



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL (APPLICATION) NO. 9 OF 2007
(CORAM: ONYANGO OTIENO, KARANJA & MARAGA JJA)

BETWEEN

DR. VIJAY KUMAR SAIDHA.....1ST APPELLANT

DR. UMA SAIDHA.....2ND APPELLANT

AND

TRIBHUVAN GORDHAN BAKRANIA.....1ST RESPONDENT

MAHIMUD RANA.....2ND RESPONDENT

ALNASHIR VISRAM.....3RD RESPONDENT

(An application to take additional evidence from the ruling and decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice P.J. Ransley) dated 6th October 2005

in

HCCC NO. 538 OF 2009)

RULING OF THE COURT

1. Being aggrieved by the judgment of the Hon. Mr. Justice P.J. Ransley delivered in Nairobi HCCC No. 538 of 1999 (OS) on 6th October 2005, the Appellants filed this appeal on 26th January 2007. On 24th March 2011, they filed a notice of motion under **Rules 29, 42 and 43** of the **Court of Appeal Rules** (the Rules) and sought leave of this court to take additional evidence in this appeal. This ruling is on that application.
2. The application is based on the ground that the evidence the Appellants wish to adduce was not in their possession at the time of the hearing of the suit before the High Court and that the third Respondent to whom it relates will not be prejudiced if the evidence is adduced.

3. Basing himself on the first Appellant's affidavit in support of the application, Mr. Kahiga Watindi for the Appellants submitted that in early 2011 the third Respondent was proposed by the President of the Republic of Kenya to replace the Hon. Justice Gicheru, who had retired, as the Chief Justice of this country. In the course of vetting him, there were media reports particularly in the Standard Newspaper that the Law Society of Kenya opposed his appointment on the ground that he had made false declarations while applying for a practising certificate for the year 1999. At the request of the first Appellant his lawyers wrote to Law Society of Kenya which responded by sending to them copies of the third Respondent's applications for practising certificates for the years 1998 and 1999 which, according to them, clearly proved that the third Respondent was at the material time a partner in the firm of M/s Veljii Devshi & Bakrania Advocates (the firm). That information which the Appellants did not have during the hearing will go a long way to corroborate their assertion that the third Respondent was indeed a partner in the firm at the time they were defrauded by the firm.
4. The application was strongly opposed. Relying on the third Respondent's replying affidavit, Mr. Esmail submitted that this application has absolutely no merit and should be dismissed with costs. He argued that to succeed in such an application the applicant has to satisfy two criteria. One, that despite the exercise of due diligence, the Appellants were unable to secure the evidence they now want to adduce. Secondly, that if the evidence sought to be adduced were available it could have influenced the decision appealed against.
5. In this case, Mr. Esmail further argued, the Appellants have failed to prove that they exercised due diligence but failed to secure the evidence sought to be adduced. He said that it is common knowledge that anybody seeking to have any information regarding a practicing advocate in Kenya, the offices of the Law Society of Kenya is his first port of call. The Appellants have not shown why they did not seek information on the third Respondent from the Law Society of Kenya before the date of hearing. On the second criterion, counsel argued that even if the evidence sought to be adduced were placed before the trial court it would not have made any difference in this case as the trial court would still have reached the decision appealed against. In the circumstances he urged us to dismiss this application with costs.
6. We have read the application as well as the record of appeal and have considered the rival submissions. **Rule 29 (1) (b)** of the Rules under which this application is made reads as follows:

“On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power –

(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. What constitutes sufficient reason as stated in the above provision has been adjudicated upon in several cases including **Karmali Mohamed & Another vs Z.H. Lakhani & Company [1958] EA 567; Edgar Ogechi & 12 Others vs University of Eastern Africa Baraton Civil Appeal (application No. 130 of 1997 (unreported); Mzee Wanjie & 93 Others vs Saikwa & Others [1982-88] 1KAR 462; and Joginder Auto Services Ltd. vs Mohamed Shaffique & Another Civil Appeal No. 210 of 2000 (CA, Nairobi)**. Besides emphasizing the fact that the power of the court under **Rule 29(1)(b)** to grant leave to take additional evidence in appeal is discretionary, these cases state that the principles upon which a party can be allowed to adduce additional evidence on appeal are well settled. They are mainly three. One, that the applicant must show that despite having exercised due diligence, he was unable to secure for use in the trial the evidence sought to be adduced. Two, the evidence must be such that, if it was available and it was tendered before the trial court, though not decisive, it would have influenced the decision of the court. And thirdly, that the evidence must be apparently credible, although it need not be incontrovertible. The case of **Joginder Auto Services Ltd. vs Mohamed Shaffique & Another**

Civil Appeal No. 210 of 2000 (CA, Nairobi) established a fourth criterion that leave will be granted if it is shown that the Respondent fraudulently or otherwise obstructed the adducing of that evidence.

8. In this case there is no claim of the third Respondent, to whom this application relates, having obstructed the tendering of evidence now sought to be adduced. That leaves us to consider the three first stated criteria.
9. The documents sought to be adduced have been obtained from the offices of the Law Society of Kenya. We have no doubt on their credibility and we hold that the Appellants have satisfied the third above stated criterion. However, the Appellants have a problem on the remaining two criteria, that is, that despite having exercised due diligence they were unable to obtain the evidence and that if the evidence were available at the trial it could have influenced the decision of the court.
10. On the first one we agree with Mr. Esmail that the first port of call of anybody wishing to have information on a practicing advocate in Kenya is the Law Society of Kenya. The documents the Appellants want to bring on board as additional evidence are copies of the third Respondent's applications for practicing certificates for the years 1998 and 1999 both of which were available in the offices of the Law Society of Kenya from the beginning of 1999. The record shows that the hearing of the application, the ruling of which gave rise to this appeal, was between 21st April and 12th July 2005 and the ruling was delivered on 6th October 2005. The Appellants have not shown why they did not seek, before the trial, information on the status of the third Respondent in the said firm which as we have pointed out was readily available in the offices of the Law Society of Kenya.
11. As regards the second criterion, having perused the copies of the third Respondent's said application for practicing certificate for the years 1998 and 1999 we are satisfied that even if those documents were before the trial court they could not have influenced its decision. In the application for 1998 practising certificate, the third Respondent is shown as having stated in paragraph 2(a) thereof that "my place of business is Veljee Devshi & Bakrania (firm)." In the one for 1999 the same information is given except that at the end of the firm name it has the term "(employer)". We agree with Mr. Esmail that the first application shows that the third Respondent was a partner in the firm while the second one shows him as having been an employee of the firm. The issue in this case is whether or not the third Respondent was a partner in the firm in September 1998 when the Appellants allegedly paid the money claimed in the suit to the firm. The trial judge found as a fact that the third Respondent resigned from being a partner of that firm with effect from 1st August 1998. In the circumstances even if the evidence now sought to be adduced were available at the trial, it could not have influenced the decision of the court.
12. For these reasons we find that the Appellants notice of motion dated 28th February 2011 has no merit and we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 20th day of April 2012

ONYANGO OTIENO

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JUDGE OF APPEAL

WANJIRU KARANJA

.....

JUDGE OF APPEAL

D.K. MARAGA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR