



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 30 OF 2019

EZEKIEL KEMUE ORINA..... APPELLANT/ APPLICANT

VERSUS

ASKA NYABOKE KOBIRO..... 1ST RESPONDENT

BERNARD ONKOBA T/A

BETICO AUCTIONEERS2ND RESPONDENT

HEGEONS AUCTIONEERS.....3RD RESPONDENT

(Being an appeal from the order of Hon. S.N. Makila SRM given on 22nd February, 2019 in

Kisii CMCC No. 192 of 2013)

RULING

1. The appellant has moved this court vide a Notice of Motion dated 20th September 2020, seeking leave to conduct the appeal by way of *viva voce* evidence by calling witnesses. He has also sought that the court directs the respondent's counsel on record to appear as a witness in the matter and that the costs of the application be in the cause.
2. The grounds in support of his application are that the respondents introduced peculiar documents after he had filed his submissions and there will be need call witnesses to cross examine them on the extraneous documents. In his supporting affidavit, the appellant identified the peculiar documents as pertaining to SONY SUGAR COMPANY LTD vs OMWOYO AUCTIONEERS which was a different case from that in the court below but which the court had purportedly used to issue a vesting order. The appellant deposed that the impugned documents would not have any probative value unless they were produced in court by way of evidence.
3. The grounds filed by the respondents in opposition to the application were that:
 - a. The application is incurably defective, incompetent, bad in law and out rightly an abuse of the court process and ought to be struck out at the earliest opportunity;
 - b. The instant application is frivolous, vexatious and scandalous in nature;
 - c. The appellant/applicant has not provided and/or annexed any evidence in support of the allegations contained in grounds 1 and 2

of the notice of motion as well as those contained in paragraphs 3 and 4 of his supporting affidavit;

d. It is inconceivable that the respondents have filed new documents in the instant appeal as there has never been any leave granted to adduce new evidence in this matter;

e. The respondent's replying affidavit dated 12th November 2019 and the submissions on record clearly address the critical issues in this appeal;

f. The applicant raises allegations of a criminal nature but has chosen not to pursue the same through lodging a criminal complaint against the purported persons and further, the same involved the court's administrative issues which do not prejudice the parties' rights in any way whatsoever;

g. The instant application as well as the orders sought have no basis in law and are thus untenable;

h. The applicant is in blatant contravention of Sections 1A and 1B of the Civil Procedure Act, 2010 as he has failed to prosecute his appeal against the respondents but has resorted to filing numerous, frivolous and vexatious applications;

i. The instant application is misplaced, mischievous and/or misconceived and ought to be struck out at the earliest opportunity; and

j. The instant application lacks merit and ought to be dismissed.

4. The parties filed written submissions in support of their rival positions. In his submissions, the appellant claimed that the respondent's counsel had not filed his response to the application despite being given ample time to do so. He submitted that the instant application was filed due to the belated introduction of documents through submissions and the application was meant to inquire into the veracity of the documents by cross examining counsel and other intended witnesses. The appellant wanted an explanation by the respondent's counsel on how the matter of Kisii Miscellaneous Application No. 185 of 2016 of Omwoyo Auctioneers versus SONY Sugar Co. Ltd was related to Kisii Miscellaneous No. 137 of 2016.

5. For his part, the respondents' counsel submitted that this court had already given directions for disposing of the appeal by way of written submissions. He contended that the appellant had not demonstrated exceptional circumstances that would vitiate the directions earlier given by the court. He was of the view that there was no indication on the record that the appellant had ever preferred to canvass the appeal by way of *viva voce* evidence. Counsel also submitted that he had never sworn an affidavit that would warrant his presence in court for cross examination. According to him, the application had been brought for purposes of delaying the conclusion of the appeal. **ANALYSIS AND DETERMINATION**

6. The applicable law pertaining to the taking of additional evidence by an appellate court is **Section 78 (1) (d) of the Civil Procedure Act** which stipulates:

78 (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-

(d) to take additional evidence or to require the evidence to be taken.

