REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 7 OF 2009

UKWALA SUPERMARKET COMPANY LTD ..... APPELLANT

VERSUS

EZEKIEL MAUGO NDUBI …..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. G. A. Mmasi (Senior Resident Magistrate) in Eldoret Chief Magistrate's Civil Case No. 1441 of 2004 delivered on 11th December, 2008)

RULING

The Appellant has come to court vide Notice of Motion dated 24th April, 2012 brought under Sections 3 and 3A of the Civil Procedure Act, Order 42 Rules 13 (1), (2), (3), (4), 26, 27 and 28 of the Civil Procedure Rules. He prays for the following orders:-

(a) This Honourable court to give directions generally as to the hearing of the appeal.

(b) The Appellant be allowed to produce additional evidence at the appeal.

(c) Costs in the cause.

It is based on the following grounds:-

1. That directions have never been given.

2. The Appellant has filed the records of Appeal for directions to be given.

3. The court from whose decree is preferred declined to give the Appellant another opportunity to adduce it's evidence.

4. The additional evidence will have a significant outcome on the appeal.

5. It is to the ends of justice and fairness that additional evidence be adduced/produced.

It is further supported by the Affidavit of Anilk Haria, a director of the Applicant Company. He depones that at the time the appeal was filed on 9th January, 2009, the Appellant was represented by the firm of M/s. Nyairo & Company Advocates. That the Appellant was supposed to be notified of the Judgment of the lower court yet it had not tendered defence before the said court. That the Appellant thereafter instructed the firm of M/s. Kariuki Mwaniki & Company

Advocates who made an application before the trial court to have the defence case reopened but the application was dismissed. That if the defence is allowed to tender its evidence, the same would lead to a reversal of the outcome arrived at by the trial court in its judgment.

The application is opposed vide a Replying Affidavit sworn by the Respondent on 6th September, 2012. He states that it is not true that the trial court declined to grant the Applicant an opportunity to tender its defence, but that the Appellant (Applicant) voluntarily sought to close its case without calling witnesses. That the application filed before the trial court seeking to re-open the defence case was an after thought made after this appeal had been filed. That the appeal relates to the entire judgment and decree of the lower court and the reliefs sought by the Applicant are not available.

The application was canvassed before me on 18th June, 2013 by way of oral submissions. Mr. Mwaniki advocate appeared for the Applicant while Miss Kipseii Advocate represented the Respondents. Each reiterated the averments contained in the Supporting and Replying Affidavits respectively. In addition, Mr. Mwaniki submitted that the rules of natural justice dictate that a person should not be condemned unheard. That documentary evidence the Applicant seeks to tender relate to employment of the Respondent and are crucial to the case. He submitted that the previous counsel representing the Applicant may have made a mistake in failing to advise the Applicant to put in further evidence, but such mistake should not be visited upon the party. He said that, under Order 42 Rule 28 of the Civil Procedure Rules, the court should admit the new evidence and give directions as to the mode of taking it.

Miss Kipseii on the other hand added that an appellate court relies on court record as opposed to allowing admission of fresh evidence. She submitted that in any case, the Applicant's application dated 26th January, 2009 filed before the lower court seeking to reopen the defence case was dismissed on merit. She said that the Applicant was ably represented by a counsel who told the court that the defence did not wish to tender any evidence. She submitted that under Order 42 Rule 27, an application of this nature would only be entertained if the subordinate court declined to admit evidence which a party intended to produce. That in such a scenario, additional evidence would only be called for by the court for purposes of clarification only.

In rejoinder, Mr. Mwaniki submitted that Rule 27 applies in a situation where an opportunity to tender evidence by a party was declined, in which case the Appellant would be granted such an opportunity.

I have accordingly considered the well-thought out submissions made by the respective counsel. From the onset, Mr. Mwaniki informed court that he was only focused on prayer (b) of the application, which is to allow the Appellant to produce additional evidence at the appeal.

Order 42 Rule 27 stipulates the circumstances under which an appellate court may entitle a party to produce additional evidence. It provides as follows:-

"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."

Rule 28 on the other hand lays down the mode of taking the additional evidence as follows:-

"28. 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."

While Rule 29 provides for limits to be defined or recorded when such additional evidence taken as follows:-

"29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified."

