



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KARANJA & MAKHANDIA, JJA

CIVIL APPEAL NO. 197 OF 2014

VIPUL PREMCHAND HARIA.....APPELLANT

VS

KILONZO AND CO. ADVOCATES.....RESPONDENT

(Being Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ogola, J.) Dated 5th December, 2013

in

Misc. Appl. No. 35 of 2010)

RULING OF THE COURT

Before us is a Notice of Motion dated 2nd November 2012 filed by the appellant in the main appeal seeking orders:

1. The Honourable Court be pleased at the Hearing of this application to take additional documentary evidence in the form of:

a. The annexed letter of Kethi D. Kilonzo to Mr. Vipul P. Haria dated the 20th November, 2008 referencing HCCC No. 21 of 2005 (OS);

b. The annexed letter of Mutula Kilonzo Junior to Mr. Vipul P. Haria dated the 6th of November, 2007 referencing HCC 69 of 2005.

c. The annexed Statement of Account of Kilonzo & Company Advocates to Mr. Vipul P. Haria dated the 5th November, 2007 for a sum of Shillings Three Million, Ninety-Seven Thousand, Five hundred and Twenty only

(Kshs. 3,097,520/=) and demanding an outstanding balance of Shilling Two Million, nine Hundred and Ninety-Seven and Twenty (Kshs. 2,997,020/=).

d. The annexed Fee Note of Kilonzo & Company Advocates to Mr. Vipul P. Haria dated the 5th of November, 2007 for a sum of shillings three Million, Ninety-seven Thousand, Five Hundred and Twenty Only (Kshs. 3,097,520/=).

e. The annexed letter of Mutula Kilonzo Junior to Mr. P. Haria dated the 6th of November, 2007 referencing HCCC No. 21 of 2005 (OS);

f. The annexed Fee Note of Kilonzo & Company Advocates to Mr. Vipul

P. Haria dated the 02th of November, 2007 for a sum of Shillings & Six Million, Fifty-One Thousand, Five hundred and Seventy-Five only (Kshs. 6,051,575/=).

- g. The annexed statement of Account of Kilonzo & Company Advocates to Mr. Vipul P. Haria dated the 2nd of November, 2007 for a sum of Shillings Six Million, Fifty-One Thousand, Five hundred and Seventy-Five only (Kshs. 6,051,575/=) and demanding an outstanding balance of shillings One million, Three hundred and one thousand, Five Hundred and seventy-five only (Kshs. 1,301,575/=).*
- h. The annexed letter of Mutula Kilonzo Junior to Mr. Vipul P. Haria dated the 12th of August, 2008 referencing HCC No. 21 of 2005 (OS);*
- i. The annexed letter of Mr. Vipul P. Haria to Hon. Mutula Kilonzo dated 22nd of August, 2008.*
- j. The annexed letter of Kethi Kilonzo to Mr. Vipul P. Haria dated the 3rd of December, 2008 referencing HCCC No. 21 of 2005 (OS).*
- k. The annexed letter of Mr. Vipul P. Haria to Kilonzo & Company Advocates dated 17th of December, 2009.*
- l. The annexed letter of Kethi D. Kilonzo to Mr. Vipul P. Haria dated the 3rd of February, 2009 referencing HCCC No. 21 of 2005 (OS);*
- m. The annexed letter of Mr. Vipul P. Haria to Hon. Mutula Kilonzo dated the 29th of October, 2009;*
- n. The annexed letter of Mr. Vipul P. Haria to Kilonzo & Company Advocates dated the 29th of October, 2009.*
- o. The annexed letter of Vipul P. Haria to Kilonzo & Company Advocates dated the 29th of October, 2009.*
- p. The annexed letter of Kethi D. Kilonzo to Mr. Vipul P. Haria dated the 3rd of November, 2009 referencing HCC No. 21 of 2005 (OS).*
- q. The annexed letter of Hon. Johnson Nduya Muthama, MP, Kangundo Constituency to Kilonzo & Company Advocates dated 24th of November, 2009; and*
- r. The annexed letter of Mr. Vipul P. Haria to Kilonzo & Company Advocates dated the 24th of January, 2010.*

2. That if the above prayer is granted, the said documents be decreed to be part of the Record of Appeal.

3. That costs do abide the outcome of the Appeal.

It is supported by grounds on its body and a supporting affidavit of **Vipul Premchand Haria**, together with annexures thereto, and deposed on 2nd November 2019. It has been opposed by a Replying affidavit of **Senator Mutula Kilonzo Junior**, together with annexures thereto deposed on behalf of the respondent and dated 10th May 2019.

The application was canvassed by way of oral submissions. Learned counsel **Mr. Andrew Wandabwa** appeared for the applicant, while learned counsel **Miss Makobu** appeared for the respondents.

The background to the application is that the appellant retained the respondent to represent him in a divorce and a matrimonial property causes. According to the applicant, the fee demanded by the respondent was a sum of Kshs. 5,700,000/- which he says he duly paid. He however complained that the Respondent failed to conclude the divorce matter despite the payment in full of the fee. On the part of the respondent, it is stated that the applicant was charged under Schedule V of the Advocates Remuneration Order and when informed of the same, he did not object to it.

