REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.16 OF 2016

BETWEEN

MOMBASA CAR IMPORTERS LTD ..... APPELLANT

AND

KENNEDY OBUYA MBORI .....1ST RESPONDENT

JOHN NGUNJIRI MUTHEE

t/a TANGO AUCTIONEERS .....2ND RESPONDENT

(Being an appeal from the ruling/order by J.P. Nandi (RM)

in Oyugis PMCC No.91 of 2011)

JUDGMENT

1. The 1st respondent had filed a suit against the appellant and the 2nd respondent at **Oyugis** and the matter had proceeded to hearing and conclusion of the 1st respondent (then plaintiff) case. When the defence case was to commence, the appellant applied to be allowed to call a witness named **SAMUEL KAMAU GITAU** who was not initially listed as a defence witness, and whose statement had not been recorded and served on the respondents. The appellant wished that the witness substitutes another witness named **JOHN MUTHEE NGUNJIRI**.

2. The request was rejected by the trial court on grounds that all the parties had been given directions to file all sets of documents within 14 days from 10th February 2016 but the appellant disregarded this order. Further that the respondent's case had been heard and closed, so the introduction of the additional list of witness, witness statements and documents, was being made too late in the day and would occasion prejudice. It was also pointed out that introduction of the documents at that stage of the trial amounted to litigation by ambush; and the appellant had not offered any reason for the late filing of those documents.

3. This refusal by the trial court is termed as erroneous and biased as it amounts to denying the appellant the constitutional right to access to justice, and the right to a fair hearing.

4. The appellant urges this court to allow the appeal and order the trial magistrate to allow the named **SAMUEL KAMAU GITAU** to testify.

5. The appeal was canvassed by written submissions.

6. The 1st respondent's counsel submitted that the appellant has been using delaying tactics in the matter all along as initially even after being served with the pleadings and summonses the appellant and the 2nd respondent did not file any defences. The matter was heard exparte and judgment entered in the 1st respondent's favour on 28th February 2012. Eventually the appellant successfully applied for setting aside of the judgment on 6th September, 2012.

7. The appellant thereafter entered appearance and filed a statement of defence. The matter was then set for hearing on 11th March 2014, when the appellant's counsel failed to attend court and the matter proceeded ***exparte***, and once again an ***exparte*** judgment was entered on 25th March 2014. The appellant once again sought to have the ***exparte*** judgment set aside but the application was dismissed on 5th November, 2014.

8. The appellant thereafter lodged an appeal vide **Homa Bay HCCA No.18 of 2014** which set aside the ***exparte*** judgment, but the decision set timelines within which the original suit was to be heard and determined.

9. When the matter reverted to the trial court for hearing, the trial court gave directions for expeditious disposal of the suit on 10th February 2016 that the appellant was to file supplementary documents and list on or before 10th March 2016 documents if any, and indeed the appellant filed a further list of witnesses, witness statements, and statement of agreed issues on 29th March, 2016.

10. The hearing commenced and the 1st respondent closed its case on 30th March 2016. However when the hearing resumed on 25th May 2016, the appellant introduced a supplementary list of witnesses, and a witness statement it sought to rely on at the defence hearing.

11. **What are the circumstances necessitating introduction of the witness at this stage? Did the trial magistrate misdirect himself?**

In opposing this appeal counsel submitted that the respondent would be exposed to undue prejudiced as the appellant would be allowed to bring on board new evidence which the 1st respondent would not have a chance to respond to in his cross examination. Further that in any event the appellant had been given ample opportunity to complete all the preliminaries, and the move was simply litigation by ambush calculated to prejudice the 1st respondent. Counsel urged the court to pay heed to the provisions of **Section 1A** and **1B** of the **Civil Procedure Act**, and the decision in **JOHANA KIPKEMEI TOO –VS- HELLEN TUM [2014] eKLR** where the High Court dealt with a similar situation and find that the trial magistrate properly exercised his discretion in declining the request.

12. **Order 3 Rule 2** the **Civil Procedure Rules 2010** requires that parties furnish their evidence in advance before the commencement of the trial. These include witnesses' statements and documents. Further **Order 11** has a proviso for written statements being filed with the leave of the court at least 15 days prior to the Pre-Trial conference. The objective for these provisions is to make clear to the adverse party the nature of the evidence he/she will meet at the trial. I get the impression that the appellant simply got a brainwave after hearing the evidence presented by the 1st respondent and decided to now introduce another witness. It is not so much a question of whether the witness was present, ready and willing to testify – it is more a question of balancing the case and what prejudice will be occasioned, upon the introduction of additional evidence which the 1st respondent did not have when he testified and was cross examined.

13. **Did the trial magistrate misdirect himself?** I am minded of the observation made in the case of **CHEMWOLO & ANOTHER –VS- KUBENDE (1996) KLR PG 492-502** that an appellate court will not interfere with the discretion of a trial court unless it is satisfied that there was misdirection in some matter which resulted in a wrong decision or it is manifestly clear that the trial court wrongly exercised its discretion that has resulted in a miscarriage of justice.

14. **Denial of access to justice and right to a fair trial:** How far can fairness get? The right to a fair trial as envisaged under **Article 50** of the **Constitution of Kenya** requires that **EVERY** party to a trial gets fairly treated. From the history of this matter the appellant has been acting like a petulant child who must have his way at every turn. The court had in the past indulged the appellant and it seems to thrive in taking too many bites at the same cherry – that cannot be fair at all. This is an old matter, where the High Court had earlier on given timelines.

15. The appellant after hearing the evidence presented by the 1st respondent and testing it on cross-examination suddenly realized it needed to fill in certain loopholes by introducing a different witness. This in my view is not only litigation by ambush, but also a way of allowing the appellant to do some patch-work to its case as the trial progresses. It will not be a fair trial to allow a party to hide the evidence it intended to rely on, and then spring it out at the last moment in utter surprise to the other party midstream. The 1st respondent has closed its case and will have no chance to rebut the new evidence sought to be introduced by the substitute. I find no reason whatsoever to interfere with the trial magistrate's discretion as to do so will not be in the interest of justice. Consequently the appeal had no merit and is dismissed with costs to the respondents.

Delivered and dated this 17th day of August, 2017 at Homa Bay

H.A. OMONDI

JUDGE