Case Number:	Civil Appeal 2 of 2018
Date Delivered:	01 Feb 2019
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Asenath Nyaboke Ongeri
Citation:	Nayan Mansukhlal Salva v Hanikssa Nayan Salva [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.2 OF 2018

NAYAN MANSUKHLAL SALVA……...APPELLANT

VERSUS

HANIKSSA NAYAN SALVA…….RESPONDENT

RULING

1. The Application coming for consideration is the one dated 4.12.2018 seeking the following orders;

(i) THAT the Court be pleased to grant to the Appellant leave to adduce further evidence.

(ii) THAT Costs be in the cause.

2. The application which is supported by the affidavit of NAYAN MANSUKHLAL SALVA is based on the following grounds;

(i) **THAT the piece of evidence that the Appellant wishes to rely on was inadvertently not included on the list of documents to be relied on.**

(ii) **THAT it's in the interest of justice to allow the production of the said document.**

(iii) **THAT the application is made in good faith.**

(iv) **THAT unless the order sought is granted, the applicant would stand to suffer irreparable damage and loss.**

(v) **THATthe application has been made timeously.**

3. The application is supported by the Affidavit of NAYAN MANSUKHLAL SALVA in which it is deposed as follows:

(i) THAT on 11.1.2017 he reported to Parklands Police Station a threat he received from the Respondent.

(ii) THAT he has been informed that the said copy of the OB did not form part of his evidence.

(iii) THAT he has been informed by his advocate that the said document was inadvertently left out.

(iv) THAT the non-inclusion of the said evidence was a honest mistake by his Advocate which ought not to be visited on him.

(v) THAT he is now seeking to have the said document included in his evidence.

4. The Respondent opposed the Application and filed a Replying Affidavit in which she deposed as follows:

(i) THAT the Applicant filed his list of bundle of documents dated 19.7.2017 and one of them was an abstract dated 28.12.2016.

(ii) THAT the intended additional evidence is an afterthought and an attempt to patch up its case on Appeal.

(iii) THAT the contention that the mistakes of an advocate should not be visited upon the Applicant is unwarranted and diversionary to the main issues in this case.

(iv) THAT she has been advised by her advocate that new evidence is not admissible and it must be shown that evidence could not have been obtained with reasonable diligence for use at the lower Court trial.

(v) THAT what the Applicant is trying is to build a strong case on appeal.

(vi) THAT the application should be dismissed with costs as it has not fulfilled the conditions for granting the orders sought.

5. I have considered the Affidavits filed in the Application dated 4.12.2018.In the case of FIBRE LINK LIMITED v STAR TELEVISION PRODUCTION LIMITED [2015] eKLR (CA 172 of 2012),the court held as follows on admission of evidence at appeal stage;

"The applicable law as regards the admission of additional evidence by an appellate court is Section **78 of the Civil Procedure Act which provides that: -**

"(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

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

(e) to order a new trial.

(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as ate conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

The procedural Rules that are hand maidens to Section 78 of the Civil Procedure above provide under Order 42 rule 27 of the Civil Procedure Rules that:-

"(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 reasons for its admission."

6. The said Court further held that generally,

" appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in **TARMOHAMED &ANOTHER V LAKHANI &CO (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in LADD V MARSHALL (1954)1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:**

"except in cases where the application for additional evidence is based on fraud or surprise:

"to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, 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; thirdly, 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.""

7. The Court in the above case further said that

"In **NATIONAL CEREALS AND PRODUCE BOARD V ERAD SUPPLIES &GENERAL CONTRACTS LTD (CA 9 OF 2012), THE ADMINISTRATOR, H H THE AGHA KHAN PLATINUM JUBILEE HOSPITAL V MUNYAMBU (1985)KLR 127 the Court of Appeal** emphasized that the principal rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. In **Wanjie &others v Sakwa & others(1984) KLR 275** the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the Court of Appeal Rules. Chesoni JA observed at page 280:

"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 the parties to make out a fresh case or to improve their case by calling further evidence. It follows ***that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."***"

8. The court further said that

"Hancox JA as he then was in the same case above stated that ***the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.***

On the other hand, courts have been urged to administer justice by exercising a delicate balance and in exceptional circumstances, new evidence should be allowed after weighing the two interests, that of doing justice and that of avoiding being mired by endless litigation which would occur if parties were allowed to adduce fresh evidence at any time during and after the trial without any restrictions. (see **GENERAL PARTS (U) LTD V KUNNAL PRADIT KARIACA NO 26 OF 2013 UCA.**

In the **Wanje V Sakwa** (supra) case, the court dismissed an application for additional evidence because most of the evidence sought to be admitted was not new, having been used before the trial court and because the applicants were merely trying to have a second bite at the Cherry. Courts have also disallowed such applications where the evidence sought to be admitted was in possession of the applicant at the time of the hearing before the trial court **See CHEPKOECH SALAT V JOSEPHINE CHESANG CHEPKWONY SALAT CA APP 211/2014."**

9. The Court of Appeal further said in the case referred to above that

"In **WALTER JOE MBURU V ABDUL SHAKOOR SHEIKH & 3 OTHERSCIVIL APPEAL NO. 195 OF 2002 [2015]**

EKLR it was stated:

"Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court's discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.

….., that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage."(emphasis added)."

10. I have considered the above stated authorities and the submissions filed herein and my findings are as follows:

(i) The Evidence the Applicant is seeking to adduce was in his possession at the time of the hearing of this case.

(ii) There are no exceptional circumstances to warrant this court to allow the admission of the same at the appeal stage.

(iii) I find that this is an attempt to strengthen the appeal.

(iv) The Application dated 4.12.2018 lacks in merit and I accordingly dismiss it with no orders as to costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 1ST DAY OF FEBRUARY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI