



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CIVIL APPEAL NO 11 OF 2018

TIMAU FLOUR LIMITED.....APPELLANT

VERSUS

ELIJAH NDUNGU KAMAU.....RESPONDENT

(Appeal from original Decree dated 03/09/2018 in Nanyuki CM

Civil Case No 77 of 2013 – W J Gichimu, PM)

R U L I N G.

1. This ruling concerns an application by **notice of motion dated 20/08/2019** by the Appellant seeking the main order that pending hearing and determination of the appeal the Appellant be granted leave “to file additional documentary evidence”, and that such evidence, which is annexed to the affidavit sworn in support of the application (the evidence is a medical report) “be deemed to have been on court record from the date of filing of the record of appeal.”

2. The application is stated to be brought under **sections 1A, 1B, 3A & 78(1) (d)** of the **Civil Procedure Act**, and also under **Order 42, Rule 7(1)(b) & Order 51** of the **Civil Procedure Rules**.

3. **Rule 7 of Order 42** of course has no application in the matter at hand. It was probably meant to quote **Rule 27 of Order 42** which has application. It provides –

(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.”

4. The application is supported by an affidavit sworn by a legal officer of the insurance company that had insured the Appellant, and which had given instructions for defence of the Appellant (defendant in trial court). The Respondent in this appeal was the plaintiff in a personal injury claim as a result of an industrial accident.

5. The Respondent has opposed the application by a replying affidavit sworn by his advocate and filed on 09/10/2019. The main point taken is that the application is an abuse of the court process just meant to give the Appellant a chance to unfairly re-open its defence after the case has been heard and determined. It is further stated that a copy of the medical report now sought to be introduced was on the court record all along, and that what happened was that the Appellant failed to call the doctor who made the report to produce it in evidence.

6. The Appellant filed a supplementary affidavit on 26/11/2019 in response to the replying affidavit.

7. The application was canvassed by way of written submissions. Those of the Appellant were filed on 14/02/2020, while the Respondent's submissions were filed on 04/03/2021. I have considered the submissions, including the cases cited. I have also perused the record of the trial court as presented by the material now before this court.

8. It has not been argued by the Appellant that the trial court refused to admit in evidence the medical report now sought to be produced here. That is why the Appellant has not applied under paragraph (a) of Subrule (1) of Rule 27 of Order 42.

9. With regard to paragraph (b) of the Subrule, it is clear that the duty is with this court to go through the record of appeal (which has not yet been filed), or after hearing the appeal, and determine if the court

“...requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause”.

What is now before this court is the memorandum of appeal, a typed copy of the trial court judgment, and the pleadings related to the application at hand. This court does not have before it a typed copy of the proceedings of the trial court. It was the duty of the Appellant to place before this court all relevant materials to enable it to do its duty under paragraph (b) aforesaid.

10. It may however be noted that the purpose of that paragraph can never be to give a litigant a second chance to present its case better than it did at the trial. Also, issues between a litigant and his counsel leading to bad or inadequate prosecution or defence of a case will never be allowed to prejudice the opposite party. That is a matter for other proceedings in professional negligence, etc.

11. In conclusion, upon the material now before the court, I do not find that this court requires any document to be produced or any witness to be examined to enable it to pronounce judgment. The court has not yet heard the appeal in any case. Nor do I find any other substantial cause to grant the order sought.

12. In the result, I find no merit in the application. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 22ND DAY OF SEPTEMBER 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 23RD DAY OF SEPTEMBER 2021