



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.137 OF 2016

ALI ABDULWAHAB.....1ST APPELLANT

LINDBERG HOLIDAYS & SAFARIS.....2ND APPELLANT

-VERSUS-

MONICAH NYAMBURA KAMAU.....RESPONDENT

(Being an Appeal against Judgment in Nakuru Chief Magistrate's

Court Civil Case No. 8 of 2014 by Hon. B. Mararo, P.M. delivered on 11th day of October 2016

RULING

1. This a ruling on the appellants' application dated 30th November 2018. It seeks the following orders:-

- i. Spent
- ii. Spent
- iii. Leave to produce additional evidence
- iv. That additional evidence be in the in the following forms:-
 - a) Documentary and oral evidence by Viraud Insurance Investigators Limited
 - b) oral evidence by psychiatrist on the patient John Kamau Maina
 - c) oral evidence by the patient John Kamau Maina
- v. That psychiatric examination be conducted on the patient John Kamau Maina by independent psychiatrist.
- vi. Costs of the application be provided.

2. Grounds on the face of the application are as follows:-

- i. That the Appellants/Applicants herein have discovered new and very important evidence, which is highly material to the outcome of the judgment in this appeal.
- ii. That the Appellants were unable even after exercising due diligence to obtain and produce this new evidence during trial of the primary suit.
- iii. That there is important need of adducing the additional evidence as well as having the patient herein be re-examined by an independent psychiatrist to establish his true mental status.
- iv. That investigations carried by Viraud Insurance Investigators Limited revealed that the patient herein is in good mental health and working for gain and damages in the lower court are excessive and unjust.

v. That the Plaintiff's Advocate concealed this material fact and therefore the Plaintiff's claim is fraudulent due to the misrepresentation on the mental status of the patient John Kamau Maina.

vi. That by allowing this application this court will promote the just, expeditious, proportionate and affordable resolution of this Appeal.

3. In response, the respondent filed replying affidavit dated 3rd January 2019 sworn by respondents Advocate John Ndungu Njuguna. He averred that the application herein is an abuse of court process aimed at delaying expeditious hearing and determination of this appeal.

4. He averred that the primary suit was instituted in the year 2014 and concluded in the year 2016 and sufficient opportunity was given to parties to adduce evidence.

5. Respondent's Advocate further aver that the appellant was granted an opportunity to subject the patient herein to examination of their choice and they referred to Doctor Malik.

6. The respondent's contention is that the appellant was accorded proper, adequate and enough opportunity to call for and present any evidence be it medical or otherwise to support their case and that the appellant has not complained of denial of such opportunity by the lower court.

7. Counsel for the appellant further averred that there is already medical and psychiatric evidence on record by Doctor Malik and Doctor Njau respectively which the trial magistrate had opportunity to consider before arriving at his decision.

8. Further the evidence by Viraud Investigations Limited cannot be that which could not have been discovered after due diligence; that the evidence was available during hearing at the lower court.

9. That the application does not address questions in the appeal and is intended to fill in gaps in the case by patching up weak points at late stage of appeal when parties had taken directions on appeal. He averred that it is an abuse of court process, unfair and prejudicial; and allowing it will allow the appellant to make out a fresh case in the appellate stage, which is prejudicial to the appellant and detrimental to fundamental rules of fair hearing, due process of law and natural justice and rule to have litigation come to an end. The respondent prayed for dismissal of the application.

10. Advocates herein made oral submissions. In addition to restating ground and facts set out above, counsel for the appellant/applicant submitted that the suit was filed by the wife of the patient herein who sought leave to be appointed his guardian on ground of incapacity due to head injury. That the appellant's contention is that the patient was awarded damages for pain and suffering and loss of earning but investigations have proved that the said patient is in good health and that the investigation finding will directly affect the appeal. He submitted that he is employed and there cannot be loss of earnings.

11. Counsel argued that the court has discretion to take the new evidence. He submitted that the Advocate could not have known the condition of the patient as his wife was acting on his behalf. He denied the allegation that the appellant is trying to fill gaps.

12. In his oral submissions counsel for the respondent argued that Mr. Mahinda has been on record in this matter all along and that evidence to be adduced is not new. He submitted that the origin of this application is a letter from the insurance saying that investigation in this matter will help reduce damages.

13. He referred to authority filed 22nd January, 2019 where the court stated that the evidence should be new and not intended to patch up the case. That the appellant is seeking evidence to defeat this case. That there is no reason given as to why the investigation report was not given in the lower court. That the appellant was represented in the lower court and Mr. Mahinda has not explained why he never carried out due diligence. He added that the appellant is challenging the decision of the lower court through evidence, which was not availed at that stage: that he should have applied for review in the lower court to consider before appeal is filed.

ANALYSIS AND DETERMINATION

14. I have considered arguments by parties herein. I have also perused the lower court record and authorities filed. Order 42 rule 27 under which this application has been brought provide as hereunder:-

27(1)

“The parties to an appeal shall not be entitled to adduce additional evidence, whether oral or documentary in the court to which the appeal is preferred; but if:-

(a) the court from whose the appeal is preferred has refused to take evidence which ought to have been admitted

(b) the court to whom the decree is preferred requires any document to be produced or any witness to be examined to enable it pronounce its judgment or for any other substantial cause,

The court to which appeal is preferred may allow such evidence to be produced or witness to be examined....”

15. From the above it has come out clearly court can only allow additional evidence if trial court declined to admit evidence that ought to

have been admitted and secondly, if the production of a document or evidence of a witness orally will enable court pronounce judgment or for any other substantial cause.

16. The court is required to record reasons for allowing the additional evidence.

17. In **Civil Appeal No 325 of 2013 Kenya Anticorruption versus Willesden Investments Limited & 7 Others** the court of appeal held that the appellate court has discretion in determining whether additional evidence should be admitted and the exercise of discretion shall be guided by principles laid down in the case of **Ladd vs Marshall [1954]1WLR1489 at 1491** as follows:-

(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 be believed, or in other words, it must be aplenty credible, though it need not be incontrovertible.

18. The above principles were applied in the case of **Mzee Wanje & 93 others Vs Saikwa and others[1982-88]1KAR 462** where the court found that the material was not needful for the task the court was required to discharge in determining the appeal before it.

19. In the instant case, could the evidence be obtained with reasonable diligence? Record show that the appellant was given an opportunity to subject the patient to second medical examination which was done. The argument that the wife was conducting trial and patient's condition could not be known by the appellant cannot be true. The appellant had all the opportunity to obtain evidence which was done.

If the new evidence was admitted would it affect result of the case?

20. On perusal of lower court record it is evident that the patient was examined by psychiatrist Doctor Joseph Waigi Njau who testified as PW6. From the record at the time he testified psychiatrist of more than 10 years' experience. He confirmed that the patient was mentally impaired and had no capacity to testify in court. The appellant's Advocate had opportunity to cross examine the doctor.

21. The defendant adduced evidence by Doctor Malik who also examined the plaintiff. The appellant never availed the doctor to adduce evidence in person, which would have given the plaintiffs advocate an opportunity to cross examine him. It is however evident in his report that he give his opinion on mental illness. The evidence was therefore available for the trial court to consider in comparison to evidence by doctor Njau. The nature of evidence that the appellant seek to adduce is not therefore new. Result of the trial would not be affected by introduction of evidence the appellant is seeking to admit.

Do the evidence appear apparently credible?

22. On perusal of the investigation report which the appellant is relying in this application I note that on page 3 of the report, the maker indicate that he never met the patient but met one Ken who is alleged to be the manager of Grand Forest Joan Hospital where the patient is alleged to be working. He said that he called the patient using the number given by the said Ken and from the telephone conversation; he learnt that the patient is mentally upright. He says the patient works in Nakuru but never attempted to meet him after talking to the said manager in the Nairobi office. The additional evidence as portrayed in the investigative report do not appear credible to warrant exercise of court's discretion to allow additional evidence.

23. From the foregoing I find that the application is not merited and dismiss with costs to the respondent.

FINAL ORDERS

1. Application is hereby dismissed

2. Costs of this application to the respondent.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Njuguna Counsel for Appellant

