles to produce the records if indeed he thought the records were a vital part of his evidence. That all in all, the applicant has not proved that he is entitled to the orders of this court.

The principles upon which an appellate court in civil cases 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 (see Wanje V. Saikwa – above).

As regards principle (b) above, a decision on whether or not such evidence will actually affect the outcome of the appeal can only be made after evidence has been received and considered along with the other available evidence.

In this application, the applicant is saying that he was not able to obtain a copy of the records from the registrar of motor vehicles despite concerted efforts to do so. However, the applicant has not annexed to the supporting affidavit any evidence to show that he applied to the registrar of motor vehicles for the copy, nor has he annexed evidence of reminders to the registrar to be supplied with the copy records. There is also no evidence by means of affidavit by the officer who is said to have made the visits to the registrar to confirm that he indeed made the visits and found that the relevant file was missing. The supporting affidavit does not show that the process server WILFRED MUIRURI cannot be found to swear an affidavit to these facts.

On the basis of the above facts, I find that the applicant did not exercise due diligence in trying to obtain copy of the records for use at the trial. In its statement of defence filed on 26.4.2002, the defendant denied ownership of the subject motor vehicle and the whole of paragraph 3 of the plaint where that fact was pleaded. From the moment the applicant was served with that defence, he was put on notice that the ownership of the motor vehicle was and would be in dispute during the trial and he needed to ensure that all the evidence that would be needed to prove that fact had to be marshaled before the trial commenced. Unlike the applicant's position in **Edgar Ogechi & 12 others V. University of Eastern African, Baraton**, where the applicant went to great lengths to force the respondent to produce the document that the applicants now sought to have produced as additional evidence, the applicant in this case did nothing of the sort. It would seem to me that the applicant was contend with the way things were and it is only after the appeal was filed that the applicant woke up to the reality that the evidence of the copy of records of the Registrar of Motor Vehicles would be necessary after all.

Mr. Kariuki for the applicant has contended that the **Wanje V. Sakwa case (above)** is not relevant to this case as it seeks to interpret the provisions of Rule 29(1) (a) of the Court of Appeal Rules. With respect I do not agree. The principles set out the **Wanje case** were the same principles that were applied in the **Edgar Ogechi case (above)** and I am therefore unable to see the distinction that learned counsel is trying to bring out. At page 278 of the Wanje case the Court of Appeal held that both conditions (a) and (b) have to be established by the applicant before he can succeed on an application. The applicant has to show that the new evidence could not have been obtained with reasonable diligence for use at the trial and that it was of such weight that it was likely in the end to affect the court's decision. I am not persuaded that such, or any diligence at all was exercised by the applicant in obtaining the evidence he now seeks to introduce.

After judgment was given in his favour, the applicant drew bill of costs and had the same taxed. Even when the appellant filed an application for stay under Order 41 Rule 4, Mr. Kariuki for the applicant in opposing the application submitted that the appeal was unlikely to succeed. Why the panic now?

In my view therefore, the applicant has not shown sufficient reason to persuade this court to exercise its wide discretion in his favour. What the applicant is attempting to do is to have the additional evidence admitted for his own convenience in an attempt to patch up his case during the appeal. With this in mind, I am minded to observe that there is need for great caution on my part in dealing with this application lest I should open the door for the applicant to start his cause all over again at the appeal stage.

In the result, I dismiss the applicant's application dated 12.10.2004 as the same lacks merit. Costs of the application shall be paid by the applicant to the respondent. It is so ordered.

Dated and delivered at Meru this 31st day of May 2005.

RUTH N. SITATI

JUDGE

31.5.2005