**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Suit 108 of 2001**

**JANE WANJIKU MBUGUA (Suing as the legal representative of the Estate of JOHN MBUGUA KINYANJUI (Deceased)…….....…..……**
**PLAINTIFF**

**-VERSUS-**

**JOSEPHINE MUMBI NGUGI…….....……...1ST**
**DEFENDANT**

**PETER OMONDI…….....……2ND**
**DEFENDANT**

**LAKE FLOWERS LTD. …….....……3RD**
**DEFENDANT**

**RULING**

On 26th September, 2005 the second and third defendants filed an application by way of a **Notice of Motion** brought under Order **XVII Rule 12** of the **Civil Procedure Rules** seeking to have a witness who had testified, Mr. Geoffrey Gichuhi recalled for re-examination on the evidence that he had given. The application was made on the ground that Mr. Gichuhi (hereinafter referred to as "**the witness"**) withheld vital information and that his evidence misrepresented the facts relating to the accident which was the subject matter of the suit herein. It was further stated that the witness was the Plaintiff in Nakuru Chief Magistrate's Civil case No.2435 of 2000, Geoffrey G. Ndungu vs. Lake Flowers Co. Ltd. and Others, and the evidence adduced by him in the said suit was different from the evidence given by him herein. It was also alleged that the witness gave a statement to Sauti Security and Investigation Services who had been instructed to investigate the accident by Tausi Assurance Company Limited which statement is different from the evidence given by him in this case. The affidavit in support of the said application was sworn by Mr. Mahida, Advocate for the applicants.

The Plaintiff through his advocate, Mr. Kiburi, opposed the said application and relied on grounds of opposition filed on 4th October, 2005. The grounds of opposition were **inter alia** that:

(a) the application was misconceived, incompetent and bad in law as it was only the court on its own motion that could re-call a witness.

(b) the application was incurably defective and did not meet the conditions precedent for recalling a witness.

(c) the affidavit in support of the application was sworn by an advocate based on matters which were not within his personal knowledge.

In support of the application and further to the stated grounds pursuant to which the application was made, Mr. Mahida referred to the copy of the plaint that had been filed by the witness in Nakuru C.M.C.C. NO.2435 of 2000 and the statement which he had allegedly given to Sauti Security and Investigation Services. The copy of the statement was unsigned. Both documents were annexed to Mr. Mahida's affidavit. The source of the said statement was not disclosed.

In his submissions, Mr. Kiburi stated that only the court was mandated to recall a witness and put to him such questions as it deemed fit. He further submitted that the witness had testified and had been subjected to cross-examination by Mr. Ntabo advocate who was working for Mr. Mahida and Mr. Ntabo had all the information which he would have required to enable him conduct the cross examination. According to Mr. Kiburi, the application was an attempt by the applicants to get a second bite at the cherry. He sought to rely on a Court of Appeal decision in **FERNANDES VS NORONHA [1969] E.A. 506** where it was held that the discretion to recall a witness for further examination or cross-examination should be exercised in exceptional cases and only where an injustice would otherwise occur.

Mr. Kiburi further submitted that since the defence case was yet to be heard, the investigator who took the alleged statement from the witness could be called to testify and produce the same and with regard to the suit which the witness was said to have filed, the court record could be produced as an exhibit.

Order XVII rule 12 of the Civil Procedure Rules provides as follows:

"***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."*

The application before me is premised on the aforesaid rule. My understanding of the above quoted rule is that it empowers a judge or I am alive to the provisions of **section 146 (4**) of the **Evidence Act** Cap 80 Laws of Kenya which states as follows:

"***(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief of for further cross-examination, and if it does so, the parties have the right to further cross-examination and re-examination respectively."***

This provision of the Evidence Act is, in my view, the relevant one for the kind of application as under consideration herein but as was stated by Sir Charles Newbold in **FERNANDES VS NORONHA** (Supra) it is a provision which in civil cases should be exercised only in most exceptional circumstances. A court has to be satisfied that the further evidence is likely to have material effect on the case and that there is good reason why such evidence was not given in the first instance.

Mr. Mahida conceded that Mr. Ntabo had all the facts that were relevant when he was cross-examining the witness now sought to be re-called. If that was the case, then he should have cross-examined the witness exhaustively. Even if he did not have any of the relevant files or other material that was in existence at the time, such files or materials could, with exercise of due diligence have been availed to Mr. Ntabo. Perhaps Mr. Ntabo's approach to the matter was different from that of Mr. Mahida, and that is not unusual, different advocates have different approaches and styles in handling cases but Mr. Ntabo was not in any way prevented or limited by any material factor in the conduct of his cross-examination of the witness.

I also agree with Mr. Kiburi that Mr. Mahida deponed to contested matters when he had no personal

knowledge of the same. This was with regard to the alleged statement of the witness given to the accident Investigators. Mr. Mahida did not state the source of such statement or how he came by it. He did not state that it was given to him either by Tausi Assurance Company Limited or Sauti Security and Investigation Services. The copy of the statement is unsigned. The affidavit was not in conformity with the provisions of **Order XVIII rule 3.**

In conclusion, I find that the application was not only brought under inapplicable provisions of the law and thus procedurally incompetent but was also unmerited as there existed no exceptional circumstances under which a competent application for recall of a witness could be allowed. I dismiss the same with costs to the plaintiff.

DATED, SIGNED AND DELIVERED at NAKURU this 8th day of March, 2006

D. MUSINGA

JUDGE