



REPUBLIC OF KENYA



**KENYA LAW**  
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**Obunga & another v AK (Minor Suing though his Mother and Next Friend RCT  
(Civil Appeal 37 of 2021) [2023] KEHC 3326 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL 37 OF 2021  
RN NYAKUNDI, J  
MARCH 24, 2023**

**BETWEEN**

**ERNEST KAFERA OBUNGA ..... 1<sup>ST</sup> APPELLANT**

**INGATIOUS SHIKOLI MBAKAYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AK (MINOR SUING THOUGH HIS MOTHER AND NEXT FRIEND  
RCT ..... RESPONDENT**

**JUDGMENT**

1. The appeal arises from the ruling of Honourable Jacinta A Orwa delivered on February 3, 2020 in the Kapsabet SPMCC No 26 of 2016. When the matter came up for hearing on February 3, 2020 the Plaintiff made an oral application to have a statement by one Lilian Cheruto dated October 21, 2018 to be admitted on record and be deemed as duly filed. The trial Court directed that the documents be deemed as duly filed and admitted on record. The appellants being dissatisfied with the decision of the trial court instituted the present appeal vide a memorandum of appeal dated February 25, 2020 premised on the following grounds;
  1. That the learned trial magistrate erred in law and in fact in admitting the witness statement dated October 21, 2018 on record without leave having been sought before filing the same.
  2. That the learned trial magistrate erred in law and in fact in allowing the alleged eye witness to take the witness stand without a valid witness statement on record.
  3. That the learned trial magistrate erred in law and in fact in failing to appreciate that pleadings had closed at the time the said witness statement was filed mad no leave had been sought or obtained before filing and or putting the witness statement on record.



4. That the learned trial magistrate erred in law and in fact in failing to apply and appreciate the provisions of order 11 of the [Civil Procedure Rules](#) as to compliance.
5. That the learned trial magistrate erred in law and in fact in allowing a document that was not attached to the respondent's initial documents on record without giving the appellant an opportunity to seek instructions on the same hence creating a leeway for possibility of a fictitious eye witness.
6. That the learned trial magistrate erred in law and in fact failing to hold that the late filing of the said eye witness's statement must have been an afterthought and a creation of a witness.

The parties filed submissions on the appeal.

### **Appellant's Case**

2. Learned counsel for the appellant submitted that the trial magistrate erred in admitting the witness statement filed by the Respondent out of time and without leave of Court being sought and obtained since Pleadings had since closed, matter confirmed for hearing and indeed hearing proceeded. That the parties had been given full opportunity to file documents before the matter was fixed for hearing and leave of the Court was necessary before filing any documents outside the timelines provided for in the rules. Counsel contended that the said witness did not have a valid witness statement on record. Despite the Appellants objection, the Court allowed her to adduce evidence in support of the Plaintiffs case. The Trial Magistrate without considering the Appellants right of fair hearing under Article 50 of the [Constitution of Kenya 2010](#) allowed the alleged eye witness to take the stand without a valid Witness Statement on record.
3. Counsel urged that rules of procedure are not for decorative purposes but must be specifically adhered to by any party who seeks Courts intervention in a matter. In submitting he chose to rely on the case of [Alois Oceano D'sumba v Rainikant Narshi Shalt and New Ocean Trading \(K\) Limited](#)[2017]eKLR.
4. The applicant stated that that Order 3 Rule 2 of the [Civil Procedure Rules](#) provide explicitly the documents to accompany a suit. Further, that it is clear that for one to file a witness statement outside time stipulated by law one needs to seek the leave of court before the same is filed. The Respondent's failure to follow the procedure laid down and/or even seek the leave of court before the said document was filed cannot be excused on the ground that this was a procedural technicality. Counsel submitted that compliance with the pre-trial requirements in the Civil Proceedings is governed by the provisions of Order 11 of the [Civil Procedure Rules](#) on case management and conferences. That the trial magistrate failed to abide by the mandatory provisions of Order 11 of the [Civil Procedure Rules](#) and proceeded to make a ruling allowing the alleged eye witness to take a stand without a valid witness statement on record contrary to the law.
5. Counsel urged that the decision of the trial magistrate be set aside and the witness statement be expunged.

