



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 44 OF 1998**

JAMIL MOHAMED FARAH SAID APPELLANTS

- Versus -

HUSSEIN SHARIFFA ADNAN RESPONDENT

RULING

The Appellants, Jamil Mohamed Said & others (the Appellants) by their application dated the 28th December 1999 seek leave of this court “to file additional documents” in this appeal. The application is brought under Order 41 Rules 22 and 23 of the Civil Procedure Rules and is supported by the affidavit of Mr. Joseph Gathuku, counsel for the Appellants. The ground upon which the application is brought is given in the said affidavit as:-

“THAT the Appellants/Plaintiffs seeks leave to file the attached documents marked “JGA - E” which were not signed at the time the proceedings were going on in the lower court and they are very important to this case.”

The Respondent opposed the application by filing grounds of opposition to the effect that the application is frivolous, vexatious and a gross abuse of the process of court and that it also offends the provisions of Order 41 of the Civil Procedure Rules.

Mr. Gathuku argued the application relying on what is stated in the supporting affidavit. In opposition Mr. Jengo for the Respondent argued that the application is incompetent. It does not contain the grounds upon which it is brought. It also does not meet the criteria set in Order 41 Rule 22 and the authority in the case of Edgar Ogechi & 12 Others =Vs= University of E.A. Barton Civil Appeal No. 130 of 1977 (C.A.) (UR). He further argued that the documents sought to be introduced were not produced in the lower court.

Order 41 Rule 22(1) of the Civil Procedure Rules provides that a party cannot be allowed to adduce additional evidence on appeal unless:-

1. The trial court refused to admit the evidence which ought to have been admitted; or
2. the Appellate court requires the additional evidence to be able to deal with the matter; or
3. There is any other substantial case.

The Appellants have not alleged any of the matters in requirements 1 and 2 and I therefore presume they are proceeding on the third one of there being substantial cause.

This provision, allowing evidence on appeal, is not intended to enable an unsuccessful party to patch up the weak points in his case. Nor is it intended to enable a party to make out a fresh case on appeal. There

would be no end to litigation if that were to be allowed. It is intended to enable the court do justice but only in certain specific situations.

In the case of *Wanje =Vs= Saikwa [1984] KLR 275* the Court of Appeal set out the principles upon which additional evidence can be adduced on appeal under Rule 29(1) of the Court of Appeal Rules as follows:-

“(a) it must be shown that the evidence could not have been 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, though it need not be decisive;

(c) 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.”

In my view these principles apply equally to the High Court in appeals from subordinate courts when a party is applying to adduce additional evidence on the ground of substantial cause.

In this application the applicants simply state that the documents they wish to introduce, were not signed at the time the proceedings were going on in the lower court and they are very important to this case. They have not said why the documents were not signed at that time. They have not said when they were signed. They have also not said why they think the documents are very important.

I have looked at the copies sought to be introduced. The first one is an extract of the minutes of the meeting of the Town Planning & Works Committee of the Municipal Council of Mombasa held on the 27th October 1998. The second one is a letter from the Commissioner of Lands dated the 12th September 1991. The others are newspaper cuttings of 1999.

The case giving rise to this appeal was heard between the 15th May 1998 and 5th June 1998 and judgment was delivered on the 26th June 1998. Other than the letter from the Commissioner of Lands the other documents were not in existence at the time of trial. In the circumstances to allege that the documents were not signed at the time of trial simply does not make sense.

Even if indeed the documents had not been signed as alleged and I was persuaded to allow this application, how can they just be allowed to be included in the record of appeal without calling witnesses to testify on and produce them? There is absolutely no merit in this application. It is a total abuse of the court process. The same is dismissed with costs.

DATED this 17th day of February 2004.

D.K. Maraga

Ag. JUDGE