**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 19 OF 2010**

**HOMALIME COMPANY LTD.....APPELLANT**

**VERSUS**

**WILSON OTIENO OKOKO.....RESPONDENT**

**J U D G M E N T**

The respondent filed this suit against the appellant claiming general and special damages pursuant to an industrial accident on 23-11-2001. The suit proceeded to the extent that the respondent closed his case.

When the same came up for hearing of the appellant's case the appellant's witness DW1 did not conclude his evidence in chief since in the cause of testifying an issue arose regarding a contractual document between the appellant and one Caleb Sitima. The trial court sustained an objection by the respondent to the reference and production of the said exhibit by the appellant.

The court after denying the appellant to produce or to rely on the said document ordered the appellant to make a formal application to amend the defence. The appellant did make the said application but the same was rejected hence this appeal.

The appellant has filed a Memorandum of Appeal citing 7 grounds. The substance of those grounds are that the trial court failed to appreciate the grounds for granting leave to a party to amend the pleadings and it further attached the ruling dated 26-3-2009 when the appellant had been denied the opportunity to refer to the contractual document alluded above.

The issue between the parties herein revolves around the ruling made on 26-3-2009 and that of 21-1-2010. From the proceedings it appears that the ruling of 26-3-2009 arose spontaneously pursuant to an oral objection by the respondent to the production of the contract document. The court, beside agreeing with the respondent herein went further to adduce as follows:

> **“Nishi: I apply for leave to amend my defence.**
>
> **Mboya: I oppose the application.**
>
> **Court: the defence to make a formal application”.**

As earlier indicated the court refused the said amendment and stated thus:

> **“I am alive to the fact that amendment can be done at anytime before judgment. However, in view of the circumstances of this case and my ruling dated 26-3-2009. I am reluctant to allow this application. I do therefore dismiss the application dated 7-10-2009 with costs”.**

I have perused the parties written submissions herein as well as their respective authorities. There is no dispute that ordinarily amendments to the pleadings can generally be undertaken at anytime for the ends of justice to be met.

The amendment which was being referred to by the appellant relates to the issue as to whether the appellant had contracted one Caleb Sitima who in turn employed the respondent. The trial court found this argument to be belated as the respondent was not going to have a chance to cross examine since he had closed his case.

On perusal however it is evidently clear from the proceedings of 23-11-2005 that the respondent was cross examined on this issue. In some part the respondent stated:

> **"I knew Kaleb Temba Sitima as we were working with him. He is the one who was in charge of that area. He was our boss. He was at the factory, down where we were working. He was a contractor. He was a contractor with Homalime. It is true he was contracted to do all that work of bringing logs. He used to look for casuals to do for him jobs. I am not cheating....."**

From the above portion of the cross examination proceedings there is no doubt that the said Caleb Sitima was to be an integral part of the proceedings. The court nonetheless refused a production of a contract documents between Mr. Sitima and the appellant. Reading the proceedings of that the lower court in my opinion, by allowing the appellant to make a formal application for amendment moreless did not anticipate that an earlier ruling on objection would be taken seriously by the appellant. My understanding is that the substantive formal application would enable the parties to re-evaluate their issues clearly and which it actually did. Although the application was made late counsel for the appellant clearly explained the predicament that led to the delay in making the formal application, namely continual sickness of her mother which necessitated counsel to travel out of the country twice that year. This explanation was plausible enough as there were sufficient documentary proof of the same.

The trial court by refusing to engage itself on the substantive application for the reasons that it had made a decision on 26-3-2009 was erroneous.

Further, the appellant in the defence had clearly denied that the respondent was its employee and the production or reference to the document was therefore necessary.

Of course this suit has been inordinately delayed. From the proceedings so far it appears that both parties are to blame. Numerous adjournments have been caused by both parties. At some point the respondent proceeded without formally serving the appellant which resulted to the case being closed and judgment given which was later set aside.

The case of **United India Insurance Co. Ltd -VS- E.A Underwriters (Kenya) Ltd 1985 KLR 898** clearly spelt out when to interfere with the court's decision. These include when Judge:

a. **Misdirected himself in law.**
b. **Misapprehended the facts.**
c. **Took account of considerations of which he should not have taken account.**
d. **Failed to take account of considerations of which he should have taken into account.**
e. **His decision, albeit a discretionary one, is plainly wrong".**

The trial court misapprehended the facts. The issue of Caleb Sitima was well within the proceedings and he should have in any event allowed the amendments to the defence. Equally, the ruling of 26-3-2009 essentially paved way for the appellant to make a formal application which in essence he should have proceeded to make a substantive decision over the same on merit and not to avoid it by virtue of the earlier ruling of 26-3-2009.

Consequently, I do find this appeal meritorious and so as to expedite the finalisation of this suit its

directed that:

a. **The ruling of 21-1-2010 is hereby set aside.**
b. **The appellant is granted leave to amend its defence and serve the same within 14 days from the date herein and the respondent shall have the liberty of responding within 14 days after service.**
c. **Costs in the cause.**

**Dated, signed and delivered at Kisumu this 27th day of March, 2014.**

**H.K. CHEMITEI**
**JUDGE**