REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appeal 174 of 1999

CENEAST AIRLINES LIMITED .... APPELLANT

AND

KENYA SHELL LIMITED .... RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya Milimani Commercial Courts (Commissioner Gacheche) dated 20th July, 1999

in

H.C.C.C No. 593 of 1998)

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RULING OF THE COURT

This is an application brought under rule 29 of the Court of Appeal Rules by Ceneast Airlines Ltd. (the applicant) seeking to have additional evidence admitted at the hearing of the appeal herein. The evidence the applicant, defendant in the superior court seeks to have admitted being a letter written to the applicant by Kenya Shell Ltd. (the respondent), plaintiff in the superior court, dated 5th of May, 1994.

The reason advanced by the applicant for the said letter not having been tendered in evidence in the proceedings in the lower court being that:

"Mr. Moses W. Murichu who instructed the appellant's advocate on record did not know that the respondent had written a letter to the appellant after a reconciliation meeting held on 5th of May, 1994. The respondent withheld the letter from the superior court during the hearing of the application seeking to set aside the ex-parte judgment entered in default of appearance".

The respondent herein filed a suit in the superior court on 13th of October, 1998, claiming a total sum of Ksh.21,438,001/95 balance of money owed to it by the applicant for goods sold and delivered to the applicant during 1993. According to the affidavit of service on record the summons and plaint were served upon Moses Murichu, the Managing Director of the applicant on 9th December, 1998. The applicant did not enter appearance within the 10 days prescribed in the summons. Upon request filed in the court on 23rd of December, 1998 judgment in default of appearance was entered for the respondent on 4th of January, 1999. Immediately thereafter the applicant filed an application on 15th of January, 1999 seeking to have the ex-parte judgment set aside basically on the ground that there had been no proper service of the summons. It was alleged that the same had been left in the applicant's premises on an unknown date. The applicant's director (Moses Murichu) had found the summons in the premises on 22nd day of December, 1998 when the time for entering appearance had expired. Nevertheless he had

immediately instructed the applicant's counsel to enter appearance and file a defence. It does not concern us now, but it would appear to us that up to the time of hearing of the application, those instructions had not been complied with, notwithstanding Murichu's averment that:

"the appearance and defence were ready for filing on 9th January, 1999 together with a request for particulars",

since there was no draft defence annexed to his affidavit in the application.

That application which was objected to by the respondent was heard on 20th July, 1999 by Jeanne Gacheche, Commissioner of Assize, who dismissed the application upon having satisfied herself that the same lacked merit. This is the ruling that the applicant is unhappy with and has filed an appeal to this Court. Hence this application that the letter we have alluded to earlier be admitted as evidence in the appeal.

We are in full agreement with the decision of this Court in the case of *Mzee Wanjie and 93 Others vs A. K Saikwa, A.C Kanyarati, S.W Kibogo and William Gachiringa* *(1982-88) 1 KAR 462* and as restated by this Court in *Edgar Ogechi & 12 others* *CA No.130 of 1997 (unreported)*, where it was held that before this Court permits the adduction of additional evidence the applicant must show:-

1. that the additional evidence sought to be adduced on appeal could not have been obtained by reasonable diligence during the trial in the superior court;

and

2. that such evidence, had it been made available to the trial court, would have been likely to have affected the result of the suit.

Matters which were not in dispute in the superior court were that the applicant and respondent had a long business relationship starting in 1987. That the respondent supplied the applicant with aviation fuel. Payments for the fuel by the applicant varied at different periods. From 1987 to 1988 the applicant paid the respondent for the fuel consumed in London. From 1988 to 1992 the fuel consumed was paid for weekly locally with a guarantee from Habib Bank Ag. Zurich.

Finally from 3rd July, 1992 onwards, it was paid for in full upon consumption. Difference arose as to actual sums owed in respect of 1993 transactions. According to the applicant it had been overcharged as a result of the respondent charging customs duty on the fuel it consumed and VAT when the same had been exempted by the Minister on 3rd July, 1992. The letter which he wishes to be admitted was on this issue and had been written after a meeting in which the accounts were discussed and reconciled. It was also relevant to establish that the amount demanded and which judgment had been entered for was mainly money that they should not have been charged in the first instance, the parties had in fact reconciled their accounts and only a sum of Sh.4,697,975.75 was owed.

The first question we ask ourselves is whether this letter could have been produced in the trial in the superior court by exercising of reasonable diligence. The reason Murichu gives for not availing the letter is that after the meeting of 25th April, 1994 between him and a Mr. Ngaari, the latter wrote the letter on 5th May, 1994. The letter although marked for his attention, was delivered to Mr. Ngige Mondo, another director of the applicant. Mr. Mondo was the one that was handling these matters. The same Mr. Mondo has been stationed in Mwanza for the last two years. So at the time that he (Murichu) was instructing counsel in the court below, he had no idea that this letter had been written to them and was in Mr. Mondo's personal file. Mr. Mondo returned to Kenya for the hearing of the appeal on 14th October, 1999 and that is when the letter was discovered. Prior to this date he was not aware that the respondent had written this letter to the applicant confirming the meeting he (Mr. Murichu) had with the respondent and in which the accounts were reconciled.

We are not satisfied with the explanation given by Mr. Murichu for the following reasons. Annexed to a

replying affidavit sworn by Mr. Ngaari is a letter that was written by Mr. Murichu himself on 27th May, 1994, in which he makes reference to the letter in issue and deals with all the matters that had been alluded to therein. He does not want us to believe that he was not aware of his own reply to that letter, which, no doubt, would have brought to his notice the existence of the letter in issue.

Mr. Murichu has not denied that he replied to the letter, therefore his story that he had no knowledge of the existence of the said letter cannot be correct. Further, it is not true that Mr. Mondo had been away from the country for the last two years. Mondo is an active director of the applicant. According to Murichu himself, Mondo was in the country in October, 1999 for the hearing of the appeal. There is also evidence that he attended the VAT Appeals Tribunal on 19th May, 1998. This is definitely a director who was fully involved in the affairs of the company. We are of the view that with just a little diligence, the letter in issue would have been made available to the trial court.

The issue of the respondent withholding the letter, from the superior court, as contended by the applicant does not arise. The respondent was under no obligation to provide evidence that would support or prove a case that the applicant had brought to court.

Now to consider the other issue, had this letter been produced in the proceedings in the superior court, would it have affected the result of the case? According to the applicant the letter is meant to "confirm" the following facts:-

(a) "That the respondent charged VAT and Customs duty which the appellant justifiably disputed in view of the fact that aviation fuel was exempted from these taxes.

(b) That no credit has ever been issued by the respondent for the wrongful debit of VAT and Customs duty.

(c) That the sum claimed by the appellant is includes in excess Sh.18M wrongly charged as VAT and Customs duty"

We have considered the substance of the affidavit sworn by Murichu on 25th February, 1992 which the applicant placed before the superior court. What is clear is that all the matters that are contained in the letter were clearly and exhaustively placed before the court by way of that affidavit and counsel's submissions.

Whether or not the learned Commissioner did not consider the matter or reached the wrong conclusion, is indeed a matter that does not fall for our consideration in this application. It is a matter that must be canvassed in the appeal.

On this issue we are also not satisfied that had this letter, which was only meant to "confirm" the evidence already before the court, been produced it would have affected the outcome of the case.

Consequently, both the conditions we have stated above have not been established by the applicant and application must of necessity fail. The same is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th day of December, 1999.

R.O KWACH

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR