



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan JA (in chambers))

CIVIL APPLICATION NAI 12 OF 1978

CMC AVIATION LTDAPPLICANT

AND

KENYA AIRWAYS LTD (CRUISAIR LTD).....RESPONDENT

JUDGMENT

This is an application under rule 29(2) of the Rules of this Court for an order that the amended pleadings in High Court Civil Case 842 of 1976, *Kenya Airways Ltd (now Cruisair Ltd) v CMC Aviation Ltd* be admitted as additional evidence in Civil Appeal 31 of 1977 which is the substantive appeal between these parties (Cruisair Ltd being the appellant, and CMC Aviation Ltd the respondent) from a decision of the High Court consequent upon a winding-up petition presented by the respondent company against the appellant company, under the Companies Act on the ground that the appellant company is insolvent and unable to pay its debts, and in the circumstances, it is just and equitable that the appellant company should be wound up.

Co-existent with the with the winding-up petition was Civil Case 842 of 1976, which has not been heard yet, in which the appellant company as plaintiff claims from the respondent company as defendant the return of an aircraft and certain equipment or their total value in the sum of Shs 1,368,105 and damages, as against the respondent company's claim of Shs 206,825/50 against the appellant company in the winding-up petition.

It appears from paragraph 9 of the amended plaint filed in the civil case that the appellant company as the plaintiff was ordered by the court to join a certain insurance company as the second defendant. The amended plaint, the amended defence of the respondent company which has become the first defendant, and the defence of the second defendant (ie the insurance company), were all filed after the delivery of the judgment of the court in the bankruptcy and winding-up cause.

Rule 29 reads:

- (1) 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.

Mr Hewett for the applicant has argued that the amended pleadings are evidence and they ought to be admitted as additional evidence in Civil Appeal 31 of 1977 as this evidence was not available to the respondent company at the time the hearing of the winding-up petition in the High Court and it came into

being later. He submitted that this application falls well within the *dictum* of Denning LJ in *Ladd v Marshall* [1954] 3 All ER 745, 748:

In order to justify the 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; second, 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; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

Apart from the fact that the amended pleadings could not in any way have influenced the judge having been filed after his judgment was delivered, it must first be considered whether the amended pleadings constitute evidence.

The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in *Cassell’s English Dictionary*, p 394:

Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

In the Australian case, *Re Williams Bros Ltd* (1928) 29 SRNSW 248, Harvey CJ said: “To give evidence in my opinion means to make statements on oath before a person duly authorised to administer an oath”. Therefore, the application is dismissed with costs.

Order accordingly.

Dated and delivered at Nairobi this 18th May 1978.

C.B MADAN

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JUDGE OF APPEAL (IN CHAMBERS)

I certify that this is a true copy of the original

DEPUTY REGISTRAR