



**Mudwasi (Suing as Chairman of Wankanyakla Self Help Group) & 3
others v Tsusho Capital Kenya Ltd & another (Civil Appeal E35 of 2021)
[2022] KEHC 15989 (KLR) (Commercial and Tax) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E35 OF 2021
A MSHILA, J
NOVEMBER 25, 2022**

BETWEEN

**JOASH OYWA MUDWASI (SUING AS CHAIRMAN OF WANKANYAKLA SELF
HELP GROUP) 1ST APPELLANT**

**ROSEMORNICA ANYANGO ODERA (SUING AS TREASURER OF
WANKANYAKLA SELF HELP GROUP) 2ND APPELLANT**

**KEVIN ODHIAMBO OKELLO (SUING AS SECRETARY OF WANKANYAKLA
SELF HELP GROUP) 3RD APPELLANT**

WANKANYAKLA SELF HELP GROUP 4TH APPELLANT

AND

TSUSHO CAPITAL KENYA LTD 1ST RESPONDENT

TOYOTA KENYA LIMITED 2ND RESPONDENT

JUDGMENT

Background

1. The Appellants being dissatisfied with the Ruling of the Chief Magistrate's Court delivered on 16th 2021 by D. O. Mbeja (PM) Appeals against the whole of the said ruling on the following grounds: -
 - a. The learned Trial Magistrate erred in law and fact in allowing the 1st Respondent's Application dated 15th January 2021 by failing to apply the correct legal principles.
 - b. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellants Replying Affidavit and Submissions and therefore arrived at a wrong finding.



- c. The Learned Trial Magistrate erred in law and fact by treating the Application dated 15th January 2021 as an application for recalling of a witness when in reality the application before him was for leave to allow the 1st Respondent to file a supplementary list of documents and thereby arrived at a wrong decision.
 - d. The Learned Trial Magistrate erred in law and fact in failing to appreciate the fact that in allowing the application by the Respondent, the Appellants will be greatly prejudiced which prejudice will not be cured by recalling the Plaintiffs' witness and thus arrived at a wrong decision.
 - e. The learned Trial Magistrate in law and fact when he relied on the case of Trust Bank Limited vs Amalo Co. Ltd (2002) eKLR which case was different from the application that was before him.
 - f. Learned Trial Magistrate erred in law and fact when he held that there were special circumstances obtaining in the case which militated towards allowing the application but failed to set out those special circumstances and how the same led him to be of the view that the application dated 15th January 2021 was to be allowed.
 - g. The Learned judge contradicted himself by holding that there were special circumstances warranting the grant of the orders sought and on the other hand stated that he reluctantly allowed the application.
 - h. Learned Trial Magistrate exercised his discretion unjudiciously hence arriving at a wrong decision.
 - i. The learned trail Magistrate decision was plainly wrong and unfair.
2. The Appellant sought for the following orders that:
- a. The Appeal be allowed.
 - b. The Ruling of Nairobi Chief Magistrate- Milimani Commercial Courts in CMCC No. 6638/2018 by Hon. D. O. Mbeja (PM) dated and delivered on 16/04/2021 be set aside.
 - c. The Court to order that the matter do proceed from where it had reached before any other Magistrate other than Hon. D. O. Mbeja (PM)
 - d. The Appellant be granted the costs of this Appeal.

APPELLANTS' CASE

3. It was the Appellant's case that the application that gave rise to the impugned ruling is the 1st Respondent's Application dated 15th January 2021 in which the 1st Respondent sought the following prayers:
- a. That Leave be granted to the 1st Defendant to file and/or for the court to admit the 1st Defendant's Supplementary list and bundle of documents dated 20th December 2019 on the court record as part of the pleadings prior to commencement of the Defence hearing.
 - b. This Honourable Court do grant any other or further orders as it may deem fit in the circumstance.



4. The gist of the Application was that the Appellants had filed a supplementary list of documents 5 days to hearing and that it was therefore fair that the 1st Defendant be granted same indulgence.
5. In opposing the 1st Respondent's Application, the Appellants contended that its supplementary list of documents though filed after close of pleadings was not received under protest when it was served and neither did the Respondents raise any objection to the same when the matter came up for hearing of the Plaintiffs' case and that the Respondents cross examined the Plaintiffs' witness on their supplementary list of document and did not indicate to the court or to the Plaintiff or their counsel that they will be filing a supplementary list and bundle of documents. The Respondent's list and bundle of documents were filed after the Plaintiffs had tendered their evidence and closed their case.
6. The Appellants in opposing the Respondent's Application in the lower court argued that that they will be greatly prejudiced as they had already closed their case, the Respondents had heard what the Appellants testimony was and therefore the Intended supplementary list of documents was meant to patch up its case after they had the testimony of the Appellants testimony.
7. On whether the learned Trial Magistrate erred in law and fact in allowing the 1st Respondent's Application dated 15th January 2021 by failing to apply the correct legal principles; the Appellant submitted that when a party makes an application to adduce additional evidence, the court ought to consider among others the following: the discovery of new evidence, the stage of the proceedings at which the evidence is sought to be introduced and the prejudice that the other party is likely to suffer if the applicant is permitted to introduce additional evidence.
8. The Appellant relied on the case of the case of Chairman, Secretary & Treasurer suing as officials / on behalf of House of Hope vs Wotta House Limited (2018) eKLR where the court held that;

