

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 331 OF 2020

SELEMANI S. KAMBANGWA APPLICANT

VERSUS

THE CHAIRMAN DASICO (DAR ES SALAAM

SMALL INDUSTRIES CO-OPERATIVE SOCIETY LTD RESPONDENT

**(Application for tendering additional evidence arising from Civil Appeal
149 of 2020 and decision of the Resident Magistrate’s Court of
Dar es Salaam at Kisutu in Civil Case No. 174 of 2017)**

RULING

19th April, 2022

KISANYA, J.:

The Applicant herein unsuccessfully sued the respondent for defamation. The suit was filed before the Resident Magistrate’s Court of Dar es Salaam at Kisutu in Civil Case No. 174 of 2017. Undeterred, the applicant appealed to this Court in Civil Appeal No. 149 of 2020. Alongside the said appeal, the applicant filed the present application under Order XXXIX, Rule 27(1)(b) and (2) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). He prayed for the orders that:

- (a) That this Honourable Court be pleased to receiving (sic)-additional evidence in civil Appeal before this Court.*
- (b) That this Honourable Court be pleased to make any other order that may appear to be just and convenient in the circumstances.*

In terms of the supporting affidavit, the additional evidence sought to be tendered is the minutes of general meetings of Dar es Salaam Small Industries Co-operative Society (DASICO) held on 12th December, 2016. The application is being contested by the respondent as shown in the counter-affidavit sworn by Mfaume Yusuf Mfaume who introduced himself as the Chairman of the Board of Directors of DASICO.

When the parties appeared before the predecessor judge, it was agreed to and ordered that the application be disposed of by way of written submissions. The applicant and respondent filed their respective submissions for and against the application on 9th December, 2021 and 21st December, 2021. As the predecessor judge was transferred to another duty station, this matter was re-assigned to me for final disposal.

Submitting in support of the application, Mr. George Anyosisye Timoth, learned counsel contended that, the applicant was represented by one Henry

Mgonja who is not in the roll of advocates. He submitted further that the said Henry Mgonja failed to tender a number of important exhibits including the document sought to be tendered in the case at hand. It was the learned counsel submission's that the said minutes contained defamatory words stated during the meeting and thus relevant to the appeal pending before this Court.

Citing the case of **Latifa Hassan Alibahai vs Jayendra J Amrchand and Another**, Land Case No. 119 of 2019, HCT Land Division at Dar es Salaam (unreported), Mr. Timothy argued that this Court has mandate to receive additional evidence after considering the principle of justice, equity and common sense. Therefore, he prayed that the said minutes be admitted as additional evidence on the account that it is an official document from the respondent. He was of the firm view that the said document will enable this court to arrive at a fair judgment.

In response, Ms Margret Ngasani, learned advocate for the respondent dismissed the applicant's counsel submission arguing that the minutes sought to be tendered was neither appended to the pleadings nor tendered during trial. Referring the Court to the provisions of Order XIII, Rule 2 and Order XXXIX rule 27(1)(a) of the CPC, Ms Ngasani submitted that the

applicant's advocate did not forget to tender the said document because it was not in possession of the applicant. She further submitted that it is the applicant who was negligent to tender the said document and not the trial court. In that regard, the learned counsel submitted that additional evidence cannot be admitted based on the party's own negligence. Citing further the case of **Mathias Erasto Manga vs MS Simon Group (T) Ltd**, Civil Appeal No. 43 of 2013 (unreported), she argued that the respondent proved his case on the balance of probabilities.

Commenting on the case of **Latifa Hassa Alibai** (supra) relied upon by the applicant's counsel, Ms. Ngasani contended that it distinguishable from the circumstances of this case. Her argument was based on the fact that the said case involved additional evidence which was tendered during trial and not at appellate stage. That said, the learned counsel for the respondent invited this Court to dismiss the application with costs.

I have examined and considered the pleadings, records which gave rise to the pending appeal as well as the submissions from both sides. It seems to me that the issue for determination is whether the applicant has made a case warranting an admission of additional evidence.

The general rule set out under Order XXXIX Rule 27 of the CPC is to the effect that parties to an appeal cannot produce additional evidence. However, the said provision empowers this Court to admit additional evidence in appeal. It reads as follows:

"27.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, 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 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 may allow such evidence or document to be produced, or the witness to be examined."

Flowing from the above cited provisions, it is clear that the power to admit additional evidence is so limited. Therefore, once a suit is tried and judgment delivered, the trial cannot be reopened in appeal by admitting additional evidence unless it is established that the admission is in compliance with the above cited provisions.

In terms of Order XXXIX Rule 27(1)(a) of the CPC, additional evidence can be admitted if the same was wrongly rejected by the trial court. It is common ground that the minutes sought to be tendered was not rejected by the trial court. That being the case, such document cannot be admitted under Order XXXIX Rule 27(1)(a) of the CPC. I think that is why the present application was made under Order XXXIX Rule 27(1)(b) of the CPC.

It is my considered view, Order XXXIX Rule 27(1)(b) of the CPC empowers this Court to admit additional evidence upon being satisfied such evidence will enable it to give judgment or render justice. I am persuaded by the decision of the High Court of India in **Venukuri Krishna Reddi and Another vs Kota Remireddi and Others**, AIR 1954 Mad 884 in which it was held that such power is employed when the appellate court finds that there is lacuna after having heard the parties to appeal.

Further to this, one of principles for allowing additional evidence is to the effect that it must be shown that such evidence could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the trial by the party seeking to tender the same. See the decision of the Supreme Court of Kenya

in **Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed and Three Others** [2018] eKLR.

In the instant application, the minutes sought to was not tendered during trial due to the following reason deposed in paragraph 4 of the supporting affidavit:

"That during the hearing of Plaintiff case my advocate negligently forgot to tender the evidence of minutes by DASICO in which it has defamatory statement against me."

In the light of the above, it is apparent that the trial was conducted when the applicant was in possession of the minutes sought to be tendered as additional evidence. However, it was neither appended to the plaint filed before the trial court nor prayed to be tendered in evidence. The applicant contends that the minutes was not tendered due to negligence by the advocate who represented him during trial. It is my humble opinion that an error made by an advocate of the party to the case through negligence is not a sufficient reason, envisaged under Order XXXIX, Rule 27(1) of the CPC, for admission of additional evidence in appeal. As rightly argued by the learned counsel for the respondent, the case **Latifa Hassan Alibahai**

(supra) does not apply in the case at hand because it discussed admission of additional document during the trial.

I have also considered the argument put forward by the applicant's counsel that during trial, the applicant was represented by one, Henry Mgonja who purported to be an advocate while his name is not in the roll of advocates. However, that fact was not deposed in the supporting affidavit. Thus, it cannot be considered. Even if I was to consider the same, it is on the record of appeal that during trial the applicant was also represented by Mr. George Timothy and Mr. Henry Samwel, learned advocates. It was not known as to why the above stated minutes was not tendered by the said two learned advocates.

In the event, I find no merit in this application. It is, accordingly, dismissed. Cost to follow the event.

DATED at DAR ES SALAAM this 19th day April, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 19th day of April, 2022 in the absence of the parties. B/C Bahati present.



A handwritten signature in black ink, appearing to be "S.E. Kisanya".

S.E. Kisanya
JUDGE
19/04/2022