



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 14 OF 2020

ISAAC GICHUNGE LEAKEYAPPELLANT/APPLICANT

VERSUS

NJOGU TITUS GICHURU.....RESPONDENT

RULING

1. By a Motion on Notice dated 3/06/2020 brought under **Sections 1A, 1B and 3A of the Civil Procedure Act, Article 159 of the Constitution** and **Order 42 Rule 27 of the Civil Procedure Rules**, the applicant sought to be allowed to produce additional evidence.
2. The grounds upon which the application was grounded upon were in its body and in the supporting and supplementary affidavits of **Isaac Gichunge Leakey** sworn on 3/06/2020 and 23/06/2020, respectively.
3. The applicant contended that the respondent's case before the trial court was based on the sale of his shares in a company known as West End Corner Pharmacy Limited ("the aforesaid Company") on 26/02/2017 to the applicant.
4. It was alleged that when the dispute arose, the applicant searched the company but got no results from the Registrar of Companies until the case was about to be finalized. He has since secured the records dated 17/01/2019 and 25/05/2020, which showed that the shares in the aforesaid company were never transferred to him and the respondent is still the shareholder of the company. He attached the documents to the submissions but the same were rejected by the trial Court. He contended that the respondent had not supplied him with any of the completion documents neither did he supply the same to the trial court.
5. The application was opposed vide the replying affidavit of **Njogu Titus Gichuru** sworn on 12/03/2020. He deponed that, in terms of the agreement between them, he executed the transfer of shares in favour of the applicant, delivered to him the same together with the resignation letter as a director and a signed resolution confirming the transfer of his shares.
6. That upon signing away his shareholding, it was not his business to know when the applicant intended to effect the changes at the Registrar of Companies. That at no time did the applicant raise the issue of completion documents. That the applicant was not genuine in his application because, way before the suit was filed on 25/02/2019, the applicant had the information that he wishes to produce but chose not to provide the court with the same.
7. The applicant submitted that the additional evidence he sought to produce was relevant and was only a form which the respondent will have no difficulty in making a response to. That the evidence had met the guidelines as to its submission. That the evidence was credible, directly relevant and removed any vagueness or doubt in the matter that will enable the court to make a sound judgment in the matter.
8. It was further submitted that **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Article 159 of the Constitution** provide for the overriding objective in the administration of justice. The cases of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**, **Attorney General v Torino Enterprises Limited [2019] eKLR** and **Springbox Kenya Ltd v Daniel Kulanga Nthusa [2015] Eklr**, were relied on in support of those submissions.
9. On his part, the respondent submitted that the issue of non-execution of share transfer forms was never raised as an issue before the trial court. By seeking to introduce a document which was available to the applicant before the commencement of the suit, the applicant was seeking to introduce new issues for determination.
10. It was submitted further that the applicant had failed to satisfy the proviso to **Order 42 Rule 27 of the Civil Procedure Rules**. The cases of **Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others [2014] eKLR** and **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] Eklr**, were relied on in support of those submissions.

11. Order 42 Rule 27 of the Civil Procedure Rules provides the guidelines on how to deal with the issue of production of additional evidence. The same 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.”

12. In Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] Eklr, the Supreme Court of Kenya held: -

“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.

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.”

12. The applicant sought to be allowed to produce additional evidence in the form of a search record from the registrar of companies. He stated that he was not able to obtain the same before the hearing at the trial court. That he tried to attach the same to his submissions but it was rejected.

13. The documents the applicant attached to his application and which he wished to produce as additional evidence are dated 17/01/2019 and 25/5/2020, respectively. The suit was filed by the respondent on 25/02/2019. It goes without saying that by the time the suit was being filed and the applicant filed his defence on 8/03/2019, he was either in possession of or was aware of the evidence in question.

14. Nowhere in his affidavit did the applicant state the date he applied for the records from the registrar of companies and when he received the two documents. Since the burden always lies on he who alleges, it was upon the applicant to prove that as at the time the case was being heard, he did not and could not have the said evidence.

15. Having failed to disclose that fact, this Court cannot speculate on the matter. Reading the document dated 17/01/2019, it would be safe to hold that the applicant had in his possession or would have obtained the evidence he seeks to produce now.

16. It would be therefore safe to hold that, the evidence the applicant sought to produce was well within his knowledge well before the institution of the suit in the trial court. He chose not to produce the same at the trial and cannot be allowed to do so now.

17. Permission to introduce new evidence must be used sparingly and with caution. It was clearly decreed as such by the Supreme Court in the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others (supra)**.

18. In any event, this Court has looked at the pleadings filed in this suit. It was not one of the issues raised for determination that there had been no transfer of shares as claimed by the respondent in his suit. The issues were that the applicant signed the agreement without knowing the effect and tenure thereof among other issues. To this Court's mind, the application does not meet the threshold set in the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others** by the Supreme Court.

19. In the premises, the application has no merit and the same is hereby dismissed with costs.

DATED and DELIVERED at Meru this 1st day of October, 2020.

A. MABEYA

JUDGE