



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 13 OF 2018

AINU SHAMSI HAULIERS LTD.....APPELLANT

-VERSUS-

ANASTACIA NDINDA MWANZIA

(Suing as the administrators of the estate of)

HARRISON MWENDWA KAVILI.....RESPONDENT

RULING

INTRODUCTION

1. The Application for determination is dated 12/07/2018. It was filed under certificate of urgency and is brought under Section 78 (1) (d) & (2) of the Civil Procedure Act (CPA), Order 42 rules (27), (28) & Order 51 of the Civil Procedure Rules(CPR), 2010. It seeks the following orders;

a) Spent.

b) That the Honorable Court be pleased to issue an order allowing additional evidence be taken or require additional evidence be taken during the main appeal.

c) That costs be in the cause.

2. The Application is premised on the grounds on the face thereof and a Supporting Affidavit sworn on 12/07/2018 by Counsel Seth Ojienda.

3. The Application is opposed through the Replying Affidavit of Paul Mutunga sworn on 10/08/2018. According to the Respondent, the Application does not meet the conditions set out in Order 42 rules 27 & 28 and that the Appellant has not proved that he was denied a chance to bring any evidence before the Trial Court.

4. Directions were given that the Application be canvassed by way of Written Submissions. Only the Applicant complied.

THE SUBMISSIONS

5. The Applicant submits that the additional evidence will help this Court to determine a crucial issue in the appeal with regard to causation and apportionment of liability between motor vehicles KAY 060X Nissan UD (*the bus*) and KBQ 869V/ZD7699 (*the trailer*).

6. Further, he submits that the relevant law appreciates that situations may arise that make it imperative for a party to introduce new evidence at the appellate stage. He contends that the police abstract relied on at the trial was inconclusive thus the trial Court was bereft of evidence to substantively deal with the issue of liability.

7. He relies on the case of **James Mwangi Ng'ang'a –Vs- Kenyatta University Council & 4 others (2009) KLR** where the Court of Appeal adopted the judgment of Lord Denning in **Ladd –Vs- Marshall (1954)1 WLR,1489** in which the Court of Appeal for Eastern Africa stated that;

“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.”

8. The Applicant submits that during the trial, the indication in the police abstract was that the matter was pending under investigations (P.U.I) and as such, none of the parties could have obtained such evidence as it was not within their abilities to determine the findings of the investigation. That the police file was availed on 05/07/2018 during the hearing of a test suit at the Makindu law Courts.

9. Further, the Applicant submits that the covering report and summary of investigations show that the bus driver was to blame for the accident that occurred on 24/11/2013 at Ngokomi area along the Nairobi-Mombasa highway. That such evidence would have greatly influenced the result of the case.

10. The Applicant also submits that the new evidence is a public document within the meaning of Section 79 of the Evidence Act. That the copy of police file is a record of investigations by police officers who are public officers and as such, the evidence is credible and/or presumably capable of being believed.

11. The Applicant also submits that the additional evidence will not prejudice the Respondent as he will have an opportunity to rebut it or question it's veracity.

12. Having looked at the Application, the Replying Affidavit, the Appellant's submissions, the authorities cited therein as well as the entire record, it is my considered view that the only issue for determination is whether additional evidence should be admitted.

WHETHER ADDITIONAL EVIDENCE SHOULD BE ALLOWED

13. **Section 78 (1)** of the CPA provides as follows;

“Subject to the conditions and limitations as may be prescribed, an appellate Court shall have power;

- a) To determine the case finally.*
- b) To remand a case.*
- c) To frame issues and refer them to trial.*
- d) To take additional evidence or to require evidence to be taken.*

14. **Order 42 rule 27** of the CPR provides as follows;

(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.

15. With regard to the mode of admission of additional evidence, **Order 42 Rule 28** provides that;

“Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred”

16. From the above, it is clear that this Court has power to take additional evidence or order that such evidence be taken by the subordinate Court. The conditions for admission of such evidence are as stipulated in the **Ladd case (supra)**.

17. During the trial of the matter herein, the police abstract (*exhibit 5*) was produced by a police officer from Sultan Hamud Traffic case. The police abstract indicated that investigations were still pending and the witness testified that nobody was charged or blamed.

18. My view is that if the investigations had been completed, such information would ordinarily have been expected to be within the knowledge of the officer who produced the abstract. I am therefore convinced that the subsequent information, which became available during the hearing of the test suit in Makindu, could not have been obtained by the Applicant even with exercise of due diligence.

19. I have read the trial Court's judgment and I have also looked at the copies from the police file which the Applicant wants to introduce as additional evidence. I have no doubt that the findings of the completed investigations would have greatly influenced the trial Court's finding on liability.

20. With regard to credibility, the Applicant captured it aptly in his submissions. The additional evidence being a record of investigations by public officers, squarely falls within the meaning of a public document as envisaged by section 79 of the Evidence Act, Cap 80 Laws of Kenya. Further, conducting investigations is a statutory mandate of the police officers and any findings from such investigations are *prima facie* reliable and/or credible.

21. Finally, it is my view that the provisions with regard to additional evidence are expressly provided for in our laws to advance the interests of justice by ensuring that no Court of Law is deprived of information which will enable it arrive at a fair and just decision.

CONCLUSION

22. The court thus holds that, the Application has merit and it is hereby allowed on the following terms;

i. The additional evidence shall be received by this Court during the hearing of the appeal.

ii. Costs in the appeal.

SIGNED, DATED AND DELIVERED THIS 17TH DAY OF OCTOBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE