



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
CIVIL APPEAL NO. 293 OF 2011

ANDY FORWARDERS SERVICES LIMITED.....PLAINTIFF

VERSUS

GALLAGHER POWER FENCING (.E.) LIMITED.....RESPONDENT

**(Being an appeal from the Ruling and Order of Honourable Principal Magistrate L. Arika (Mrs.)
Delivered on the 3rd June 2011 at the Chief Magistrate's Courts, Milimani Commercial Courts
Nairobi)**

JUDGMENT

1. On 17th July, 2002, the Applicant (Plaintiff in the Lower Court) filed suit against the Respondent (Defendant) claiming the sum of Ksh.79,738.30 plus interest and costs. The said sum is stated to be the outstanding balance for services rendered when at the Defendant's request the Plaintiff cleared goods from the port of Mombasa and delivered the same to the Defendant in Nairobi. The claim was denied. In the alternative the Defendant stated that the Plaintiff overcharged the Defendant. The particulars of overcharging were given in the defence. A reply to the defence was filed.

2. PW1 Peter Wambua Muthoka testified on the Plaintiff's side. The Plaintiff's case was then closed. On the day the case was set for the hearing of the defence case, learned counsel for the defendant applied for the recalling of the Plaintiff's witness for purposes of further cross examination. The application was objected to. The trial magistrate made orders that a formal application be filed.

3. In the meantime the trial magistrate left the station. The learned counsel for the Defendant applied before the succeeding magistrate for the case do start *de novo*. The court was informed of the pending application seeking orders that the Plaintiff be recalled for further cross-examination. The application for the case to start *de novo* was opposed to by the learned counsel for the Plaintiff. The court proceeded to hear the formal application dated 18th December, 2006 and delivered the ruling dated 3rd June, 2011. The trial magistrate allowed the application and ordered that PW1 be recalled for further cross-examination. The trial magistrate further directed that the matter being part-heard, the proceedings to be typed and the matter to be fixed for directions. This ruling is what triggered this appeal.

4. The grounds of appeal are as follows:

“1. THAT the learned magistrate erred in law and in fact in allowing the Respondent's

Notice of Motion application dated 18th December, 2006, to recall the Appellant's witness Mr. Peter Wambua Muthoka for further Cross-Examination.

2. THAT the learned magistrate misdirected herself in law and in fact in failing to appreciate that jurisdiction to permit a witness to be recalled for *inter alia*, cross examination as provided for under Section 146(4) of the Evidence Act Cap 80 Laws of Kenya was discretionary and the same ought to be exercised judiciously.

3. That the learned magistrate erred and misdirected herself in law and in fact in failing to appreciate that jurisdiction under O XVII rule 12 (of the repealed Civil Procedure Rules) was for the court to recall a witness who had been examined, for its own questioning as it thought fit, which was not the case herein.

4. THAT the learned magistrate erred and misdirected herself in law and in fact in failing to appreciate that import of Section 67 and 65 of the Evidence Act Cap 80 Laws of Kenya regarding proof of documents, to the detriment of the Appellant.

5. THAT the learned magistrate erred and misdirected herself in law and in fact in failing to appreciate the import of Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya conferring upon her inherent powers to ensure ends of justice and prevent abuse of the court process.

6. THAT the learned magistrate erred in law and in fact in disregarding the Appellant's replying affidavit as well as submissions by the Appellant's counsel on the Respondent's Notice of Motion Application dated 18th December 2006.

7. THAT the learned magistrate erred in fact in failing to acknowledge the fact that the Respondents sought to have the Appellant's witness Mr. Peter Wambua Muthoka recalled for further cross examination, on materials and/or information directly connected with documents and/or evidence produced by him during the hearing.

8. THAT the learned magistrate erred in fact in allowing the application to recall the Appellant's witness for further cross examination on unfounded allegations that the Respondent's counsel could not cross examine in relation to the alleged material as he had not been duly instructed by the Respondent, to the detriment of the Appellant.

9. THAT the learned magistrate erred in fact in failing to appreciate the fact that the Respondents had not disclosed in their Notice of motion application dated 18th December, 2006, the alleged "fresh material/information" that they had subsequently discovered long after the Appellant's witness had been stepped down, and its bearing to their Defence so as to warrant recall of the Appellant's witness.

10. THAT the learned magistrate erred in fact in failing to appreciate the fact that the Respondents and their learned counsel, having been served with the Appellant's documents long before the trial, had ample opportunity to peruse the documents before the trial.

11. THAT the learned magistrate erred in law and in fact in failing to appreciate the fact that the issues raised by the Respondents in paragraphs 6,7 and 8 of the supporting Affidavit to their application, concerning the Appellant's "non compliance with the initial agreement, inflation and duplication of invoices and non production of receipts from Kenya Ports Authority" were issues that ought to have been pleaded by the Respondent's in their statement of defence, and proved by evidence during the hearing of their defence case.

