



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, GATEMBU & OTIENO-ODEK, JJA)

CIVIL APPEAL (APPLICATION) No. 244 of 2013

BETWEEN

PITTY GATHIGIA BAARU.....1st APPLICANT

J. GACHERU NDUGI2nd APPLICANT

AND

KENYA BUS SERVICES LIMITED *also known as*

STAGE COACH BUS INTERNATIONAL.....1st RESPONDENT

CHARLES OBIERO OGOLA2nd RESPONDENT

(Being an application for introduction of additional evidence in an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Angawa, J.) dated 29th May 2007

in

HCCC No. 411 of 2003)

RULING OF THE COURT

1. Before us is a Notice of Motion dated 13th November 2018 brought under **Rules 29, 42 (1) (20)** and **43 (1)** of the Rules of this Court seeking leave to adduce additional evidence by way of affidavit (and/or) as may be found suitable.
2. At the hearing of the application, learned counsel **Mr. C. N. Kihara** appeared for the applicants while learned counsel **Mr. Alex Mola** appeared for the respondents.

BACKGROUND FACTS

3. On or about 15th September 1977, the 1st applicant, **Pitty Gathigia Baaru**, was standing on a pavement along Ronald Ngala Street in Nairobi waiting for traffic to clear for her to cross the road. Suddenly, a bus owned by the 1st respondent, **Kenya Bus Services Limited** *also known as Stage Coach Bus International* driven by the 2nd respondent, **Charles Obiero Ogola**, climbed onto the pavement violently knocking her down whereby she sustained severe body injuries. As per the amended plaint dated 14th May 2004, it is particularized that the 1st applicant suffered a head injury (cerebral concussion); multiple cuts and abrasions on the face; abrasion over the right chest wall; fracture of the right collar bone; crush injury to the right upper limb leading to amputation of the same; and crush injury to the right lower limb leading to an above knee amputation of the same.

4. In the amended plaint, particulars of future prognosis and future medical requirement are given. Of relevance to this application, it is stated that the 1st applicant would require refashioning and placement on the posterior at the scar over the amputation stump - the cost estimated at Ksh. 200,000/= . It is further pleaded a prosthesis that has both an ankle and knee joint was recommended at an estimated cost of Ksh. 700,000/= all inclusive. In the amended plant, a claim was made for future medical care.

5. Upon hearing the parties, the learned judge dismissed the claim for future medical treatment.

APPLICANTS SUBMISSIONS

6. The applicants seeks leave of this Court to adduce additional evidence. It is urged leave is sought to adduce additional evidence in the form of medical treatment that the 1st applicant has undergone subsequent to delivery of the judgment by the trial court.

7. The grounds in support of the application as stated on the face of the Motion and in the supporting affidavit are that the suffering of the 1st applicant has continued to escalate specifically in medical bills, travel expenses and anticipated future medical care which has caused the applicant to travel abroad and seek medical aid in Austria. The applicants seek leave to adduce the following additional evidence:

(i) *Copy of the applicant's passports stamped with details of travel to Austria.*

(ii) *Copy of Medical records from the hospital that provided the prosthesis care, orthopaedicaiechnik Sanitat and Gesundheit Buchsbaum Hospital in Austria.*

(iii) *Copy of Electronic Air Return Tickets from Turkish Airlines for the 1st applicant and her two (2) primary care givers dated 25th July 2014 to 7th August 2014 from Nairobi, Kenya through Istanbul in Turkey and to Vienna in Austria.*

(iv) *Copy of Air Ticket Returns from Turkish Airlines for the 2nd applicant and one (1) primary care giver of the*

1st applicant dated 29th July 2014 to 8th August 2014 from Nairobi via Istanbul to Vienna in Austria.

8. In further support of the application, it is deposed that the magnitude of the information sought to be adduced as additional evidence arose overtime and could not have been anticipated at the time of trial; that it is just and fair for leave to be granted to adduce the additional evidence.

RESPONDENT'S SUBMISSIONS

9. The respondent filed a replying affidavit deposed by learned counsel **Mr. David M. Mereka** Advocate who has the conduct of this matter on behalf of the respondent.

10. In opposing the application, it is deposed that the documents sought to be adduced as additional evidence were obtained on 8th August 2014 or thereabout which is over four (4) years from the date when the instant application was filed on 15th November 2018; that the applicants advocate way back by letter dated 14th June 2017 had intimated he will be making the instant application; the delay in filing the present application is an afterthought.

