



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 156 OF 2019**

**BETWEEN**

**ABDULRAHMAN OPONDO OSAMA.....APPELLANT/APPLICANT**

**AND**

**WINFRED KENDI.....1<sup>ST</sup> RESPONDENT**

**O.C.S MERU POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. By a plaint dated 27.10.2017 filed in **MERU CMCC 197 OF 2017** on 31.10.2017, the Appellant who was the Plaintiff sought orders for a declaration that some goods recovered from the 1<sup>st</sup> Respondent's shop were his, general damages, costs of the suit and interest.
2. 1<sup>st</sup> Respondent on the other hand claimed that the goods recovered from his shop were his.
3. In a judgment dated 21<sup>st</sup> November, 2019, the learned trial magistrate found that the 1<sup>st</sup> Respondent had established that the disputed goods were hers and hence dismissed Appellant's case with costs to the Respondents.
4. Dissatisfied with the judgment, Appellant on 05.12.2019 filed this appeal vide a memorandum of appeal dated 03.12.2019 mainly on the ground that the trial magistrate erred in failing to consider that the Appellant had produced all the receipts to prove ownership of the disputed goods.
5. By a Notice of Motion dated 15.01.2021 filed on 23.02.2021, the Appellant now seeks orders to be allowed to adduce new evidence to these proceedings and for an order for production of original receipts tendered before the trial court.
6. The application is based on the grounds that Appellant did not at the hearing produce receipts in support of his claim. The application is supported by an affidavit sworn by the Appellant on 15.01.2021 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is a bundle of receipts which he avers he produced in **MERU CRIMINAL CASE NO. 1167 OF 2018** but did not produce them during the trial of the civil case that is the subject of this appeal.
7. The application is opposed by the 1<sup>st</sup> Respondent vide an affidavit sworn on 02.23.2021 in which she faults the Appellant for attempting to reopen a case that is already concluded by introduction of evidence that was in his custody and which he ought to have tendered before the court but failed to do so.

**ANALYSIS AND DETERMINATION**

8. I have considered the application in the light of the supporting affidavit, the replying affidavit and submissions made on behalf of the parties and the issue for determination is whether the Applicant has made out a case for introduction of new evidence.
9. The law relating to production of additional evidence in appellate court is to be found in Section 78 of the Civil Procedure Act which provides that (1) **Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—**

(a) .....

(b) .....

(c) .....

(d) to take additional evidence or to require the evidence to be taken;

(e) .....

10. Procedural law for production of additional evidence under Order 42, rule 27 of the Civil Procedure Rules and provides as follows:

**(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.**

11. In his pleadings, the Applicant admits that the evidence which he now wishes to introduce on appeal was indeed available to him long before the hearing of MERU CMCC 197 OF 2017 and had even been tendered in MERU CRIMINAL CASE NO. 1167 OF 2018.

12. I therefore find that the Applicant has not met the threshold established by the Court of Appeal in the case of James Mwangi Nganga v Kenyatta University Council & 4 others [2009] eKLR more particularly by failing to prove that the additional evidence could not have been obtained with reasonable diligence for use at the trial.

13. It is to be remembered that the court's discretion to admit additional evidence is not intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions on appeal as the Applicant herein intends to do.

14. From the foregoing analysis, this court declines the invitation to allow introduction of additional evidence for in doing so, the court would be allowing the Applicant to make out a fresh case or to improve its case on appeal.

15. I am of the considered view that the appeal as it stands is capable of argument on the basis of the existing grounds. The Notice of Motion dated 15.01.2021 filed on 23.02.2021 is hereby dismissed in its entirety.

**DATED IN MERU THIS 15TH DAY OF JULY, 2021**

**T.W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For the Applicant - Mr. Kithinji for Kithinji Kirigiah & Co. Advocates**

**For the Respondents - Ms. Mbogo for Murango Mwenda & Co Advocates**