



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO 175 OF 2016**

**ANWARALI & BROTHERS LIMITED.....APPELLANT**

**VERSUS**

**P.C.E.A WOGECT CENTRE, MAKUPA.....RESPONDENT**

*(Being an Appeal from the Ruling and Order of Hon Nathan S. Lutta, Senior Principal Magistrate (SPM) delivered on 16.11.2016 in Mariakani SPMCC No.24 of 2014)*

**JUDGMENT**

1. Vide **Ruling** delivered on **16.11.2016**, the Learned Magistrate, Hon. Nathan S. Lutta, dismissed the Appellant's **Notice of Motion** application dated **13.5.2016** in which the Appellant sought leave to recall **Hassan Yakub Hassan**, PW1 and Police Officer, Mariakani Police Station PW3 to give further evidence and **Amend** the **Plaint**

2. Being dissatisfied with the said **Ruling**, on **14.12.2016**, the Appellant filed his **Memorandum of Appeal** dated **13.12.2016**. He relied on **fifteen (15) Grounds of Appeal**.

- a) That the Honourable Magistrate erred in fact and in law in failing to apply the principles of granting, Re-calling of witnesses and Amendment of the Plaintiff.*
- b) That the Honourable Magistrate erred in fact and in law in finding that, the Plaintiff wanted to fashion the case after being cross-examined by the Defendant.*
- c) That the Honourable Magistrate erred in fact and in law in determining that the Application before it was an afterthought.*
- d) That the Honourable Magistrate erred in fact and in law in finding that the trial would be muddled and the Defendant prejudiced.*
- e) That the Honourable Magistrate erred in fact and in law in failing to appreciate the law relating to the Amendment of the Plaintiff.*
- f) That the Honourable magistrate erred in fact and in law in failing to appreciate that further would have a material effect on the case.*
- g) That the Honourable Magistrate erred in fact and in law in failing to appreciate that grave prejudice will be suffered by the Plaintiff if the orders sought were not granted.*
- h) That the Honourable Magistrate erred in fact and in law in Law and in fact by finding that the Plaintiff needed to provide exceptional circumstances to warrant the prayers sought.*
- i) That the Honourable Magistrate erred in fact and in law in failing to appreciate that a party may amend his pleadings any time before Judgment.*
- j) That the Honourable Magistrate erred in fact and in law in making a final finding which was highly prejudicial to the Plaintiff.*

k) *That the Honourable Magistrate erred in fact and in law in failing to appreciate the grave consequences of disallowing the Re-calling of the witnesses sought.*

l) *That the Honourable Magistrate erred in fact and in law by failing to make a finding on Amendment of the Plaintiff.*

m) *That the Honourable Magistrate erred in fact and in law by failing to use his discretion fairly and shutting out the Plaintiff's case.*

n) *That the Honourable Magistrate failed to appreciate that no prejudice will be suffered by the Defendant if the witness were re-called and the Plaintiff Amended.*

o) *That the Honourable Magistrate erred in fact and in law by*

*dismissing the Application in its entirety without giving proper and sound reasons.*

3. Having looked at his **Grounds of Appeal**, it appeared to this court that the issue that had been placed before it for determination was whether the Learned Magistrate misdirected herself when she dismissed his aforesaid application. All the Grounds of Appeal were heard together as they were all related and intertwined.

4. The parties before me reiterated the arguments they had made before the trial magistrate. **M/s. Okata**, Learned Counsel for the Appellant submitted a **Letter of Authority** and a **Police Abstract** which were inadvertently and mistakenly overlooked during the proceedings but the same were present in the list of documents, and had already been alluded to by the witnesses. Therefore, no new evidence was being introduced. Further, Counsel submitted that as soon as the mistake was discovered, the Appellant sought the re-calling of the witness without delay. And that the amendment of the Plaintiff was restricted to the description of the Respondent.

5. **Mr. Mokaya**, Learned Counsel for the Respondent submitted that no cogent evidence or exceptional circumstances had been adduced by the Appellant to warrant overturning of the impugned Ruling, and that the Appellant is seeking to undo the damage caused on cross-examination of the two witnesses. Counsel urged this Court to dismiss the instant Appeal.

#### **Determination**

6. In considering this Appeal, this court has read the grounds upon which it is grounded, the submissions and the proceedings and Judgment of the trial Court. It has also placed regard to the cited case and Statute laws. I find two issues arise for determination;-

a) *Whether the Appellant should be granted Leave to recall witnesses for purposes of adducing further evidence.*

b) *Whether the Appellant should be granted Leave to Amend its Plaintiff.*

7. On the issue of recalling witnesses for purposes of adducing further evidence, this court note that **Section 146(4)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** and **Order 18 rule 10** does afford the Court the discretion to entertain the application and grant the orders sought by the Appellant in the trial Court, namely, the recall of the two witnesses for the Appellant, for the purpose of producing a **Letter of Authority** and a **Police Abstract**.

***“S. 146(1) Witnesses shall first be examined in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.***

(2) ...

(3) ...

***(4)The court may in all cases permit a witness to be re-called either for further examination in-chief or further cross- examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”***

**Order 18 Rule 10** of the **Civil Procedure Rules** provides that:

***‘The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.’***

8. It is noteworthy that the Appellant sought to produce documents already on record but had inadvertently been left out during examination in chief of PW1 and PW3. Therefore, in my view, the Appellant did not seek leave to produce documents that were alien to the suit before the trial Court and the Respondent has not demonstrated any prejudice it is bound to suffer if the Appellant is allowed to recall its witnesses.

9. For the above stated reasons, this Court is not persuaded that the Respondent will suffer any prejudice if the Appellant is allowed to recall the witnesses as the Respondent would be accorded the right to subject the said

witnesses to cross-examination on the content of the said documents and the Respondent is yet to call any witness in support of its case. This will go a long way in serving substantive justice for the parties.

10. On amendment of the Plaintiff, **Section 100** of the **Civil Procedure Act Cap 21 (Laws of Kenya)** stipulates as follows:-

*“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in the suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised (emphasis court) by or depending on the proceedings.”*

11. It is noteworthy, that the said issue of amendment was not objected to by the Respondent at the trial Court and in this instant Appeal.

12. For the reasons set out, this Court finds and holds that the trial Magistrate erred in failing to grant the Appellant Leave to re-call PW1 and PW3 so they can produce the aforesaid documents and amend the Plaintiff in terms of the Respondent’s description.

13. The upshot of this matter is, that in the greater interest of Justice, this Court allows the Appeal and sets aside the **Ruling and Order** of the trial Magistrate dated **16.11.2016**. The Ruling said is then substituted with an Order allowing the Application dated **13.5.2016** with costs.

It is hereby so ordered.

**DATED, SIGNED, and DELIVERED at MOMBASA on this 28<sup>th</sup> day of September, 2020.**

**D. O CHEPKWONY**

**JUDGE**

**28/9/2020**

+In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.

**D. O CHEPKWONY**

**JUDGE**

**28/9/2020**