



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 267 OF 2017

P. M. MBUTHIA.....APPELLANT

VERSUS

FRANCIS NJUGUNA KIMANI.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 8th October, 2019 was filed pursuant to the provisions of Order 51, Order 42 Rule 27 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. It sought the following orders:-

1. THAT this Honourable court be pleased to admit new evidence in the form of the Appellant's Original Passport No. A438543 at the hearing of this Appeal.

2. THAT costs of the application be in the cause.

2. His Written Submissions were dated 10th December 2018 and filed on 11th December, 2018 while those of the Respondent were dated 18th January, 2019 and filed on 31st January, 2019.

3. Parties asked this court to deliver its Ruling based on the said Written Submissions that they fully relied upon. The said Ruling is based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant relied on Section 78(1) (d) of the Civil Procedure Act Cap 20 (Laws of Kenya) that empowers an appellate court to take additional evidence or to require the evidence to be taken and Order 42 Rule 27 of the Civil Procedure Rules that provides that additional oral or documentary evidence can be produced on appeal in certain circumstances.

5. In this regard, he relied on the case of **Fibrelink Ltd vs Star Television Production Ltd [2015]eKLR** where it was held that:-

“...The appellate court must find the evidence useful.... It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

6. It was his submissions that his passport ought to have been admitted as a matter of law by the trial court as the Respondent would not have been prejudiced. It was his contention that the additional evidence would be required for the determination of the dispute of the parties to the Appeal herein as the Trial Court ought to have looked at his original passport and not limited itself to copies of the biodata and visa pages as this would have proved that his passport had been extended after expiry until 30th July 2003. His supporting Affidavit was sworn on 8th October 2018. He therefore urged this court to allow his application.

THE RESPONDENT'S CASE

7. In opposition to his application, the Respondent swore his Supporting (sic) Affidavit on 5th December 2018. The same was filed on 6th December 2018.

8. He contended that the Appellant was in possession of the Passport during the hearing and ought to have produced the same in evidence. He averred that equity aids the vigilant and not the indolent and that his application was seeking to introduce new evidence at the appellant state which was irregular. It was his averment that the present application was intended to deny him enjoyment of the fruits of his judgment.

9. He placed reliance on the case of **Reuben Mongare Kaba vs M. W. N. Minor & Another [2018] eKLR** in which Majanja J relied on the case of **Mzee Wanje & 93 others vs A. K. Saikwa & Others [1982 - 1988]1 KAR 462** where the principles of admitting new evidence at the appellate stage were set out as follows:-

- 1. It must be shown that the evidence could not have been obtained with reasonable diligence at trial**
- 2. 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.**
- 3. The evidence must be apparently credible, though it need not be incontrovertible.**

10. He was emphatic that Article 164(3) of the Constitution of Kenya, 2010 and Section 3 (1) of the Appellant Jurisdiction Act limits the jurisdiction of appellate courts to hearing appeals. He, however, admitted that Rule 29(1) (b) of the Appellate Jurisdiction Act recognises that there are certain situations where additional evidence can be given at the appellate stage.

11. Section 78(1) of the Civil Procedure Act sets out the powers of an appellate court. It stipulates that:-

“ Subject to such conditions and limitations as may be prescribed, an appellant court shall have power to –

- 1. determine a case finally.**
- 2. to remand a case;**
- 3. to frame issues and refer them for trial;**
- 4. to take additional evidence or to require the evidence to be taken;**
- 5. to order a new trial.”**

12. Section 78(2) of the Civil Procedure Act further states that:-

“Subject to the aforesaid, any appellate court shall have the same powers as nearly as may be possible the same duties conferred and imposed this Act on courts of original jurisdiction in respect of suits instituted therein.”

13. It is therefore undisputed that an appellate court can either take evidence itself or require the same to be taken. Further, it is trite law that additional evidence will not be adduced at the appellate stage unless the circumstances enumerate hereinabove have been met. It is not intended to give a party who had lost in trial, a second bite at the cherry.

14. In deciding whether or not to allow an application seeking the production of additional evidence at the appellate stage, the court must be minded of the fact that litigation has to come to an end at some point to allow a successful litigant enjoy the fruits of his judgment but at the same time also keep at the back of its mind that at all given times a court should consider all evidence pertaining to a case so as to do substantive justice. It would be a sad day in justice not to deliver justice due to technicalities.

15. This court perused the lower court proceedings and noted that the Respondent testified in the lower court that the Appellant was the one who took him to hospital when he fell off a ladder while at the Appellant's property. The Appellant denied ever having known the Respondent or taking him to hospital. He contended that he was out of the country at the material time. He asserted that the Trial Court only considered the copies of the biodata and visa pages of his Passport which had been extended after its expiry.

16. As the entire document was not placed before the Trial Court, it would be in the interests of justice that all evidence be placed before the court hearing the Appeal so as to determine the real question in controversy between the parties herein.

17. As can be seen hereinabove, this court can determine a case finally, remand a case or order a retrial. It can also either take evidence or require the same to be taken. However, bearing in mind the controversy of validity or otherwise surrounding the said Passport, it would be prudent to have the evidence of the Appellant subjected to Cross-examination as opposed to this court taking the additional evidence itself, a power the Respondent conceded it has.

DISPOSITION

18. Accordingly, the upshot of this court's Ruling is that the Appellant's Notice of Motion application dated and filed on 8th October, 2018 is merited and is hereby allowed in the following terms:-

- 1. THAT the lower court file be placed before the Chief Magistrate Milimani Commercial Courts for directions on 20th June**

2019 with a view to allocating this matter to a magistrate other than the Trial Magistrate for the taking of evidence regarding the Appellant's validity of his original Passport at the material time.

2. In view of the fact that the Appeal herein is pending hearing and determination, the evidence should be taken within thirty (30) days from the date of this Ruling and file returned to this court to facilitate the hearing and determination of the Appeal herein.

3. Matter to be mentioned on 23rd July 2019 to confirm compliance and/or for further orders and/or directions.

4. Costs of the application will be in the cause.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of June 2019

J. KAMAU

JUDGE