11. It is further averred that the applicants in their plaint did not plead future medical expenses in terms of transport to and from Austria. The claim for transport expenses being a claim for special damages must have been pleaded and prayed as part of future expenses. The respondent submitted that this Court cannot grant special damages that have neither been pleaded nor sought before the trial court. The instant attempt to adduce additional evidence is an endeavour to amend and introduce a new cause of action that was never pleaded; the claim for the third prosthesis and two (2) stocking was neither pleaded nor particularized in the plaint. Counsel urged the trial court correctly held subsequent prosthesis was not proved by way of pleading or receipts. It was reiterated that to allow the instant application is to allow the applicants to amend their pleading and remedy the case they failed to prove at the High Court. The respondent observed that there should be an end to litigation and the evidence sought to be adduced does not support what was pleaded in the plaint but is a new cause of action christened "escalating medical bills" which cause of action was not before the trial court.

ANALYSIS

12. This is an application for adducing of additional evidence. We have considered the application and the grounds in support thereof, submissions by counsel and authorities cited. The Motion before us is brought *inter alia* under **Rule 29** of the Rules of the Court. The relevant part of that rule provides:

"29. (1) On any appeal from a decision of superior court acting in the exercise of its original jurisdiction, the Court shall have power-

(a) to re-appraise the evidence and to draw inferences of fact; and

(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."

13. This Court in discussing its power to admit additional evidence under **Rule 29(1)** of the Court of Appeal Rules stated as follows in **Republic vs. Ali Babitu Kololo (2017) eKLR**:

"It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of

the appeal. In the words of Chesoni Ag. JA (as he then was) in Wanje vs. Saikwa (1984) KLR 275:”

14. The Supreme Court in Mohamed Abdi Mahamud -v- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR laid down the following principles for allowing additional evidence:

“[79]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 the 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.”

15. Following the guidelines as given by the Supreme Court, it is our duty to consider and determine if the instant application fulfills the principles as laid out in Mohamed Abdi Mahamud -v- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR. Of relevance is whether the additional evidence sought to be introduced is directly relevant to the appeal before this Court and if given, would influence or impact upon the result of the verdict. It is important to determine if the proposed additional evidence 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 by the applicant.

16. In the instant matter, the applicant submitted that the additional evidence sought to be introduced is relevant as it supports and affects the claim in the amended plaint for future medical expenses and the pleading relating to the recommended prosthesis.

17. Conversely, the respondents opposes the instant application on three grounds; first, that there has been delay in filing the application; second the claim for prosthesis was never pleaded and third, the proposed additional evidence introduces a new cause of action.

18. We have considered the applicant’s submission and the respondent’s response thereto. We have examined the amended plaint specifically the heading “Future Prognosis”. Under this heading, a claim for future medical treatment in form of a prosthesis is made. In the amended plaint, damages are sought for future medical care. In our considered view, future medical care not only encompass medical treatment but costs associated to the medical treatment. We are satisfied the pleadings before the trial court as per the amended plaint contain a claim for future medical care.

19. On the issue of delay in filing the instant application, the respondents contends the information sought to be adduced as additional evidence was available way back in 2014. The applicants submitted the additional evidence sought to be adduced was acquired over time and the extent of harm inflicted upon the 1st applicant has continued to escalate over time. The documents sought to be adduced as additional evidence plainly show the information was available way back in 2014; the air tickets and the medical bills were all incurred in 2014. We have balanced this fact with the prejudice likely to be suffered by the respondent if leave is granted to adduce the additional evidence. At this stage, the only issue before us is whether leave is to be granted. Taking into account that the amended plaint contained a plea for future medical treatment and that the evidential value of the additional evidence will be ascertained during the hearing of the main appeal, it is our considered view that the respondent will not be prejudiced if leave is granted in this matter.

20. The respondents have not demonstrated to our satisfaction the prejudice they stands to suffer if leave is granted. It is contended the additional evidence introduces a new cause of action that was never pleaded in the original claim. Noting the amended plaint contains a plea

and claim for future medical treatment, it is our considered view adducing of the additional evidence neither creates nor introduces a new cause of action. A claim for future medical treatment or expenses is anticipatory expenses whose exact figures remain unknown at the time of pleading. It is impractical to plead and claim specific sum as future medical expenses.

21. For the foregoing reasons, we find the Notice of Motion dated 13th November 2018 has merit. We grant leave to the applicants to adduce additional evidence in this appeal. We give the following directions to facilitate adducing of the additional evidence:

(i) This matter to be listed before the High Court for purposes of taking the additional evidence.

(ii) The applicant to adduce the additional evidence before the High Court and the respondent be at liberty to cross-examine and test the veracity of the additional evidence.

22. Cost of this application be costs in the appeal.

Dated and delivered at Nairobi this 19th day of July, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR