



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 59 OF 2017

BETWEEN

THE CHAIRMAN, SECRETARY & TREASURER

Suing as the officials/on behalf of HOUSE OF HOPE..... APPELLANT

AND

WOTTA - HOUSE LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. W.K. Onkunya, PM dated 25th August 2017 at the Chief Magistrates Court at Kisumu in Civil Case No. 239 of 2015)

JUDGMENT

1. This is an appeal from an interlocutory decision of the learned trial magistrate granting leave to the respondent to file and serve further documents within 7 days after the plaintiff had closed its case and the defendant's witness had given evidence in chief and had been cross-examined and was in the course of being re-examined.
2. The appellant, who is the plaintiff in the subordinate court, claimed Kshs. 500,000/- being a refund of a deposit paid to the respondent to drill a borehole at its Children's home. In its defence, the respondent denied that it was liable to refund the deposit. It admitted that there was an agreement but that the agreed deposit was Kshs. 550,000/- and not Kshs. 500,000/- and that the appellant had not paid Kshs. 50,000/- to enable it commence the work.
3. After setting aside the default judgment, hearing of the matter commenced. David Okongo Odhiambo (PW 1) and Josephine Chepkurui (PW 2) testified on the appellant's behalf. After the close of the plaintiff's case, Ken Kaudu (DW 1) testified on the defendant's behalf. It was during DW 1's re-examination that the respondent's counsel sought an adjournment to recall the witness on another date and for leave to file further documents.
4. Counsel for the appellant objected to the application for adjournment and for leave to file additional documents on the grounds that the respondent had been given a last adjournment and that the appellant had already closed its case. He contended that in the course of the hearing, the respondent did not disclose or indicate that it had any other documents it required to produce. Counsel for the respondent submitted the appellant would not suffer any prejudice if the application was allowed in view of the fact that the payment under the agreement was not disputed. Counsel contended that failure to file the documents was inadvertent and that the documents would show that it was not possible to refund the deposit as the money was used to purchase material.

5. The trial magistrate considered that provisions of **Order 18 rule 10** of the **Civil Procedure Rules** (“the **Rules**”) which allows the court to recall any witness at any stage of the proceedings and **section 146** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides that he court may permit a witness to be recalled either for further evidence-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively. The court came to the conclusion that:

It is clear from the foregoing provisions of the law that the law allows the recall of (a) witness who had previously testified. I am not persuaded that the plaintiff will suffer any prejudice if the defendant is recalled as he would be accorded (the) right to subject him to cross-examination. Moreover, if the defendant is granted leave to file further documents their production or otherwise will still be subjected to the rules of evidence at the trial.

Consequently, I exercise my discretion(ary) power and invoke the overriding objective in the circumstances and allow the application by the defence counsel.

6. The parties before me reiterated the arguments they had made before the trial magistrate. At any rate, they agreed that the appeal involved the review of the trial magistrate’s exercise of discretion to adjourn the matter and allow the respondent to file additional documents. The general principle applicable when the appellate court is called upon to interfere with the exercise of discretion of the trial court, is well settled and was stated as follows in **Mbogo & Another v Shah [1968] EA 93, 96**:

An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.

7. The issue in this appeal is when and under what circumstances in the course of the trial, a party may introduce documents to support his or her case. The trial magistrate appreciated that the general tenor of the **Civil Procedure Rules** is that parties ought to disclose their case at an early stage to avoid ambush, delay and increase of costs. The plaintiff is required to file a verifying affidavit, list of witnesses, statements of witnesses and copies of documents to be relied upon at the trial under **Order 3 rule 2** of the **Rules**. A similar requirement is imposed on a defendant when filing the defendant and counterclaim, if any, under **Order 7 rule 5** of the **Rules**. Before the pre-trial conference, written statements may be filed with the leave of the court at least 15 days prior to the Pre-trial Conference under **Order 11** of the **Rules**. After the Pre-trial conference, the matter is set down for hearing. It is expected that at the Pre-trial conference, all the parties will have made full disclosure so that either party knows the case that they will face at the trial.

8. Even after the Pre-trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of **Order 18 rule 10** of the **Rules** and **section 146** of the **Evidence Act**, is intended to ensure that each party is afforded a fair trial guaranteed under **Article 50 (1)** of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. What these rules must not do is to become an end in themselves and impede a fair trial and that is why **Article 159(2)(b)** of the Constitution provides that justice shall be administered without undue regard to technicalities. The constitutional imperatives are further supplemented by the overriding objective enacted in **sections 1A and 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**.

9. As I stated at the opening of this judgment, the issue in this case is whether the trial magistrate was right in allowing the respondent to produce further evidence after the close of the plaintiff’s case and after the testimony and cross-examination of the defence witness. In **Raila Odinga & 5 Others vs IEBC & 3 Others, SCK Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR**, the Court had to consider

whether to allow additional evidence filed outside the contemplation of the rules in a Presidential election petition. It adverted to the principles applicable as follows;

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

10. I have considered the ruling appealed against and I find that the trial magistrate did not give consideration to the fact that the parties had been given the full opportunity to file their documents before the hearing commenced. 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 up its case at the very end of the trial.

11. Although the respondent sought leave to file additional documents, it did not show the documents it wanted to produce to enable the court consider their utility at the trial. The trial magistrate did not give consideration to the fact that it was necessary to consider the nature, tenor and effect of the proposed documents. Further, there was need to consider the nature of the proposed documents vis-a vis the defence advanced by the respondent. All these considerations being weighed against the fact that leave to produce further documents was being sought very late in the proceedings and was clearly an ambush. The mere fact that the parties had a right to examine and cross-examine each other could not overcome the prejudice caused by allowing the respondent to produce an indeterminate number of documents, which were never alluded to, after the close of the plaintiff's case and after the principal defence witness had been cross-examined.

12. For the reasons I have set out, I find and hold that the trial magistrate erred in granting leave to the respondent to produce indeterminate documents at this late stage of the proceedings that would fundamentally alter the course of the trial and substantially prejudice the appellant.

13. I allow the appeal, set aside the ruling and order of the trial magistrate dated 25th August 2017 and substitute it with an order dismissing the application.

14. The appellant shall have costs of the appeal which I assess at **Kshs. 30,000/-**.

DATED and DELIVERED at KISUMU this 25th day of January 2018.

D.S. MAJANJA

JUDGE

Mr Onyango instructed by P. D. Onyango and Company Advocates for the appellant.

Mr Omollo instructed by Amuga and Company Advocates for the respondent.