



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 225 OF 2018

AIG KENYA INSURANCE COMPANY LTD....APPELLANT/RESPONDENT

VERSUS

MICHAEL OKOTH.....RESPONDENT/APPLICANT

(Being an Appeal from the ruling and order of the Hon. P. N. Gesora (Mr.) on

13th March, 2018 in Milimani Chief Magistrate Civil Case No.7000 of 2017)

RULING

1. The application for consideration is the respondent's notice of motion dated 5th of February 2021, brought under order 42, Rule 27, Section 3A of the civil procedure Act and Article 15A of the constitution of Kenya, 2010. The application seeks the following orders:

1. That the Respondent be granted leave to adduce additional documentary evidence in this appeal as follows:

- a) Letter dated 14th July, 2017 addressed to Abba's Investments Limited by AIG Kenya Insurance Co. Limited.***
- b) Letter Dated 4th September, 2017 addressed to Abba's Investments Ltd by AIG Kenya Insurance Co. Limited.***
- c) Complaint dated 18th September, 2017 and filed in the Chief Magistrate's Court at Mombasa as Civil Suit No. 1608 of 2017.***
- d) Verifying Affidavit of Abdul Kader Mohamed sworn on 18th September 2017.***
- e) Witness statement of Abdul Kader Mohamed dated 18th September 2017.***
- f) Witness statement of Benjamin M. Masaka filed in court on 21st September 2017.***
- g) Defence filed by the Respondent in Mombasa CMCC No 1608 of 2017.***
- h) Witness statement filed by the Respondent in Mombasa CMCC No. 1608 of 2017.***
- i) Ruling dated 2nd March, 2018.***

2. That the above additional documentary evidence be admitted by way of affidavit and the same be filed through a supplementary Record of Appeal.

3. That such further or other order be granted as this court seems fit and just in the circumstances of this appeal.

On grounds that:

- i. The additional evidence is relevant.***
- ii. The evidence was not available at the time of the decision giving rise to this appeal was made.***

iii. The additional evidence is of such weight that it will most likely help this court reach a fair and just decision in this appeal.

iv. It is in the interest of justice that the additional evidence be admitted at this stage.

2. The application is predicated on the grounds on its face and supporting affidavit sworn on 5th February 2021 by PAUL AMUGA an advocate of the high court on behalf of the respondent/applicant. He has averred that this appeal is against an order by the lower court dismissing the applicant's application dated 7th December 2017. He deposed that the case in the lower court concerned a dispute over payment of the sum of Kshs. 5,810,000 being the insured value of the applicant's motor vehicle registration number KCK 511H Mercedes Benz which was written off and was comprehensively insured by the appellant.

3. He averred that another case related to the case which gave rise to the appeal was also filed in chief magistrate at Mombasa vide **CMCC No. 1608 of 2017 - Abba's Investments Limited vs. Michael Okoth and AIG (K) Limited**. It was concluded on 2nd March 2018 by a ruling which struck out the claim on application by the applicant. It would be fair and just and in the interest of justice that the pleadings and ruling in that case be admitted in the appeal as additional evidence.

4. The respondent/applicant avers that the appellant/respondent has already included some of the pleadings in the record of appeal dated 19th February, 2020 but the applicant's defence, witness statements and ruling were excluded. He attached the documents marked "PA1".

He believes that leave to include the said documents as additional evidence is necessary before the same can be deemed to be properly on record and that the appellant/respondent does not therefore stand to suffer any prejudice if the orders sought herein are granted.

5. In opposition to the application the appellant/respondent's advocate Mr. Crispus Mwenda Mbaka swore a replying affidavit and supplementary affidavit on 9th March, 2021 and 11th March 2021 respectively. He opposed the application for leave to include the documents set out in prayer no. 1 as the same completely lacks merit, any reasonable justification and foundation in law or fact.

6. He further deposed that he had only been served with a copy of the documents set out at prayer 1(g)(h)(i). These are:

- a) Defence filed by the applicant in Mombasa CMCC No. 1608 of 2017.
- b) Witness statements filed by the applicant in Mombasa CMCC No 1608 of 2017.
- c) Ruling dated 2nd March 2018.

7. He deposes that the documents listed in prayer 1(a)to(f) for whose production as additional evidence leave is now sought have never been supplied to them. He avers that at the time the appeal was filed all the documents for which leave is sought were all available to the applicant. He however with conscious, deliberate and strategic decision chose to withhold the said documents from the lower court.

8. Mr. Amuga for the respondent/applicant submitted that the additional evidence they are seeking to adduce are pleadings in the Mombasa case where the parties herein were defendants. Further that producing them will make the record complete. The other ones are letters in this matter and that the appellant will not be prejudiced in any way. He contends that the documents were equally important and relevant but were not produced then.

9. Mr. Mbaka for the appellant/respondent opposed the application and submitted that the documents that the applicant now wishes to produce in the appeal were available but never produced before the lower court, though some documents were produced in the Mombasa case. He contends that the applicant has not explained why he never produced the documents he now seeks to produce.

10. He further submitted that the letters the applicant intends to produce were never served on them. He equally has annexed a letter which they were denied an opportunity to produce by the lower court, (Page 115 of the Record of Appeal). He however suggested if the application is allowed they too be allowed to produce the letter dated 14/12/17 plus all other documents.

11. Mr. Amuga in response submitted that there is no application by appellant/respondent to adduce extra evidence. He added that it was not clear why not all documents were produced in the Mombasa case. He however argues that if the documents are relevant they ought to be admitted.

Analysis and Determination

12. Upon considering the Notice of Motion, the affidavits and the submissions by counsel, I find the issue for determination to be whether the application dated 5th of February 2021 is merited.

13. Order 42 Rules 27- 29 Civil Procedure Rules deal with admission of additional evidence. They provide as follows:

Order 42, rule 27. Production of additional evidence in appellate court.

"27. (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.

(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.”

Order 42, rule 28: Mode of taking additional evidence.

“28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree 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.”

Order 42, rule 29: Limits to be defined and recorded.

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

14. In this matter, it has been submitted that the proposed additional evidence is relevant to the Appeal and that it was not available at the time the decision giving rise to the appeal was made. The appellant/respondent on the other hand argues that the pleadings were available at the time of filing the appeal but they were never served with the letters which is not fair to them.

15. Learned counsel Mr. Amuga submitted that the additional evidence if admitted may influence or impact the verdict of this Court in this appeal. Mr. Mbaka in opposing the application submitted that the link between the alleged additional evidence and the appeal before this Court has not been shown; and it has not been shown how the additional evidence would shed light on points of law urged in the main appeal.

16. It is clear that if the additional evidence is to be produced it would prejudice one party who was never served with the said letters. The fact that the other documents were pleadings they ought to have been in possession of both parties who were defendants in the Mombasa case. It also confirms that the documents were with the applicant, and he can't claim otherwise.

17. The Supreme Court of Kenya in **Mohamed Abdi Mahamud -v- Ahmed Abdullahi Mohamad & 3 others** [2018] eKLR laid down the following principles for allowing additional evidence:

“[79]We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

(b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e) the evidence must be credible in the sense that it is capable of belief;

(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

18. Following the guidelines as given by the Supreme Court, and the provisions of Order 42 Rules 27 – 29 Civil Procedure Rules this court has to consider and determine whether the instant application is anywhere near fulfilling the principles as laid out in the case above. It has not been demonstrated before this court that the evidence sought to be adduced was not known to the applicant at the time of hearing of the lower court case. In the Mombasa case its been shown that both parties in this appeal were defendants who were obviously in possession of the pleadings.

19. The applicant had access to the said pleadings. So what is it that made him not produce them as evidence in the Mombasa case? No reason has been given for such failure. He has also not also explained why he did not serve the respondent with copies of the letters he now wishes produced yet they were in his possession all along.

20. It has also not been shown that the proposed additional evidence discloses a strong prima facie case of wilful deception of the trial court by any party.

21. Mr. Mbaka for the respondent cannot from the bar make an application for leave to adduce additional evidence just because the applicant had done so. He knows the procedure very well. His request is therefore declined.

22. The upshot is that the respondent/applicant has not met the threshold for admission of new evidence on appeal. I dismiss the application dated 5th February 2021 with costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF JUNE 2021 AT MILIMANI, NAIROBI BY:

H. I. ONG’UDI

JUDGE