



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KWACH, BOSIRE & O'KUBASU, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. NAI. 210 OF 2000**

**BETWEEN**

**JOGINDER AUTO SERVICE LTD ..... APPELLANT**

**AND**

**MOHAMMED SHAFFIQUE ..... 1ST RESPONDENT**

**MOHAMMED PARVEZ SAROYA ..... 2ND RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Nairobi (Keiwua, J.) delivered on 28th May, 1999

in

H.C.C.C. NO. 1126 OF 1995)

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**RULING OF THE COURT**

Rule 29 (1) of the Court of Appeal Rules (the Rules), enacts thus:

"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)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."

Rule 29(1)(b), of the Rules does not set out what constitutes sufficient reason. But this Court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence. There is for instance the case of Mzee Wanjie & 93 Others v. Saikwa & Others (1982-88) 1 KAR.462, which was applied in Edgar Ogechi & 12 Others v. University of Eastern Africa, Baraton, (Civil Appeal (Application) 130 of 1997) (unreported). There is also the old case of Karmali Mohamed & Another v. Z. H. Lakhani & Company [1958] EA.567. 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:

- (1)The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.
- (2)The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
- (3)The evidence must be apparently credible, although it need not be incontrovertible.

These are general principles, but we cannot say that they are the only ones. The relevant rule authorising the adduction of additional evidence uses a general phrase, namely, "sufficient reason."

In the matter before us Joginder Auto Service Ltd (the Appellant), as the unsuccessful party in Nairobi High Court Civil Case No. 1126 of 1995, brought this appeal to challenge the decision of the superior court in that case. Having done so it took out a notice of motion seeking the leave of the Court to adduce further evidence which it says emerged after the decision appealed from was given, and which despite exercise of reasonable diligence could not be obtained during the trial. It also says that the evidence, if adduced, is likely to affect the outcome of the present appeal considerably in its favour.

The appellant is described in the plaint as a garage. The claim against it arose as a result of the loss of a Mercedes car while in its custody for repair purposes. The value of the said motor vehicle is given in the plaint as Kshs.3,600,000. At the trial one of the issues the court was called upon to determine was the value of the said car.

At the commencement of the suit only Mohammed Shaffique was named as plaintiff. However, at the commencement of the trial one Mohammed Parvez Saroya was, by consent of the parties, added as a second plaintiff. According to the evidence Saroya is the person by whose authority the car was presented to the appellant for repairs, and he is also, the person who ordinarily was using the motor vehicle although it was registered in the name of Mohamed Shaffique. The latter was resident in the U.K.

The suit car was purchased in the U.K. in or about 1988, allegedly by Mohamed Shaffique. He did not give the price he paid for it. Saroya, who also testified, was asked about the price of the car but he denied knowledge. In his judgment the trial judge relied on a general valuation by one Mohammed Ishaq Yusuf (PW3), who relied on his general knowledge of Mercedes cars to fix the value of the subject car at Kshs.3.3 Million. In his evidence he stated that in valuing cars;

"we consider the purchase (sic) paid by the new owner. But he did not tell me what he paid for it. He could have got it as a birthday present. That is not material. I never asked him and he never told me and that was not my concern."

The evidence the appellant wishes to adduce as additional evidence are documents which show: the actual price Shaffique paid to James Green Motors, dealers in used cars in England; freight charges; clearing charges paid; duty paid; and the insured value of the motor vehicle on arrival in the country in January, 1991.

The suit motor vehicle was bought from James Green Motors, in or about April, 1988 at approximately £14,005. It was used by Shaffique in England, for sometime. According to him, the car was given to Saroya in or about 1990, and was brought to Kenya in January, 1991. It may be inferred that Saroya is the person who organised for and paid for its transfer from the U.K. to Kenya. But in his evidence he denied knowledge of its purchase price. From all outward appearances, the vehicle was his. He had use of it from 1990 to 1993 before Shaffique donated to him, by a Power of Attorney, the power to take possession of the said motor vehicle and to maintain and even sell it. It is noteworthy that the power was donated on 9th August, 1993, which was about ten days before the car was stolen. The alleged theft was reported to the police on 26th August, 1993.

Be that as it may, what is clear is that Saroya knew or must have known the purchase price paid for the vehicle in U.K. having been the person who cleared the said vehicle. His denial before the trial Judge that he knew the price was clearly a deliberate act of withholding vital evidence from the court. The evidence was vital. As we said earlier among the issues the trial court had to determine was the value of the motor vehicle in question, and the price paid for it in England, which Mohammed Yusuf said was relevant in establishing the value of the motor vehicle locally, was essential in deciding its value at the time of its loss.

But Mr. Nagpal for both the respondents submitted before us that if the appellant was able to get the evidence after the trial, then it means it could have done so before the trial had it exercised due diligence. When asked why his clients did not disclose that they had possession of that piece of evidence, his response was simple. They were not obliged to. Their duty, he said, was confined to making available such evidence as was sufficient to establish their case. Furthermore, that if the appellant wished to have the evidence the law provides procedures of discovery and interrogatories which the appellant should have but failed to take advantage of. In his view what the respondents paid for the vehicle has no bearing on the value of it at the time of loss. Besides he said, the appellant did not attempt to explain why it did not obtain the evidence before trial.

This is not a case in which the respondents could be said to have withheld the price **bona fide**. They must have known that the price paid for the motor vehicle in question could have influenced the trial Judge to award less than he did.

In the English case of Brown v Dean [1910] AC. 373, Lord Loreburn L.C., remarked at p.375 thus:

'I agree with the judgment of Farwell L. J., in which he says referring to the earlier authorities, "In the present case the county court judge has disregarded those principles, and has granted a new trial on affidavits which shew at the outside that there will be oath against oath on a new trial - and that is clearly not enough - which shew nothing in the nature of surprise, fraud, or conspiracy, and which also state nothing to shew that the information alleged could not with reasonable diligence have been obtained at that first trial." ...'

The Lord Chancellor was there dealing with a matter in which it was desired to have the case retried so that the appellant would have an opportunity of calling evidence which he did not have at the first trial. What is important about the decision is that surprise or fraud are grounds upon which further evidence may be admitted. Fraud is a false [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) 7 representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage.

The price Shaffique paid for the suit car was a fact within his knowledge. Likewise, because Saroya cleared the said motor vehicle at the port of entry into Kenya, its price or value declared at the said port was a matter within his own knowledge. They were obliged by dint of the provisions of section 112 of the Evidence Act to disclose it to the court. Having not done so it can be inferred that they withheld it in order to gain material advantage.

We observe here that what is reasonable depends on the facts and circumstances of each case as the Court, in cases of this nature, is exercising discretionary jurisdiction. The discretion has to be exercised bearing in mind, where applicable as here, that a party who has been shown to have acted in such a way as to take advantage over another should as far as possible not be allowed to take the full benefit of his wrong.

In the result, and for the reasons we have given, we allow the application and permit the appellant to adduce the additional evidence in this appeal. We also order that the record of the notice of motion before us shall form part of the appellant's record of appeal in Civil Appeal No. 210 of 2000. The respondents shall bear the appellant's costs of the present application in any event.

Dated and delivered at Nairobi this 11th day of May, 2001.

**R. O. KWACH**  
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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**  
.....  
**JUDGE OF APPEAL**

**E. O. O'KUBASU**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**