REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 85 OF 2015

(An appeal arising from the judgment and decree of the Hon. SM Shitubi, Chief Magistrate (CM), in Kakamega CMCCC No. 159 of 2014 of 19th October 2011)

ASISA CHITECHI OKECH.....APPELLANT

VERSUS

SCARCE COMMODITIES LTD.....1ST RESPONDENT

CHARLES KARIUKI KAMAU.....2ND RESPONDENT

RULING

1. The appellant filed an application, by way of Notice of Motion, dated 31st May 2018, seeking to be allowed to tender additional evidence, for the additional evidence to be admitted and to be included in the record of appeal. The application was brought under sections 1A and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 42 Rules 26, 27 and 28 of the Civil Procedure Rules, 2010, and was supported by an affidavit that the appellant swore on 31st May 2018.

2. She deposed that she was aware that the motor vehicle that caused the accident resulting in the demise of her son was motor vehicle registration mark and number KBB 492D - ZC 7990, and that the police indicated that it belonged to the 1st respondent and was being driven by the 2nd respondent. She deposed that she was informed by her advocate that the case was dismissed because the 2nd respondent stated that he was driving motor vehicle registration mark and number KBR 090 C, belonging to the 1st respondent. She stated that she instructed her advocate to establish the ownership of the said KBR 090 C, which he did, but he found that the said motor vehicle did not belong to the 1st respondent, and that it was not a lorry as was alleged. She added that from the available copies of records, motor vehicle registration mark and number KBB 492D and trailer ZC 7990 belonged to the 1st respondent. It is the said copies of motor vehicle registration KBR 090C, KBB 492D and ZC 7990 marked AC 1, AC 3 and AC4 that the applicant seeks to have admitted as additional evidence in this appeal.

3. The application was responded to by way of a replying affidavit, sworn by John Brown Shilenje, on 19th October 2015. Mr. Shilenje deposed that the evidence sought to be included in the appeal by the appellant was overtaken by events, in that all documents ought to have been filed together with the plaint in the lower court before service on the respondents. Mr. Shilenje added that the appellant was seeking to tender additional evidence, which should have been tendered during the trial and the same was an afterthought, and would deny the respondents opportunity to give an explanation for the difference in registration number. He further contended that the additional evidence that was being sought to be brought was calculated at the re-opening of the case, which had already been determined.

4. The appellant filed a supplementary affidavit sworn on 19th April 2018, replying to Mr. Shilenje's affidavit. She stated that the trial court relied on evidence, which had not been pleaded and which was not within her knowledge at the time of the defence hearing. She added that the evidence relating to KBR 090C, was introduced by the 2nd respondent at the oral hearing stage and was not pleaded in the statement of defence filed by the 2nd respondent.

5. In *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, the Supreme Court of Kenya laid guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:

> *"[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:*
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> *(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.

[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

6. The Court of Appeal in *Kenya Anti-Corruption Commission vs. Willesden Investments Limited & 7 others* [2018] eKLR held as follows with regard to the same subject:

"*The principles on which the Court acts when exercising that discretion were summarized by Chesoni Ag JA in Mzee Wanje and 93 others v AK Saikwa and others (1982-88) 1 KAR 462 where he stated:*

"*The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:*

(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."

9. In the same case the Court cautioned that the power to receive further evidence should be exercised very sparingly and great caution should be exercised in admitting fresh evidence. The Court said:

"*This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence.*

It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

10. The guidance provided in that case has been applied in many subsequent cases. Examples are Joginder Auto Services Ltd v Mohammed Shaffique and another Civil Appeal (Application) No. Nai 210 of 2000 (2001) eKLR and also Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd Civil Appeal No. 8 of 2003."

7. From the trial record, PW2, testified that the lorry which had hit the deceased was registration mark and number KBB 492D. The 2nd respondent testified in his defence as DW1, to the effect that on that day he was driving motor vehicle registration mark and number KBR 090C and not KBB 492D. The respondents' statement of defence on record and the 2nd respondent's witness statement do not indicate that the 2nd respondent was driving a different vehicle other than KBB 492D. This was clearly an ambush as this information was unknown to the applicant as the same was introduced during the hearing and there was no way the applicant could verify the same or introduce the copy of motor vehicle ownership as evidence as she had already closed her case.

8. The circumstances of the case warrant that records relating to the ownership of the two motor vehicles be admitted as evidence in this appeal in line with the principles enunciated by the apex court. The said evidence is directly relevant to the matter and it would be in the interest of justice that the same be admitted. It would influence or impact upon the result or verdict. The evidence could not have been obtained with reasonable diligence for use at the trial because the respondents ambushed the appellant with the information during the defence hearing and after she had closed her case. The evidence would remove any vagueness or doubt over the case. The same is not so voluminous so as to make it difficult or impossible for the respondents to effectively respond. The additional evidence discloses a strong *prima facie* case of willful deception of the court, as the 2nd respondent had testified that the said motor vehicle registration mark and number KBB 492D was never owned by the 1st respondent and was strange to him, whereas the copy of registration states otherwise. The additional evidence is not being introduced as an abuse of the court process, neither is it being used to make a fresh case fill up omissions or patch up the case. In any case, I see no prejudice that will be occasioned on the respondents should the additional evidence be introduced.

9. In the end, I find that the appellant's application dated 31st May 2018 is merited and the same is hereby allowed. The final orders that I shall make are as follows:

(a) That I hereby grant leave to the applicant to file additional evidence relating to ownership of motor vehicles registration marks and numbers KBR 090C, KBB 492D and ZC 7990;

(b) That the said additional evidence shall be adduced by means of an affidavit, to be filed through a supplementary record of appeal, to be filed within fourteen (14) days of the date hereof;

(c) That the respondents shall be at liberty to file a replying affidavit, if any, to the supplementary Record of appeal within 14 days of service; and

(d) That costs shall be in the appeal

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF February, 2020

W MUSYOKA

JUDGE