REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 15 OF 2014

GEOFFREY MURIUNGI…….....…….....…….....….1ST APPELLANT

NJERU INDUSTRIES…….....…….....….2ND APPELLANT

Versus

JOHN RUKUNGAM' IMONYO (Suing as the legal representative of the

estate of **KINOTI SIMON RUKUNGA-Deceased**)…....….**RESPONDENT**

RULING

[1] Before me are two Motion Applications: one is dated 29th January 2016 and the other 23rd February 2016. Both applications are asking the court to allow the Appellants to adduce further evidence in this appeal under Order 42 (27) and 51 of the Civil Procedure Rules. The evidence to be adduced is the same and so I will deal with the applications together and render a single ruling thereto.

[2] There is, however, another application seeking review, setting aside or variation of orders of 18th February 2016. As long as it seeks an order that the whole decretal sum to be deposited in a joint earning account in the name of the advocates, that application has been overtaken by events since on 28th April 2016, the advocates confirmed that the decretal sum had been deposited at KCB Meru Branch. I will not deal with this application.

[3] I now turn back to the main course. The provisions of the law cited are Order 42 (27) and 51 of the Civil Procedure Rules Section 1A,1B,3 and 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya and Article 10 (2) (b) and 159 of the Constitution of Kenya. And, below is the further evidence intended to be adduced in this appeal:-

1. Extract of police occurrence book

2. Sworn affidavits by eye witnesses; and

3. Inquest and recommendation letter by the County Directors of Criminal Investigation Officer, Meru to Director of Public Prosecution.

[4] In support of the applications, theAppellants stated*inter alia* that they have discoverednew and very important evidence that ought to be taken as evidence by the honourable court,for it is highly material to the judgment in this appeal. Secondly, the Appellant contended that they were not able, even after the

exercise of due diligence, to obtain and produce this new evidence during the trial of the primary suit. According to them, the witness who testified in the lower court matter one Samson Gichuru had now sworn an affidavit before the Senior Principal Magistrate Court Meru stating that the deceased was not hit by his motor vehicle but rather by a motorcycle on the night of 23rd November 2014. The said Simon Gichuru was the only eye witness in this case in the lower court and testified on how they were thrown out of the motor vehicle with the deceased and thereafter the driver ignited the Land Rover and ran him over.

[5] Besides, yet another eye witness also sworn an affidavit to testify to the true position of the matter; one Agnes Karambu had also come out to declare and deposed to the true account of what really killed the deceased. In addition, the County directorate of criminal investigations officer Meru one Joseph M Koini had also written to the office of the public prosecutions Meru, advising that, on the basis on the evidence that has now come up, there is contradiction on the cause of death of the deceased; some witnesses claim that the deceased was run over by a motor cycle and that evidence was not available to the appellants. The office of Director of Public Prosecutions has advised that an inquest into the death of the deceased be conducted bearing in mind the new evidence. It is for this reason that the appellants have applied in court. Accordingly, the Appellants are of the view that there is substantial cause for the court to allow them to call for this additional evidence.

Directions

[6] When the matter came up for hearing on 28th April 2016, it was agreed that the applications shall be canvassed by way of written submissions.It seems the Appellants did not file written submissions but the Respondent did. I will, therefore, consider those submissions. But, the Appellants filed affidavits the last one being a further supporting affidavit sworn on 28th September 2016 and filed pursuant to the leave of the court. I will, therefore, consider all affidavits filed.

Submissions by the Respondent

[7] It was submitted for the Respondent that Order 42 Rule 27 (1) of the Civil Procedure Rules does not allow parties to adduce additional evidence in appeals. In addition, they argued that the Appellants had not demonstrated that the trial court refused to admit the alleged police extract of occurrence book and/or refused any witness to testify. According to the Respondent, the Appellants had not satisfied the conditions of law on adduction of additional evidence as set out by the Court of Appeal decision in **WANJE VS A.KSAIKWA (1983) eKLR.**

[8] It was further submitted that it had not been explained why: (1) the purported “initial report” from Mikinduri Police Station which was a stone throw away from Tigania Law Courts was not obtained and produced; and (2) the two persons who had filed affidavits namely SamsonGichuru and Agnes Karambu were not called to record statements and testify as defence witnesses in the primary case. In any event, they argued that the alleged motorcyclist BonifaceBundiKiraithe had sworn an unchallenged affidavit sworn on 24th March 2016, denying that he hit the deceased as alleged.

Affidavit by Appellants

[9] The managing director of the Appellant however filed a further supporting affidavit in which he deposed *inter alia* that the affidavit sworn by the alleged motorcyclist one BonifaceBundi raised very serious issues yet Bundi was not a party to this suit. He could not, therefore, file a reply. He averred further that the Officer Commanding Mikinduri police station could be called to produce the occurrence book in which the initial report was made and that this evidence could not be overlooked while there was great possibility that indeed Bundi was involved and that their witnesses could be called upon to be cross examined by the respondent’s counsel.