“When the Plaintiff testified and was cross examined, there was no indication that the Respondent had other documents it intended to rely on. The trial had reached an advanced stage where allowing the defendant to produce further documents would amount to allowing the Respondent to make its case at the very end of the trial.”
9. The lower court failed and or ignored to apply the principle that the documents sought to be introduced form new and compelling evidence on basis of which the court would then be persuaded to exercise its discretion to allow the same to be relied upon. It was thus the Appellants submission that the failure by the lower court to apply the aforementioned principles resulted in an erroneous finding.
10. On whether the Learned Trial Magistrate erred in law and fact in failing to consider the Appellants Replying Affidavit and submissions and therefore arrived at a wrong finding; it was the Appellants submission that the trial court remained mute on the issue that the Appellants would be greatly prejudiced if the documents sought to be introduced are allowed.
11. Did the Learned Trial Magistrate err in law and fact by treating the application dated 15th January 2021 as an application for recalling of a witness when in reality the application before him was for leave to allow the 1st Respondent to file a supplementary list of documents and thereby arrived at a wrong decision? The Appellant submitted that the trial court misunderstood the application before it and therefore applied wrong legal principles in determining the application dated 15th January 2021. The application before the court by the 1st Respondent was for leave to file its list and or for the court to admit the 1st Defendant's Supplementary list and bundle of documents dated 20th December 2019 on the court record as part of the pleadings prior to commencement of the Defence hearing.



12. On whether the Learned Trial Magistrate erred in law and fact when he relied on the case of Trust Bank Limited vs Amalo Co. Ltd (2002) eKLR which case was materially different from the application that was before him; the Appellant argued that in relying on the case of Trust Bank Limited, the lower court erred in law in that the principle laid down in the said case were different and inapplicable to the motion that was before it hence the court arrived at a wrong decision. In the aforementioned case of Trust Bank Limited, the Appellant who was the Respondent in the superior court filed its replying affidavit outside the time lines that had been issued by the court. In the instant Appeal, the 1st Respondent filed its documents after pleadings had closed and after the Plaintiffs had closed their case. The case of Trust Bank Limited is distinguishable from the present case and therefore the trial court erred in relying on the same hence arriving at an erroneous decision.
13. The Learned Trial Magistrate erred in law and fact when he held that there were special circumstances obtaining in the case which militated towards allowing the application but failed to set out those special circumstances and how the same led him to be of that view that the application was to be allowed. On this issue the Appellant submitted that no special circumstances were obtaining in the application and none were stated by the trial court and therefore, the trial court was in error in allowing the application on some imaginary "special circumstances" which were neither deposed to by the parties and or arose from the pleadings.
14. The Learned trial magistrate contradicted himself by holding that there were special circumstances warranting the grant of the orders sought and on the other hand stated that he reluctantly allowed the application. It was the Appellants submission that the court was not convinced on a balance of probability that the 1st Respondent had made a case for its application to be allowed and that is why the court was reluctant. The said contradiction confirms that the Respondent did not discharge the evidential burden of proving that the documents that they sought to rely on could not be obtained with undue hardship and that the Appellants would not suffer and prejudice thus the hesitancy of the magistrate in allowing the application.
15. On whether the learned magistrate exercised his discretion injudiciously hence arriving at a wrong decision; the Appellant stated that the lower court exercised its discretion injudiciously by failing to take into consideration whether the documents sought to be introduced were new documents that were discovered by the respondent, the stage at of the proceedings at which the additional evidence was sought to be introduced, the conduct of the Respondents not indicating during the hearing of the plaintiffs case that they intended to file additional documents and the prejudice the Appellants would suffer if the documents were to be allowed.
16. It is the Appellants submission therefore that the trial magistrate was plainly wrong. He failed to apply the correct legal principles. He failed to take into account matters which he ought to have taken into account and thus his decision is plainly wrong.

RESPONDENTS' CASE

17. In response, the Respondents submitted that the main ground(s) for the Respondents' Application as per paragraphs 4.1 and 4.2 of the Respondents' submissions dated 4th February 2021, was that admission of the Respondents' Supplementary List of Documents on the court record would facilitate the just, fair and proper determination of the case. This is primarily because the documents in the Respondents' Supplementary list of Documents are a direct response to the supplementary list of documents filed by the Appellant 5 days before the hearing.
18. The Respondents argued that having the Appellants documents on the court record without the Respondent's documents in response would be prejudicial to the Respondent and would be



tantamount to an unfair advantage of the Appellant over the Respondent and the court would not have the opportunity to consider all the available evidence in just and proper determination of the matter which is against the principle of achieving substantive justice for aggrieved parties.

19. Further, the Respondent proposed that should its Supplementary list of documents be admitted on the court record mid trial, the Appellants be at liberty to recall their witness to be examined on the Respondents' Supplementary list of Documents for fairness and equity and to kill any prejudice that could be occasioned to the Appellants. Indeed, the trial magistrate in granting leave to the Respondent to file its Supplementary documents also directed that the Appellants could recall their witness if necessary to testify with regards the Respondent's Supplementary List of documents. This is a clear indication that the Appellants will not be prejudiced in any way and aside from the said circumstances, the Appellants did not show to the trial court any way in which they would be prejudiced.
20. It was the Respondents' position that the trial magistrate exercised his discretion in a competent manner and it is not the Appellants' place to dictate how he ought to have exercised the same more so since the trial magistrate explained the 'ratio decidendi' for his decision. Contrary to the Appellants' submissions, the trial magistrate did not misunderstand the application before him or go on a different trajectory from the issues before him simply because he referred to the statutory law for recalling a witness.
21. The trial magistrate did not misdirect himself, act on matters which he should not have acted on or fail to take into consideration any such matters; which would then mean he exercised his discretion injudiciously or his decision was plainly wrong. The trial magistrate's major basis in his discretion in coming to the decision that he made in his ruling was that the Appellants' witness could be recalled for further examination in chief, cross examination, and reexamination specifically. This was on the basis that the Appellants pleaded that they would be prejudiced if the Respondents' Supplementary list and bundle of documents was allowed on the record as they had already closed the Plaintiffs case. The trial magistrate therefore showed that closing of the Plaintiffs case was not fatal or permanent or irreversible to be prejudicial to the Plaintiffs, Appellants herein.

ISSUES FOR DETERMINATION

22. This Court has carefully considered the Appellants' Appeal, the Trial Court record, the Response and the written submissions and the following issue is for determination;
 - a. Whether the trial court erred in law and fact in allowing the 1st Respondent's Application dated 15th January 2021 by failing to apply the correct legal principles?

ANALYSIS

Whether the trial court erred in law and fact in allowing the 1st Respondent's Application dated 15th January 2021 by failing to apply the correct legal principles?

23. There are clear provisions on the requirement for parties to file documents within certain timelines. In the event that the documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences.
24. The provisions of Order 7 rule 5 of the Civil Procedure Rules provide as follows: -
 - “The defence and counter claim filed under Rule 1 and 2 shall be accompanied by –
 - (a) An affidavit under Order 4 rule 1(2) where there is a counter claim;



- (b) A list of witnesses to be called at the trial.
- (c) Written statements signed by the witnesses except expert witness; and
- (d) Copies of documents to be relied on at the trial.

Provided that statement under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.”

25. Order 11 of the Civil Procedure Rules stipulates that any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the Plaintiff’s case.
26. Further, there is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial.
27. Based on the Record of Appeal before this Court, the Plaintiff closed its case on 18th Dec 2019. Thereafter, the Defendants filed Supplementary List of Documents dated 20th December 2019 and served the same upon on the Plaintiff on 20th Dec 2019 this was after the close of the Plaintiff’s case. The Defendant argued that the documents were filed in direct response to a further list of documents served on them on 13th December 2019.
28. It is imperative to note that the said further list of documents was served on the Defendants before the hearing of the Plaintiffs’ case commenced and the Defendants ought to have filed their Supplementary List before the hearing commenced on 18th December 2019.
29. The Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party in this case the Defendants are allowed to file the documents they intend to rely on after the close of the Plaintiffs’ case. The Defendants have had the advantage of hearing the Plaintiffs’ case and it would be prejudicial to the Plaintiffs if the Defendants are allowed to prepare their documents based on what the Plaintiffs presented as evidence for their case.
30. In the case of P.H. Ogola Onyango t/a Pitts Consult Consulting Engineers vs Daniel Githegi g/a Quantalysis [2002] eKLR the court when faced with a similar situation stated as follows: -

“Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the opposing party has closed its case. To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.”
31. In light of the above, the Supplementary List of Documents by the Defendants should not have been admitted by the trial court. Therefore, this Court is satisfied that indeed the learned Trial Magistrate failed to apply correct principles of law and erred in law and fact in allowing the 1st Respondent's Application dated 15th January 2021.



FINDINGS AND DETERMINATION

32. For the forgoing reasons this court makes the following findings and determinations;
- a. This court finds that the trial court failed to apply the correct legal principles and erred in law and fact in allowing the 1st Respondent's Application dated 15th January 2021;
 - b. The Appeal is thus found to have merit and it is hereby allowed.
 - c. The Ruling of Nairobi Chief Magistrate- Milimani Commercial Courts in CMCC No. 6638/2018 by Hon. D. O. Mbeja (PM) dated and delivered on 16/04/2021 be and is hereby set aside.
 - d. This Court directs that the matter do proceed from where it had reached before any other Magistrate other than Hon. D. O. Mbeja (PM)
 - e. The Appellant is hereby granted the costs of this Appeal.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Makori for the Appellant

Miwagaba for the Respondent

Lucy-----Court Assistant