The respondent filed its bill of costs and upon taxation, in a Ruling delivered on 17th October 2012, it was concluded that the payable fee was Kshs. 5,700,000.00 The applicant appealed against the decision before the High Court **Ogola, J**, which confirmed the decision of the taxing officer. It is that determination that the appellant now seeks to challenge in the main appeal herein.

In this application, the applicant seeks to adduce correspondences exchanged between himself and the respondent, fee notes, statement of accounts from the respondent to establish that the respondent had been paid fees in full despite the allegations to the contrary. The applicant contends that these documents had been adduced during the hearing of the application for stay of execution at the High Court.

The application is opposed by the respondent who contends that the documents that the applicant seeks to adduce range from those dated 2005-2009 and yet the taxation was done in the year 2012; that though these were available they were not produced. The respondent contends that counsel for the applicant knew of the orders the respondent was seeking at the High Court and he ought to have produced the documents at the trial and not in this forum. The respondent contends further that the applicant is trying to make a fresh case in an appeal or to improve his case hence contravening the cardinal rule that there must be an end to litigation; that the evidence if adduced, will not add any weight to the applicant's appeal as the respondent had already made an election to charge its costs under Schedule V of the Advocates Remuneration Order.

We have considered the arguments put forth on behalf of the respective parties to this application as well as the law. The principles which

guide this Court in exercising its discretion to admit additional evidence are well settled. They were succinctly summarized by **Chesoni, Ag JA.** (as he then was) in the often quoted case of **Mzee Wanjie & 93 Others vs A. K. Saikwa & Others [1982 - 88]1 KAR 462** as follows:

“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 1489 at 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.”***

See also **Joginder Auto Services Ltd vs Shaffique & Another [2001] KLR 97** for the holding *inter alia*, that the applicant must show that the evidence sought to be adduced could not have been obtained with due diligence for use at the trial; **John Kiplangat Barbaret & others versus Isaiah Arap Cheluget [2016] eKLR**, for the holding *inter alia* that the applicant must show that the evidence sought to be introduced could not have been obtained before or during the hearing and that the evidence will most likely in effect have a bearing on the end result of the suit; **Dick versus Koinange [2073] 1EA165** for the holding *inter alia* that there has to be demonstration that there is a basic assumption to both sides falsified by subsequent events, and that it would affront common sense or a sense of justice to decline the request to adduce additional evidence; **Karmali Tarmohamed and another versus 1HILakhani & Company [1988] 1EA567 CCAK** for the holding *inter alia*, that:

it must be demonstrated that the evidence could not have been obtained with due diligence for use at the trial. Further, in **Dorothy Nelima Wafula vs Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR**, it was expressed as follows:

“We may add to the foregoing that in dealing with an application for the introduction of additional evidence at the appellate stage, the bench seized of application must not deal with the merit of the appeal as the appeal and the application are independent of each other.”

From the above guiding principles, it is evident that the power to receive further evidence should be exercised with caution and sparingly. The rationale for this caution was aptly set out in the **Mzee Wanjie** case (supra) as follows:

“This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence.”

Applying the above threshold to the rival submissions herein, it is our finding that having perused the documents which the applicant intends to adduce as additional evidence, we are persuaded that the same are material to the just determination of the pending appeal. It is also our finding that inclusion of the said documents as part of the record for purposes of appraisal by the court in the

determination of the merits of the appeal will assist the Court determine the main issue in the appeal which is whether the applicant paid to the respondent the sum of Kshs. 5,700,000.00 as fees to cover both the divorce and the matrimonial causes or otherwise.

It is also our observation that the documents that the applicant intends to adduce and which are annexed to the affidavit in support of the application as statement of accounts and correspondences exchanged between the applicants and the respondent are not voluminous, therefore, no inconvenience will be caused to the parties when appraising the same. The applicant has admitted that the said documents were not adduced as evidence at the Superior Court as he had inadvertently omitted to include them. In the peculiar circumstances of this application, we find it prudent to accept the above explanation first for ends of justice to be met to both parties. Second adduction of the new evidence will not prejudice any of the parties to this appeal. Third, there is no submission that admission of such additional evidence will not lead to the just determination of the appeal and therefore not helpful even if admitted.

In light of the above assessment and reasoning, we are satisfied that the additional evidence sought to be adduced substantially meets the criteria and guidelines laid out by the Supreme Court in **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**. Accordingly, the Notice of Motion dated 2nd November 2016 has merit and is hereby allowed on the following terms:

- (i) Leave be and is hereby granted to the applicant to adduce and file additional evidence marked letter a-r in prayer 1 of the application***
- (ii) The additional evidence be adduced by means of affidavit annexing thereto the subject documents and be filed as Supplementary Record of Appeal within 14 days of the date hereof.***
- (iii) (iv) Costs of this application to abide by the outcome of the appeal.***

Dated and Delivered at Nairobi this 6th day of December, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.