DETERMINATION

[10] I have carefully considered this application, the rival contentions by the parties and the authorities relied upon by the parties. This application is a request to adduce additional evidence in this appeal. The substantive law that governs adduction of additional evidence on appeal is Section 78(1) (d) of the Civil Procedure Act whereas the procedural law is Order 42 Rule 27 of the Civil Procedure Rules. Section 78 (1) (d) of the Civil Procedure Actprovided thus;

> "***78(1)Subject to such conditions and limitations as may be prescribed; an appellate court shall have power-***
>
> ***a.....;***
>
> ***b.....;***
>
> ***c.....;***
>
> ***d. to take additional evidence or to require the evidence to be taken;***
>
> ***e.....”***

Order 42 Rule 27 of the Civil Procedure Rules provides as follows:

> 27.**Production of additional evidence in appellate court [Order 42, rule 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; 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.**

[11] Doubtless, the appellate court has power to call for and admit additional evidence on appeal, but that power should be utilized sparingly only in apt cases where exceptional circumstances exist. This approach is to avoidgiving the party who was un*successful at the triala second bite of the cherry to patch up the weak points in his case and or fill up omissions and gaps in the appeal and or make out a fresh case in appeal. See* **TARMOHAMED&ANOTHER V LAKHANI &CO (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning inLADD V MARSHALL (1954)1 WLR, 1489,the Court of Appeal for Eastern Africa stated that:**

> ***“...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***

See also **WANJIE&OTHERS V SAKWA& OTHERS (1984) KLR 275 where** the Court of Appeal considered the rationale for the restriction of reception of additional evidence- albeitunder Rule 29 of the Court of Appeal Rules- what Chesoni JA observed at page 280 is pointedly relevant, that:

> ***"this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It* follows *that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."***

Hancox JA as he then was in the same case above stated that:-

> ***...the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.***

[12] Applying this test, the Appellants are not saying that the trial court refused to admit evidence which ought to have been admitted. They have also not explained why they did not call the witnesses they now intend to call to testify in the primary suit. They have further not demonstrated that, after due diligence, theevidence they seek to adduce was not available or was not within their knowledgeor could not have been obtained or produced during the trial. I do not think the alleged "initial report" and police extract occurrence book was not available at the time of trial or that it could not have been availed after the exercise of due diligence. In any event, they have not shown the opposite to have been true. Accordingly, they have not shown to the satisfaction of this court why the evidence was not produced as evidence.

[13] What is surprising is that Samson Gichuru an eye witness testified in the lower court but it seems he has now sworn an affidavit before the Senior Principal Magistrate Court giving contrary information, to wit, that the deceased was not hit by their motor vehicle but rather by a motorcycle. Such is a case of a witness having given false information and should be treated as such. The best that could be derived from the fruits of the forbidden tree is for the Appellant to explore possibility of filing a separate suit against the proper parties for reimbursement of the expense and liability they were exposed to in this case. And, I doubt whether the witnesses who gave false testimony will avoid being parties in such civil suit or in any criminal proceedings that may be comprehended. The said witness testified in the primary suit and one wonders why he did not give the evidence that he now proposes to adduce. That reality produces festering waters and does not encourage an inference that th*e evidence to be adduced by the said witness is such as is presumably to be believed, or in other words, is apparently credible.*

[14] In addition, the Appellants deposed that the affidavit sworn by the alleged motorcyclist one Boniface Bundi raised very serious issues yet Bundi was not a party to this suit. He could not, therefore, file a reply. How will they, therefore, deal with Bundi who is not a party to this appeal yet they seek to adduce evidence implicating him? This is a practical circumlocution. In real sense, the approach being applied here is simply not tenable as it seeks to stake a fresh case in the appeal and against persons who are not parties in the appeal. Again, upon perusal of the appeal, this court does not require production of additional evidence or examination or further examination of proposed witnesses in order to determine the appeal among the parties. There is absolutely no substantial cause which will impel this court to require adduction of further evidence in this appeal. These applications do not meet the appropriate legal threshold. And, they must fail. The upshot of the above analysis is that I find the applications dated 29th January 2016 and 23rd February 2016to be without merit and I accordingly dismiss them. Except, however, even if the applications were a misguided vessel, in light of the decision I have rendered, I will not condemn the Appellants to pay costs. Instead, I order that each party shall bear own costs of the applications. It is so ordered.

Dated, signed and delivered in open court at Meru this 6thday of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate for Mr. Carlpeters for Respondent

M/s. Kiome advocate for Appellant – absent

F. GIKONYO

JUDGE