IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO(P), NAMBUYE & OKWENGU, JJ.A)

CIVIL APPLICATION NO. 308 OF 2015

BETWEEN

RADHESHYAM TRANSPORT LIMITED & ANOTHER.....APPELLANT

VERSUS

CORPORATE BUSINESS CENTRE LIMITED.....RESPONDENT

(An application for leave to adduce additional evidence in an appeal against the ruling of the

High Court of Kenya at Nairobi (Sergon, J) dated 20th November 2015

in

HCCC No. 303 OF 2014

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RULING OF THE COURT

Before us is a Notice of Motion dated 1st April 2019, and filed on 2nd April 2019. It is premised on Rule 29(1) and 42 of the Court of Appeal Rules. It substantively seeks admission of additional evidence, together with an attendant prayer for provision for costs. It is supported by grounds on its body and a supporting affidavit of **Kiran Patel**. The application is opposed by a replying affidavit sworn on 17th May 2019, and filed on 29th May 2019 by **Ravji Kerai**, on behalf of the 1st respondent.

The background to the application is that the respondent to the application instituted a civil suit no. 303 of 2014 in the High Court of Kenya at Nairobi claiming unpaid balance of kshs. 24,463,327/= from the applicant for excavation works at the applicant's construction site. On 11th May 2015, judgment in default of appearance was entered against the applicant pursuant to the request for judgment dated 23rd April 2015.

Subsequently, the applicant filed an application dated 19th October 2015 seeking, *inter alia* an order for setting aside the default judgment. The superior court delivered its ruling on 20th November 2015, setting aside the default judgment and referring the matter to arbitration. It is that ruling that resulted in the appeal applicant seeks to buttress by calling for additional evidence.

The application is based on the grounds that: new developments and credible evidence that renders the appeal herein overtaken by events and indeed nugatory have arisen; despite the Court of Appeal registry having receiving correspondences from the applicant that the appeal has been overtaken by events by reason of the respondent conduct of writting to the chartered Institute of Arbitrators requesting for appointment of an arbitrator, went ahead to issue a hearing notice. In the applicant's view, the respondent's conduct alluded to above was sufficient demonstration that there is no arguable appeal and that the same has been overtaken by events.

It is the above set of circumstances, the applicant has based its arguments that the correspondences in regard to the above set of circumstances are critical and the hearing of the appeal without having the correspondences tendered as evidence will unfairly prejudice the applicant.

In opposition to the application, **Ravji Kerai** swore a replying affidavit dated 17th May 2019 deponing that the applicant's action of enforcing the orders that are the subject of the appeal by way of committing him to civil jail compelled them to proceed with the appeal. He further deponed that no arbitration was conducted to render any part of this appeal to be compromised. He also contended that the evidence that the applicant intends to introduce is irrelevant, has no probative value and has no significance on both the High Court case and this

appeal as it relates to events that occurred not only after the delivery of the High Court decision appealed against but also after the appeal had been filed.

The application was canvassed by way of the rival pleadings and written submissions filed by the respondent dated 12th May 2020. In summary, the respondent submits that in their replying affidavit already highlighted above, they have sufficiently discounted the applicants contention that the intended alleged several documents which the applicant seeks to adduce as additional evidence in opposition to their appeal were necessary towards the determination of the respondents pending appeal.

To buttress the above submissions, the respondent relies on the case of **Administrator HH The Agakhan Platinum Jubilee Hospital vs. Munyambu [1985] KLR 127,** on the principles that guide the court in the exercise of its mandate under Rule 29(1) of the rules of the court which we shall revert to at a later stage of this ruling.

We have considered the respective parties rival pleadings, respondent's written submissions and the principles of law that guide the court in the exercise of its mandate under Rule 29(1) of the Courts' rules. As already indicated above his is an application for producing additional evidence under Rule 29 of the Court of Appeal Rules that provides *inter alia* as follows:

> **"29(1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power-**
>
> **a. ……..…**
>
> **b. In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.**
>
> **2. When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross examination of any deponent."**
>
> **3. ……**
>
> **4. ……"**

The principles which guide the court in the exercise of its discretionary mandate under this rule to admit additional evidence are well settled. We take it from the *locus classicus* case of **Elgood vs. Regina [1968] E.A. 274** in which the predecessor of the court adopted the summary enunciated by **Lord Parker C.J** in **Republic vs. Parks [1969] ALL ER** at page 364 as follows:-

> **"(a) That the evidence that is sought to be called must be evidence which was not available at the trial.**
>
> **b. That it is evidence that is relevant to the issues.**
>
> **c. That it is evidence that is credible in the sense that it is capable of belief.**
>
> **d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."**

In **Mzee Wanje & 93 Others vs. A. K. Saikwa, A. K. Kanyorati, S. W. Kibogo and William Gachiringa [1982-88] 1KAR 462 at pg 465 Chesoni Ag. JA** (as he then was) had this to say:-

> **"In my opinion notwithstanding the above differences, between the English provisions and our Rule 29(1) the principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ,, as he then was, in the case of Ladd vs. Marshall [1954] 1 WLR 1491 and those principles are:**
>
> **a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;**
>
> **b. 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;**
>
> **c. 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."**

The principles enunciated by the Court of Appeal in the above case law were crystalized by the Supreme Court of Kenya in the case of **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others [2018]eKLR**; in which that court laid down guidelines for admission of additional evidence for appellate courts in Kenya and which we fully adopt as follows:-

> **"(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate**

submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:-

a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. The evidence must be credible in the sense that it is capable of belief;

f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. Where the additional evidence discloses a strong prima facie case of willful deception of the court;

i. The court must be satisfied that additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

80. We must stress here that this court even with the application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

We have applied the above crystalized threshold to the rival pleadings of the respective parties herein as well as the respondents submissions with regard to the applicant's request for additional evidence. The pending appeal relates to the judgment delivered by the superior court on 20th November 2015 wherein it was determined that the default judgment dated 11th May 2015 be set aside and the matter be referred to arbitration. The documents that the applicant now seeks to adduce as additional evidence are allegedly aimed at establishing that the respondent's advocates requested for the appointment of an arbitrator during the pendence of the appeal and in fact steps have been taken to progress the arbitration process namely, the appointment of the arbitrator, one **Mr. Peter Njeru**. This is borne out by the contents of a letter dated 8th February 2018 wherein the respondent's advocate requested for the appointment of an arbitrator, two letters dated 21st May 2018 and 19th June 2018 from the Chartered Institute of Arbitrators confirming the appointment, copies of the letters dated 22nd June 2018 and 12th March 2019, a copy of a letter dated 8th February 2018 and 26th February 2018, a copy of the letter dated 11th April 2018, copies of letters dated 21st May 2018 and 19th June 2018, copies of letters dated 14th June 2018 and 18th July 2018, copies of letters dated 22nd June 2018 and 12th March 2019.

All the above correspondence related to events that occurred after the delivery of the impugned judgment and after the filing of the appeal. They therefore do not fall into the category of additional evidence that may be introduced pursuant to Rule 29(1) of the Court of Appeal Rules and the principles that guide the courts discretionary mandate under the said Rule as highlighted above. Our understanding of this procedure and as guided by the principles highlighted above is that evidence sought to be introduced under the said Rule must be that which was in existence as at the time the impugned judgment was made but was not brought to the attention of the trial court, hence occasioning a miscarriage of justice either to both or one of the parties to the proceedings. This is not the position herein.

In the result and for reasons we have stated above, we find no merit in the application. It is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 7*th* day of August, 2020.

W. OUKO(P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR