



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEALNO. 72 OF 2018

NICHOLAS ANGWENYI SIRO T/A

RIVERSIDE CONTINENTAL RESORT.....APPLICANT/APPELLANT

VERSUS

DUKE ORIKU GISEMBA.....RESPONDENT

RULING

1. By a plaint dated 7<sup>th</sup> December 2009 the applicant, Nicholas Angwenyi Siro t/a Riverside Continental Resort, filed suit against the respondent claiming that on 22<sup>nd</sup> March 2009 the respondent negligently drove its motor vehicle registration No. KAR 797U Toyota Prado along Kisii-Kisumu road and caused the motor vehicle to veer off the road and crash into the applicant's premises known as RIVERSIDE CONTINENTAL RESORT. The applicant contends that as a result it suffered loss and damage, more particularly extensive damage to its perimeter wall, its kitchen, equipment, additional cost on security and labour. The appellant also alleged that he suffered loss of business, loss of earnings during the period the said Riverside Continental Resort was not in operation.
2. On its part, Duke Oriku Gsembe, the respondent filed his defence and denied the occurrence of the accident, and pleaded that in the alternative the accident was wholly caused by the negligence of the applicant.
3. Upon hearing the parties, the trial court delivered its judgment on 8<sup>th</sup> August 2018 and found that the applicant did not produce any title deed, lease certificate or service agreement to demonstrate that Riverside Continental Resort belongs to him. Aggrieved, the applicant lodged Civil Appeal No. 72 of 2018 before this Court.
4. By way of Notice of Motion dated 17<sup>th</sup> December 2018, the applicant has moved this Court seeking leave to adduce additional evidence, the additional evidence being the official search of **LR NO. WEST KITUTU/BOGUSERO/2285** on grounds that it could not have reasonably obtain it during trial and that had it been available before the trial court it would have affected the results of the suit. That he has equally done the bill of quantities to the property which forms part of the record. He argues that the said evidence will not prejudice or cause any judicial absurdity in dispensation of justice.
5. The respondent opposes the Motion on the grounds that the application is frivolous and unjustifiable. It further deposed that the application is for the review of the already pronounced judgement and to retry the entire case would be contrary to **Section 78** of the **Civil Procedure Act**. It urged the court to exercise its discretionary powers in determining the application. He further deposed that the applicant has failed to meet the legal requirements set for obtaining the said orders.
6. When the application came up for hearing, Miss Gogi, counsel for the applicant submitted that during the hearing before the trial court neither the copy of the certificate of search and nor title deed confirming ownership of the property were produced and the applicant now seeks leave to adduce additional evidence to be taken by the trial court by way of affidavit. She urged court that if the orders are granted the Respondent shall not suffer any prejudice and can be compensated by way of costs. It was her submissions that the evidence the applicant wishes to produce shall assist the court to make the correct finding. She urged court that the application was not a review application and sought an order of retrial.
7. Mr. Bosire Counsel for the Respondent opposed the application by relying on the affidavit of the Respondent filed on 28<sup>th</sup> February 2019. He argued that the additional evidence was meant to fill in the gaps from trial and that the evidence was contradictory in nature and could not be described as new evidence. He submitted that the applicant had not satisfied the conditions for adducing additional evidence particularly that he applied reasonable diligence in acquiring the evidence at the time of trial. Mr. Bosire submitted that the documents the applicant seeks to introduce is not new and was available at the Lands Registry since the matter was filed in 2009, he therefore urged the court to dismiss the application.
8. I have considered the application for leave to adduce additional evidence on appeal, the grounds of opposition by the respondent, the oral

submissions by counsel and find that the only issue for determination is whether the applicant has made a case for the admission of additional evidence. The additional documentary evidence that the applicant wishes to produce and rely upon in the appeal is the Certificate of Official Search for LR. NO. WEST/KITUTU/BOGUSERO/2285.

9. The applicable law in admitting new evidence at the appellate stage is covered under **Section 78 (1) (d)** of the **Civil Procedure Act** which provides that an appellate court shall have power to take additional evidence or to require the evidence to be taken. **Order 42 Rule 27** of the **Civil procedure Rules** provide that:

*“27(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; [Emphasis mine]*

*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,*

*c. 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.”*

10. The principles of law to be considered by an appellate court in admitting new evidence in an appeal were stated by the Court of Appeal in **Tarmohamed & Another V Lakhani & CO (1958) EA 567** where it adopted the Judgment of Lord Denning in **Ladd V Marshall (1954)1 WLR, 1489**, and stated as follows:

*Except in cases where the application for additional evidence is based on fraud or surprise, to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, 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; thirdly, 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. (Emphasis mine)*

11. In **Walter Joe Mburu V Abdul Shakoor Sheikh & 3 Others Civil Appeal No. 195 OF 2002 [2015] eKLR** the Court of Appeal stated:

*“Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court’s discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.*

*.....that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.”[Emphasis added].*

12. The above cases indicate the reluctance by the appellate courts in considering the additional evidence. The appellate courts only admit the additional evidence once the legal principles enumerated in **Ladd V Marshall (supra)** have been satisfied. In this matter, I note that the Applicant made the application to have the certificate of official search on 26<sup>th</sup> November 2018 after the judgment of the lower court. The said Certificate of search reveals that the applicant had been the proprietor of the land since 1980 and was issued with land certificate of title in 1987. The applicant having filed the suit in 2009 did not furnish this court with reason why the certificate of official search was not obtained and presented into evidence before the trial court. He has not explained why he did not produce the bill of costs before the trial court. I am constrained to agree with the respondent that the applicant is seeking to fill in the gaps in his case after his case was heard and determined by the lower court. It is not new evidence. His case was dismissed because he failed to prove his claim on a balance of probabilities.

13. The applicant has not demonstrated why the intended additional evidence could not have been obtained with reasonable diligence during hearing at the trial court. I do not find that the applicant has furnished this court with an exceptional circumstances constituting sufficient reason for receiving fresh evidence at this stage. The property, LR. NO. WEST/KITUTU/BOGUSERO/2285 has all along been in the name of the applicant from 1980, and in the circumstance I find that the application is merely an afterthought following the judgement of the trial court.

14. Lastly I observe that in prayer no.1 of the application dated the 17<sup>th</sup> December 2018 the applicant seeks “to leave to have additional evidence taken by trial court orally, by way of submissions or by way of affidavit yet the grounds state that the additional evidence is to be adduced on appeal. In his supporting affidavit he states that, “adducing such evidence on appeal will not prejudice or cause judicial absurdity”. The orders sought, the grounds and what is deponed in the supporting affidavit do not support what he seeks in his application. If he wanted evidence adduced before the lower court after judgment the applicant ought to have filed an application for review under order 45 of the Civil Procedure Code in the lower court.

15. For the reasons I have stated, I dismiss the application dated 17<sup>th</sup> December 2018. The costs of the application shall be in the appeal.

**DATED and DELIVERED at KISII this 13<sup>th</sup> day of JUNE 2019.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Miss Gogi h/b Mr. Nyambati For the Applicant**

**Respondent Absent**

**Rael Court clerk**