



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & SICHALE, JJ.A.)**

**CIVIL APPEAL APPLICATION NO. 120 OF 2012**

**BETWEEN**

**JAMES GITAHI MWANGI.....APPLICANT**

**AND**

**SIMBA COLT MOTORS LIMITED .....RESPONDENT/APPELLANT**

*(Being an application to adduce further evidence in an appeal from the Award of the Industrial Court at Nairobi (Mukunya, Udoto & Alumande, JJ.) dated 1<sup>st</sup> February, 2011*

*in*

*Industrial Court Cause No. 448 (N) of 2009)*

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**RULING OF THE COURT**

[1] By a Notice of Motion dated 24<sup>th</sup> October, 2014, the applicant, James Gitahi Mwangi, who is the respondent, in Civil Appeal No. 120 of 2012, has moved this Court under **Section 3A** and **3B** of the **Appellant Jurisdiction Act**, and **Rule 29 (2)** of the **Court of Appeal Rules**, seeking orders as follows:

(i) Spent.

(ii) That the court be pleased to issue an order allowing the respondent/applicant to present further information and/or evidence to show how the commission ordered (sic) vide the award/decreed made by the Industrial Court on the 1<sup>st</sup> February, 2011, ought to be calculated.

(iii) That the Amended Supplementary Record of Appeal filed herein on the 31<sup>st</sup> July, 2014, be deemed to be duly filed and served.

(iv) That this honourable court be pleased to consider the said further information/evidence as presented in the Amended Supplementary Record of Appeal filed herein on the 31<sup>st</sup> July, 2014, and make a determination thereon.

(v) That costs of this application be provided for.

[2] The application is anchored on grounds stated on the motion as well as an affidavit sworn by the applicant. In short, the applicant wishes to adduce evidence regarding the calculation of commission due to him by **Simba Colt Limited** who was the respondent in the Industrial claim and the appellant in this appeal. The commission is for the period between 16 August, 2006 and May, 2009. The applicant contends that contrary to the award/decreed in the Industrial Court given in his favour, the appellant did not calculate the commission due to him as provided in the award but came up with an arbitrary figure. The applicant contends that he had provided in the Industrial Court all the information required to calculate the commission payable to him. However, he has now filed a supplementary record of appeal showing the correct method that should be used to calculate the commission payable to him. It is this additional information that the applicant wishes to have admitted in evidence. The applicant contends that if his application is not allowed, he will suffer irreparable loss.

[3] In arguing the motion, Mr. Inonda, counsel for the applicant, pointed out that during the hearing of the applicant's claim in the Industrial Court, the appellant failed to produce records showing sales made by the applicant upon which the applicant's commission was to be calculated. The additional information sought to be adduced by the applicant is a summary of exhibits which were produced by the applicant before the Industrial Court on the sales made by the applicant. It is contended that this summary is necessary to facilitate the calculation of the commission due to the applicant as the appellant has failed to verify the amount payable to date. Counsel urged the court to read **Rule 29 (2) (b)** of the **Court Rules** together with **Section 3A (1)** of the **Appellate Jurisdiction Act** which calls for expeditious disposal of matters.

[4] The motion was opposed by the appellant through a replying affidavit sworn by Rita Mwangi, the head of legal and compliance department of the appellant. On the advice of the appellant's counsel, Rita Mwangi deposed that the application was incompetent and misconceived; does not meet the threshold of the principles necessary for the court to exercise its discretion under **Rule 29** of the **Court of Appeal Rules 2010**; that the information sought to be adduced by the applicant is not additional evidence within the meaning of **Rule 29**; that the so called additional evidence are calculations which were available and were availed during the trial and are of no relevance in the determination of the appeal as there is no issue concerning the quantum determined by the trial court.

[5] Learned counsel Mr. Khaseke, who appeared for the appellant in the application, submitted that the applicant had not satisfied the principles governing the exercise of the court's discretion in allowing additional evidence. He argued that, firstly, no sufficient reason for allowing the additional evidence was demonstrated; secondly, it was not established that the evidence was not available during the trial; further that the "summary" sought to be introduced as additional evidence was not additional evidence contemplated under **Rule 29** of the **Court Rules** and finally, that the evidence sought to be adduced was not credible evidence and that in any case, the information was before the trial court. Mr Khaseke therefore, urged the court to dismiss the motion.

[6] **Rule 29(1)** of the **Court of Appeal Rules** states as follows:

**29. Power to re-appraise evidence and to take additional evidence**

**(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) 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."**

[7] The power of this Court to take additional evidence was considered and the principles upon which this Court may receive additional evidence under **Rule 29(1)(b)** restated in **Joginder Auto Services Ltd v**

Shaffique & Another, [2001] KLR 97 as follows:

*“In summary these and several other cases decide that the power of the court and more particularly this Court to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:*

*(i) The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.*

*(ii) The evidence must be such that if given it will probably have an important influence on the result of the case, although it may not be decisive; and*

*(iii) The evidence must be apparently credible, although it need not be incontrovertible.*

*These are general principles, but we cannot say they are the only ones. The relevant rule authorizing the adduction of additional evidence uses a general phrase, namely ‘sufficient reason’.”*

[8] The issue before us is whether the applicant has met any of these principles to justify this Court exercising its discretion in his favour. In the first place the applicant has not lodged any cross appeal. Therefore the appeal referred to under **Rule 29(1)** must be the appeal lodged by the appellant. According to the memorandum of appeal that was filed, the appeal seeks to have the award made in the applicant’s favour by the Industrial Court nullified and set aside. As per paragraph 7 of the affidavit sworn by the applicant in support of this application, the additional information sought to be introduced is to aid in the calculation of the commission due to him. In the absence of a cross-appeal, the calculation of the commission will not be an issue in this appeal, nor will it have an important influence in the result of the appeal such as to justify the adduction of additional evidence.

[9] Secondly, the applicant has deponed and indeed it was pointed out by his counsel that the information now sought to be adduced as additional information was in fact availed to the trial court. What the applicant now wishes to do is to provide a summary of the information which was availed to the trial court in order to assist in the calculation of his commission. The principles are quite clear that the evidence sought to be adduced as additional evidence must not only be evidence which was not available during the trial, but could not with reasonable diligence have been obtained. In this case, clearly the evidence was available and the summary could easily have been prepared and produced at the trial.

[10] We find that the applicant’s motion is misconceived and devoid of merit. It is accordingly dismissed with costs.

**Dated and Delivered at Nairobi this 22<sup>nd</sup> day of May, 2015.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**