12. THAT the learned magistrate erred in law and in fact in failing to appreciate the fact that allowing the Respondents to recall Appellant's witness in the circumstances, will in effect be allowing the Respondents to improve on their Cross examination and amend their Statement

of Defence, which in turn will set a wrong precedent, of litigating in instalments.

13. THAT the learned magistrate erred in law and in fact in failing to appreciate the fact that the Appellant had already closed their case on 21st October 2006, and the Respondent will have an opportunity to advance their case at the hearing.”

5. The Appellant prayed for the appeal to be allowed and the ruling and the orders of the lower court delivered on the 3rd June, 2011 be set aside and/or varied.

6. During the hearing of the appeal the parties opted to proceed by way of written submissions. I have considered the said submissions. In the said submissions, both parties have narrowed the issues to whether the Appellants witness, Peter Wambua Muthoka should be recalled for further cross examination and whether the lower court exercised it's discretion judiciously.

7. The application to have PW1 Peter Wambua Muthoka recalled for purposes of further cross examination was brought under order XVII rule 2 Civil Procedure Rules and Section 3A Civil Procedure Act Cap 21 Laws of Kenya and Section 146 (4) of the Evidence Act Cap 80 Laws of Kenya. The application was premised on the grounds stated in the body of the application and was supported by the affidavit of Steven Wragg, the managing director of the Defendant company. Essentially, the Defendant's claim was that the language and terms used by PW1 in respect of the invoices in question were not fully understood by him. That after seeking advice from a clearing agent in order to understand the language and terms used, it dawned on him that the invoices were inflated and some charges had been duplicated by use of different terminologies which meant the same thing.

8. The application was opposed. One Peter W Muthoka in his replying affidavit deponed that the words that were not understood by the Defendant have not been pointed out. It was further averred that the Defendant did not state how the words in question had any bearing on the defence case. It was alleged that the Defendant was trying to amend its defence by way of affidavit. That the Defendant had possession of the documents in question for over four (4) years and therefore had ample opportunity to adduce whatever evidence they deemed necessary. It was further stated that the defence failed to particularize the purported duplication or un-receipted payments. The Plaintiff's side expressed their concern over the delay in the hearing of the case and stated that further delay would prejudice the Plaintiff's case. The court was urged to dismiss the application with costs as the same was unworthy of the exercise of the court's discretion in the Defendant's favour.

9. Section 146 of the Evidence Act Cap 80 Laws of Kenya provides for the order and directions of examination of witnesses. Section 146 (4) states as follows:

“The court may in all cases permit a witness to be recalled either for further examination-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.”

10. Order 18 rule 10 and 11 of the Civil Procedure Rules as follows:

“ 10. 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.

11. The court may at any stage of a suit inspect any property or thing concerning which any question may arise.”

11. The foregoing provisions of the law clearly provide for the recalling of a witness. The big question is whether the lower court properly exercised it's discretion in the circumstances of this case. The parties herein exchanged documents way back before the hearing date. The Defendant therefore had all the necessary documents in its possession and had ample time to prepare for their case. However, the Defendant's application for the recalling of the witness was not only based on the documents but was also

in respect of the language and terminologies used by the witness during his evidence in chief.

12. My understanding of the Defendant's application is that he wished to further cross examination the Plaintiff's witness. Indeed the main prayer in the application seeks to have the Plaintiff's witness recalled for further cross examination. There is no prayer for new documents to be introduced. In the affidavit in support the Defendant has identified in paragraph 7 the areas of the intended further cross examination i.e. regarding the allegedly duplicated charges and/or the substantial but un-receipted payments allegedly made to Kenya Ports Authority. There is no ambush since the case revolves around documents which are already before the court. Production of documents in line with Section 65 and 67 of the Evidence Act does not disentitle the Defendant of the right of cross examination to test the veracity of the evidence. No prejudice will be suffered by the Plaintiff since the Plaintiff will have a chance to re-examine the witness in question.

13. On the question of the delay that may be occasioned to the case through the re-calling of the Plaintiff's witness for further cross-examination, it is observed that the Defendant is exercising its rights to a fair trial. The Plaintiff similarly exercised its rights by making an application for summary judgment and thereafter exercised its right of appeal which has delayed the hearing of the case for more than five years. It is also noted that the case is part-heard and the succeeding magistrate is yet to give directions on the way forward, which could possibly end up with the re-opening of the case.

14. With the foregoing and taking into account that Article 159 of the Constitution enjoins the court to administer justice without undue regard to technicalities of procedure, I find no merits in the appeal. The appeal is dismissed with costs. The file to be returned to the lower court for hearing on a priority basis.

Dated, signed and delivered at Nairobi this 23rd day of Feb.,2017

B.THURANIRA JADEN

JUDGE