I have perused the lower court proceedings and noted that the issue on focus as canvassed before the trial court related to the re-opening of the defence case as opposed to calling for additional evidence. Indeed prayer (4) of the Appellant's application dated 26th January, 2009 that was dismissed by the trial court sought an order that **"the Judgment herein be set aside and the defence be reopened."**

In her ruling the learned Magistrate noted as follows:-

"The ruling follows the hearing of the application whereby the applicant is praying for orders that Mr. Kariuki be allowed to come on record as appearing for the Defendant/Applicant and further that the court be pleased to reopen the case for the defendant to offer evidence.

In this case the suit was heard and even the defendant was given a chance to testify. The defendant's counsel said he had not evidence to offer and urged court to close the suit. Hence the only option for the defendant is to file an appeal and not to bring such an application. The court therefore finds that the application lacks any merit and the same is hereby dismissed with costs to the Plaintiff/Respondent."

It is thus clear from both the prayer sought in the application and the attendant ruling made therein that the Appellant had desired to tender evidence after it had closed its case (defence) without tendering any. This position as advanced by the Appellant is a sharp contrast as provided and envisaged by Order 42 Rules 27 - 29.

In the case of **PETER NG'ANG'A MUIRURI -VS- CO-OPERATIVE BANK OF KENYA & 2 OTHERS (2012) e KLR**, the court, in applying the principle laid down in **HASSAN HASHI SHIRWA -VS- SWALAHUDIN MOHAMUD AHMED (2011) e KLR**, allowed the reopening of a case even after both parties had closed their cases. The court said:-

"..... court has a duty to find out the truth, by unearthing any mystery which may assist the court to arrive at a just decision."

Again in **PATTRIOTIC GUARDS LIMITED -VS- BARCLAYS BANK OF KENYA, CIVIL CASE NO. 838 NAIROBI, OF 2000** found at www.kenyalaw.or.ke, learned Mary Kasanga, Ag. J while citing Ibrahim, J noted as follows:-

"In the case of HCCC. No. 498 of 2002 (Milimani) there is an apt quotation by Justice Ibrahim which I believe captures what ought to be considered when such application as this one are brought.

A court inter alia, is a place of refuge for the protection of rights and requisition of vindication and remedies. Each has a seat of justice and he/she ought not to be removed from it without a hearing unless there are exceptional and justifiable grounds."

Therefore, it is discretionary upon the Judge to weigh the circumstance of each case in deciding whether or not to allow the calling of additional evidence. Such discretion should however be exercised judiciously so as not to overlook the objectives for which the rules made hereof were written.

In the instant case, unfortunately, the defence (Appellant) failed to call witnesses and opted to close its defence without calling any. Thus, it is not true to say that the trial court failed to observe the rules of natural justice. As such, the Appellant is estopped from reopening its case as the circumstance herein is far different from calling of additional evidence as envisaged by Order 42 Rules 27-29.

Finally, Mr. Mwaniki submitted that the failure to call for evidence by the defence (Appellant) during the trial was occasioned by the mistake of the counsel for the Appellant. So often courts of concurrent jurisdiction and even the appellate courts have held that the mistake of an advocate should not be visited on a party. I am of a similar view, but in applying this principle, each case must be considered on its merit. This is so because, in a scenario as in the instant case, the Appellant's counsel, then on record was appointed as the Appellant's legal agent as provided by Order 9 of the Civil Procedure Rules. Such an agent is deemed to have the full instructions of the party he represents in making any presentation on behalf of his client in court. This is so because unless where evidence is required by oral testimony or adduction of exhibits the advocate is the mouth piece of his client, and the attendance of the client (party) is never required in court.

Therefore, when the counsel for the Appellant submitted that the Appellant would not call evidence, the court as a matter of fact and procedure deemed that the instructions not to call the evidence were as given by the party. The party cannot thereafter be had to say that it was not aware that its advocate closed its case without calling any evidence.

The circumstances of this case are not exceptional. In **OMWOYO -VS- AFRICAN HIGHLANDS & PRODUCE CO. LIMITED (2002) 1, KLR, 700**, Ringera, J as he then was said:-

"Even if the matter involved an exercise of discretion (and not want of jurisdiction as in the case here) I would have declined to exercise the courts discretion in favour of the Applicant on the grounds that he found himself in a predicament as a result of his advocates alleged mistake."

I also decline to exercise my discretion in favour of the Applicant herein to the extent that it is its advocate who closed the defence case without calling any evidence for the reasons I have expounded herein above.

In the result, the application is dismissed with costs to the Respondent.

DATED and **DELIVERED** at **ELDORET** this 9th day of October, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Mwaniki Advocate for the Appellant/Applicant

No appearance for the Respondent