



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU**

**Civil Appeal 11 of 2005**

**MAKEMBO KIRERU.....APPELLANT**

**VERSUS**

**GODFREY KIBUI MAKEMBO.....SUBSTITUTING PARTY**

**BALELIO K. GICHURA.....RESPONDENT**

**JUDGMENT**

The appellant has filed 4 grounds of appeal against the Judgment of SPM Meru dated 19/3/2003 in Chief Magistrate Civil Case No. 531/91.

The first ground is that the learned Trial Magistrate erred in law and fact by allowing the respondent to amend his plaint when he had already closed his case.

The 2<sup>nd</sup> ground is that the learned Trial Magistrate misdirected himself in ruling that the case be heard de novo after the appellant and respondent had already testified.

The 3<sup>rd</sup> ground is that the learned trial Magistrate failed to consider that the respondent has intimated to the court that he would not be calling any witnesses yet after the court ruled that the same may be heard de novo he was allowed to call witnesses which procedure was wrong.

The 4<sup>th</sup> ground is that the learned Trial Magistrate erred in failing to give the defendant a chance to engage another advocate in spite of the fact that the advocate who was conducting the case there before had died.

Regarding the 1<sup>st</sup> ground the court has power to allow amendment of pleading at any stage before Judgment is delivered. From the record in this case the leave to amend was granted by court on 23/7/2002 when the respondent was in court and he informed the court "I leave the matter to court" and the court proceeded to order that "in the absence of any opposition the same is allowed and leave granted as prayed". Respondent be at liberty to amend defence within 14 days. Therefore I find no merit in that ground. Again ground No. 2 the record shows that on 3/3/2003 the order reads "by consent suit be heard de novo" the plaintiff and defendant was present. Mr. Mwenda was for the plaintiff and defendant was in person. The order was by consent suit be heard de novo. It is to be noted that the law allows parties to obtain orders by consent and unless in special circumstances consent orders are binding on both parties.

I therefore find nothing wrong with the order made by the trial court and I find no merit in ground 2 of the appeal.

On ground 3 the complaint is that the respondent was allowed to call witnesses when the case started de novo. It is to be noted here that once an order for hearing a case de novo is made all previous proceedings are set aside and the parties are enabled to start their cases afresh. There is no bidding order against a party changing his mind on how he wishes to proceed with his case. I therefore do not find that the procedure was wrong and I find that Respondent was entitled to call witnesses as he did in the new trial. With respect to ground 4 a party is entitled to engage and advocate at any state. The record shows on 29/10/2001 the matter was in court and defendant was in person. He mentioned "I will also get another advocate" and he asked for another date. The matter was adjourned and I do not see the record alleged that the court denied the plaintiff to engage another advocate.

I therefore find that the grounds of appeal filed are not justified and the appeal has no merit.

The same is hereby dismissed with costs to the Respondent.

Dated this 28<sup>th</sup> January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**28/1/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Nthiga**

Judgment read in open court.

**J. N. KHAMINWA**

**JUDGE**