



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI  
HIGH COURT CIVIL APPEAL NO. 69 OF 2004**

**MBURU MURUTHI & OTHERS ..... APPELLANT**

**VERSUS**

**KURIA KAMAU..... RESPONDENT**

(Appeal from the original judgment/decree of the Senior Principal Magistrate's Court

Civil Case No. 298 of 2004 dated 9th July 2004 by G. K. Mwaura –P.M. –Murang'a)

**RULING**

By a notice of motion dated 14th October 2004 the appellant seeks directions under order XLI rule 8 B of the Civil Procedure rules as follows:

- (1) That the record of appeal is in order**
- (2) That the appeal may proceed to hearing.**
- (3) That the appellant do have leave to adduce additional evidence generally as to the hearing of the appeal.**
- (4) That the costs be provided for.**

The Respondent has no objection to the first, second and fourth direction but strenuously objects to the appellant being granted leave to adduce additional evidence. It is the appellants contention that certain exhibits which were not available at the trial ought to be placed before the court to enable it to do substantial justice and that the documents are admissible under Order XLI rule 22(1) (b) of the Civil Procedure Rules.

The Respondent maintains that the additional evidence is not admissible under Order XLI rule 22(1) (b) OF THE Civil Procedure Rules as there is no evidence that the appellants sought to produce the evidence in the lower court and leave was denied. To the contrary it is contended that the appellant had the opportunity to produce the documents but failed to do so. It is further contended that the documents intended to be produced are not books of account but undated minutes of a commission of inquiry which minutes could have been prepared after the conclusion of the suit in the lower court. The Respondent's advocate has also taken issue with the swearing of the affidavit in support of the application by the appellant's counsel.

It is evident that an appeal court has powers under section 78 of the Civil Procedure Act as read with Order XLI rule 22 of the Civil Procedure Rules to take additional evidence or to require the evidence to be taken. This is however a discretion which the court must exercise carefully and only in exceptional cases where it is satisfied that the evidence could not with due diligence have been produced at the trial. This is necessary to avoid an appellant taking advantage of this provision to adduce evidence which ought to have been adduced but was not adduced due to negligence or any such factor. In this case there was reference in the lower court by both parties to Books showing records of shareholding and profits to shareholders. No attempt was made by any of the parties to produce these records nor was any explanation given to the lower court for this failure. It is not enough for the appellant to tell this court that the evidence was not available during the trial in the lower court. The appellant must show that he was unable despite the exercise of due diligence to procure the evidence to enable him produce it in the lower

court. No such evidence has however been availed. To the contrary the proceedings in the lower court shows that the records were available but were not brought to court. Indeed there was no attempt by any of the parties to deliver interrogatories or apply for discovery of documents under Order X of the Civil Procedure Rules.

Finally, I have examined the document sought to be adduced in evidence. Same is annexed to the affidavit in support of this application as annexure 'SBK' 2. I concur with the Respondents advocate that the same are not books of account but a report of an inquiry. No reason has been given as to why the author of this report was not called to testify in the lower court. I find therefore that there is no basis nor any justification for the admission of additional evidence at this stage. Accordingly I refuse to grant leave to the appellant to adduce additional evidence at the hearing of this appeal. I give directions in terms of Nos. (1) and (2) of Notice of Motion dated 14th October 2004 and order the costs to be in the appeal.

*Dated signed and delivered this 5th day of May 2005.*

**H. M. OKWENGU**

**JUDGE**