



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO.61 OF 1996

KIBUGU FARMERS CO-OP. SOCIETY.....PLAINTIFF

VERSUS

PHILIP MUNGAI

T/A MUNGAI ELECTRICAL VENTURES.....DEFENDANT

RULING

In this matter only two witnesses have testified. The Plaintiff called one witness and so did the Defendant. The evidence of the Plaintiff's witness was taken by Justice Khaminwa while I took that of the Defendant's witness. After the defence closed its case Counsel for the Plaintiff Mr. Njage applied to have the Plaintiff's witness recalled to produce exhibits. He said it was an oversight that the said witness did not produce the documents referred to as exhibits. Mr. Okwaro objected to this saying such action would prejudice the Defendant.

Due to many typing errors in the proceedings I directed that the same be proofread and if need be they were to be retyped. Both Counsels confirmed to me on 23/7/2014 that they had gone through the proceedings and that they are correct. I too have read through both the handwritten and typed proceedings. I have discovered that there are sentences in the handwritten proceedings which are quite disjointed. I can't correct them because they were done by another Judicial officer who is not myself.

The record reveals that PW1 referred to a number of extracts from documents which were not marked nor produced by him. It is not clear why they were not marked because they were severally referred to. PW1 has cross-examined on these documents. Order 18 rule 10 Civil Procedure Rules provides;

“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”.

Section 146(4) of the Evidence Act provides;

“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”.

These two provisions of the law satisfy me that the court has the discretion to recall a witness. Section 3A Civil Procedure Act provides;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such

orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

It is true the Plaintiff had closed its case. It does not seek to introduce any new matters. All it seeks is to have PW1 recalled to produce documents he relied on and referred to in his evidence in chief. He was cross examined on his evidence and the documents. I do not see any prejudice that the Defendant will suffer. Under section 1B(1) Civil Procedure Act one of the aims to be attained in furthering the overriding objective of the said Act is the just determination of the proceedings under the said Act. What would lead to a just determination of a matter is the availing of as much evidence as possible to the court. In the present scenario I find the Plaintiff’s application to be merited and I allow it. The Plaintiff’s witness (PW1) will produce the documents he referred to and the Defendant will be at liberty to cross examine him.

The registry will list the suit for hearing in the 1st Civil week of the new term.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 1ST DAY OF AUGUST 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Abubakar for Njage for Plaintiff

Mr. Ithiga for Okwaro for Defendant

Parties

Njue/Kirong – C/c