



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS
CIVIL SUIT NO. 244 OF 2004

SUDAN RELIEF REHABILITATION ASSOCIATION

also known as SUDAN RELIEF REHABILITATION COMMISSION.....1st
PLAINTIFF

ELIJAH MALOKALENG.....2nd
PLAINTIFF

THOMAS DUT.....3rd
PLAINTIFF

ALOIS OJETUK.....4th
PLAINTIFF

Versus

CITI BANK NA.....
DEFENDANT

RULING

Re-opening of case

[1] By application dated 14th April 2015, the Defendant applied for this case to be re-opened and they be allowed to recall Stanley Mbogo for purposes of adducing further evidence in the case. The further evidence will be in support of the defence case. The application is expressed to be brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 17, 18 and 51 of the Civil Procedure Rules. The reason given for the request is that, during cross-examination, questions touching on the subject matter were led in a manner that gave an impression that the Defendant recovered and withheld monies which are subject of this case. They applied for an adjournment to enable them to trace and avail evidence on the recovery of the subject money but it was declined by the court. They stated that they will be greatly prejudiced if the evidence is shut out as the issue on recovery of the money was not pleaded but arose during cross-examination. Nonetheless, it is an issue for determination by the court. The Defendant submitted that they have traced the relevant statements of accounts from their archives which show reversal of the said monies in the Imperial Bank’s account. The said statements are important in the determination of the suit; hence, it is in the interest of justice that they are allowed to produce the evidence in question.

[2] The application is based upon the affidavit of Stanley Mbogo.

[3] The Plaintiff objected to the application on the grounds that; a) there has been no discovery of new and important evidence; b) the matters which the defendant want to introduce were always within their knowledge but deliberately withheld it from the court; and c) the application is an abuse of the process of the court as it seeks to answer the submissions by the Plaintiff. They also asserted that cross-examination is not limited to pleadings and could be on any matter which is relevant to the case. The

DETERMINATION

[4] This is an application to re-open a case and adduced more evidence. The appropriate test is as was set out in the case of **Mzee Waujie & 93 Others v A K Saikwa & 3 Others (1982-88) 1 KAR** where it was held that in order for the Court to consider admitting new evidence, it has to be shown that the evidence which the parties seek to be admitted was not or could not have been obtained by reasonable diligence at the time of the trial, or it has an influence on the outcome of the case, or that it must be presumed to be credible. See the decision by Hancox, JA (as he then was) in the above cited case on the issue of admitting new evidence under Rule 29(1) of the Court of Appeal Rules which offers insightful dents inter alia;

“But I am not persuaded either that these proposed instances of additional evidence, if ordered to be taken, would be likely to affect the result of the suit, or that such evidence, was not available by the exercise of reasonable diligence before and during trial (indeed the contrary would appear to be the case). Both these conditions have in my opinion to be established by the applicant before he can succeed under Rule 29(1)(a). In Cooley v Edwards [1982] NLJ 247, the English Court of Appeal, in dealing with the more strict provisions of RSCOrd 59, r 10(2) said;

“It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court’s decision.”

I consider that the same test should be applied under our rules, for otherwise it would open the door to litigants to leave until an appeal all sorts of material which should properly have been considered by the Court of trial.”

[5] Similarly in **Mohamed Ahmed Hasan Hashi Shirwa v Swalahudin Mohamed Ahmed [2011] eKLR**(supra), it was held that;

“Re-opening a case is not an impossibility, but there must be cogent reasons for re-opening, and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case.”

[6] In order for the Court to consider re-opening a case that has been heard, the test as enunciated by Hancox, JA in **Mzee Waujie & 93 Others v A K Saikwa & 3 Others** (supra) must be satisfied. The Applicant must adduce cogent reasons as to why the pleadings should be re-opened to admit new evidence by showing that; 1) the new evidence could not have been obtained with reasonable diligence for use at the trial; and 2) that it was of such weight that it was likely in the end to affect the court’s decision. I should add that the Applicant must also show that the re-opening is not to enable the party to seal a loophole in his case but rather to attain substantive justice.

[7] Applying the above test, the statements were within the knowledge of the Defendant at all times and could easily have been obtained from the archives and presented before court at the trial. The Defendant closed its case on 23rd February 2015 and did not apply for any adjournment to trace and avail these statements it is seeking to introduce now. The witness, however, confirmed in re-examination that they did not recover the money in issue and that Imperial Bank had confirmed that the money had been withdrawn at the time the Defendant called them over the same. The application to re-open the case first

came to the attention of the court on 14.4.2015 when it was filed and they appeared before Kamau J. accordingly, there has been no discovery of new and important evidence in the sense of the law; this is rather an attempt to seal a loophole in their case. Accordingly, I disallow the application dated 14th April 2015. It is so ordered.

Dated, signed and delivered in court at Nairobi this 1st day of July, 2015.

F. GIKONYO

JUDGE