7. **Order 42 Rule 27** of the **Civil Procedure Rules** sets out the procedure for the taking of additional evidence. It stipulates:

27. Production of additional evidence in appellate court [Order 42, rule 27.]

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

8. The applicable principles in determining whether to receive further evidence were outlined by Lord Denning in **Ladd V Marshall (1954)1 WLR, 1489** and cited with approval by Chesoni JA in **Wanje v A.K.Saikwa Civil Appeal No. 72 of 1982[1984] Eklr** thus:

- 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.*

9. Recently, the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others PETITION 7 & 9 OF 2018 [2018] eKLR** held as follows on the same issue:

“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 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 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 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 additional evidence on the other.”

10. The application before this court is hinged on **Order 42, rule 27 (b)** of the Civil Procedure Rules. The applicant claims that the respondents annexed to their submissions, documents relating to Kisii Miscellaneous Application No. 185 of 2016 the matter of Omwoyo Auctioneers versus SONY Sugar Co. Ltd, which is not related to the suit herein or to Miscellaneous Application No. 137 of 2016. He has sought leave to receive evidence from witnesses and cross examine the respondents on the documents.

11. The appellant did not attach the offending document to his application. However, on perusing the court file, I came across a similar application by the appellant dated 14th November 2019 in which he similarly challenged documents relating to Kisii Miscellaneous Application No. 185 of 2016. The application dated 14th November 2019 was filed partly in response to an affidavit filed by the 2nd respondent who had annexed vesting orders purportedly issued in Kisii Miscellaneous Application No. 185 of 2016 vesting the ownership of motor vehicle registration number KAY 648 J Toyota Matatu to one Alex O. Mokoro.

12. For the purpose of understanding this matter, it is necessary to take a step back and revisit the facts leading up to this application. The appeal before this court is an appeal against the ruling and order of the trial court issued on 22nd February 2019 in Kisii Civil Suit No. 192 of 2013. The plaintiff in Civil Suit No. 192 of 2013, Aska Nyaboke Kobira (the 1st respondent herein) had sued the defendants, Jeran General Contractors Limited and Evans Omwoyo Onsongo, for compensation for injuries sustained in a road traffic accident involving the defendants' vehicles. The 1st respondent claimed that Jeran General Contractors Limited was the owner of motor vehicle registration number KBK 805 D Isuzu Bus and Evans Omwoyo Onsongo was the owner of motor vehicle registration number KAY 648 J Toyota Matatu. The 1st respondent's suit against the defendants was successful. On being awarded damages, the 1st respondent proceeded to execute the decree.

13. On 5th December 2018, the appellant in this matter filed an application dated 12th November 2018 claiming that the above mentioned motor vehicle KAY 648 J, which had, at that time been attached and sold off in satisfaction of the decree, belonged to him. The trial court dismissed the application in the ruling dated 22nd February 2019, which impelled the appellant to file this appeal.

14. Fast forward to the issues arising in the application before this court. The 2nd respondent herein swore a replying affidavit on 12th November 2019 in response to the appellant's amended memorandum of appeal. He averred that pursuant to the judgment and decree in the lower court in Kisii Civil Suit No. 192 of 2013 the 1st respondent commenced execution proceedings against the defendants in that suit. The 3rd respondent obtained warrants of attachment and sale and proceeded to proclaim the defendants' movable property including motor vehicle KAY 648 J. The defendants paid the decretal sum before the proclaimed goods were attached but failed to pay auctioneers charges. Consequently, the 3rd respondent filed Kisii Civil Miscellaneous Application No. 137 of 2016 for recovery of his costs and charges. The 2nd respondent received instructions from the 3rd respondent to recover his costs and he proceeded to proclaim and attach motor vehicle KAY 648 J. He issued the defendant with a notification of sale of the vehicle and sold it off in a public auction to the highest bidder known as Tom Mayaka Kebu.

15. The 2nd respondent deposed that he filed an application to the court for vesting orders vide Kisii Miscellaneous 185 of 2016 which application was allowed and the ownership of motor vehicle KAY 648 J was vested in the name of the holder of ID No. xxxx. He averred that the appellant filed Kisii Miscellaneous 192 of 2013 two years later seeking to stay the sale of motor vehicle KAY 648 J.

16. The affidavit sworn by the 2nd respondent in response to the amended memorandum of appeal raises several issues. Firstly, it is clear that the 2nd respondent swore an affidavit in clear contravention of **Order 42 Rule 27** of the **Civil Procedure Rules** which prohibits the introduction of evidence before an appellate court, unless leave is granted by the court. Secondly, the appellant attached to his affidavit in support of the application dated 14th November 2019, a copy of court proceedings which show that the Kisii Miscellaneous Application No. 185 of 2016 was a case between David Obare Omwoyo ¹/_a Omwoyo Auctioneers and South Nyanza Sugar Company which did not tally with the vesting orders purportedly issued to the 2nd respondent in Kisii Miscellaneous Application No. 185 of 2016 the matter of Bernard Onkoba ¹/_a Betico Auctioneers.

17. That said, I do not find that the circumstances call for the cross examination of witnesses as proposed by the appellant. As stated, the issue of the instant application is the vesting order annexed to the 2nd respondent's affidavit which he claimed to have obtained from the court to transfer motor vehicle registration number KAY 648 J after selling it in satisfaction of costs awarded to

the 3rd respondent. The appeal, as I understand it, concerns the ownership of motor vehicle registration number KAY 648 J at the time it was sold off by the respondents. The appellant must first show that the trial court erred in finding that he did not have an interest in motor vehicle registration number KAY 648 J before he can pursue the 2nd respondent or any other person for illegal transfer of the vehicle vide the impugned vesting orders in a separate suit. The question of whether the vesting orders attached to the 2nd respondent are a forgery would also be best dealt with by a criminal court after due process is followed.

18. The additional evidence that the appellant wants the court to take does not meet the threshold set out in the immediate foregoing authorities as it will not have an important bearing on the result of the appeal. The additional evidence also relates to the purported Miscellaneous Application No. 185 of 2016 and not the decision of the trial court in CMCC No. 192 of 2013 appealed from in this case. In my view, the orders sought by the appellant in the application dated 20th September 2020 will only convolute this matter and will serve no useful purpose in the conclusion of the appeal.

19. So far, the appellant has filed four (4) applications before this court. On 30th April 2019, the appellant filed an application to *inter alia* review the orders directing him to pay further court fees and for leave to amend his memorandum of appeal. This court found that the application was unnecessary as further court fees of Kshs. 19,929/= had already been paid and the appellant did not need leave to amend his memorandum of appeal before directions were given on how the appeal was to be heard.

20. The court gave directions for the parties to canvass the appeal by way of written submissions on 22nd July 2019. On 19th November 2019, the appellant filed the application dated 14th November 2019 which I have referred to above. He then filed another application on 29th June 2020 urging this court to hear the application dated 14th November 2019. This court advised the appellant that the court's judgment on his main appeal would deal with issues raised in the ruling he had challenged. Undeterred, the appellant filed the application now before court.

21. The appellant has not only taken to filing numerous applications but has also consistently amended his memorandum of appeal as if to stall the conclusion of the matter. The approach taken by the appellant flies in the face of the "Oxygen Principles" provided in the Civil Procedure Act which calls for the just, expeditious, proportionate and affordable resolution of civil disputes. The issues raised in the application dated 20th September 2020 are undoubtedly substantial but should be dealt with in a different forum as already advised. Since the 2nd respondent erroneously swore an affidavit in response to the memorandum of appeal, I will expunge it from the record of this court.

22. In the end, I find that the application dated 20th September 2020 is unmerited and is hereby dismissed. Each party shall bear his costs of the application.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MARCH 2021

R.E.OUGO

JUDGE

In the presence:

Ezekiel Applicant in person

Mr. Oremo for Mr.B. Gichana For the Respondents

Ms Rael Court Clerk



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