### **Respondent's Case**

6. The respondents opposed the appeal, submitting that even after pre-trial conference, the court has the power to allow the parties call further witnesses or produce further documents. Counsel stated that the power is provided for Under Order 18 rule 10 of the [Civil Procedure Rules](#) and Section 146 of the [Evidence Act](#). That the purpose of the two provisions is to ensure that each party is afforded a fair trial as guaranteed under Article 50(1) of the [Constitution](#).



7. The respondent cited the cases of *Raila Odinga & 5 others v IEBC & 3 others*, SCK presidential petitions No 3, 4 and 5 of 2013 [2013] eKLR and *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2019] eKLR and submitted that it is apparent that in determining whether to allow the production of additional evidence, the court needs to consider whether;
  - a) The production of additional evidence will occasion an injustice.
  - b) The nature, context, relevance and extent of the new material.
8. He submitted that even though the intended witness had been listed as a witness to be called at the hearing her statement had inadvertently not been filed. By the time the statement was served upon the defendant, the matter had not been set down for hearing. The matter first proceeded in court on the 5/8/2019 by which time the defendants were aware of the said witness statement. The only misgiving by the plaintiff was that the said witness statement was filed out of time and without leave of the court. Further, that the above shortcomings are curable by the provisions of Article 50 and 159 of the *Constitution* which mandate the court to do substantive justice and frown upon procedural technicalities in order to deliver justice as long as no party suffers prejudice.
9. He urged that the respondent was aware of the plaintiff's intention to call the witness from the inception of the case as the witness had been listed in the list of witnesses. Counsel prayed the court dismiss the application with costs.

### **Analysis & Determination**

#### **The following issues arise for determination;**

1. Whether the decision of the trial magistrate should be set aside

#### **Whether the decision of the trial magistrate should be set aside**

10. The power of the judges to adjudicate over disputes is clothed with discretion. That is what all of them have in common. The language by Justice Marshall the case of *Osborn et al vs The Bank of the United States* r 824 US ) 9 wheat 738 866 “ Judicial power as contra distinguished from the power of the law has no existence, Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and when tht is discerned, it is the duty of the prescribed law, and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effects to the will of the judge: always for the purpose of giving effect to the will of the legislature, or in other words to the will of the law. Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by the rule not by humour, it must not be arbitrary, vague and fanciful but legal and regular”
11. This is the impulse which the court must indulge in to satisfy itself whether the grievance by the Appellant has merit. Whatever justification that may have influenced the learned trial magistrate's decision squarely lies within the scope of discretion. It of course obvious that the *Mbogo* case herein under defines the boundaries upon which an appellate court can interfere with such a discretion.
12. As an appellate court this court's duty was set out in *Mbogo and Another v Shab* [1968]EA 93,96:-
 

“ An Appellate Court will interfere if the exercise of discretion is clearly wrong because the Judge has misdirected himself or acted upon or failed to take into consideration and in doing



so arrived at a wrong conclusion. It is trite law that an Appellate Court should not interfere with discretion of a Judge unless it is satisfied that the Judge in exercising his discretion misdirected himself and has been clearly wrong in the exercise of discretion and that as a result there has been injustice.”

13. I have perused the record of appeal and I find that the impugned witness, Lilian Cheruto, was listed among the witnesses. This lends credence to the claim that the witness statement was inadvertently excluded from the documents filed. Therefore, the appellant was aware of the presence of the witness from the onset of the case. In the case of *CMC Holdings Ltd v James Mumo Nzioki* Civil Appeal No 329 of 2001 [2004] eKLR the Court of Appeal held;

“It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle... the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

14. I am in agreement with the finding of the court in *Chairman, Secretary & Treasurer suing as the officials/on behalf of House of Hope v Wotta – House Limited* [2018] eKLR where it was held;

“ Even after the Pre-trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of Order 18 rule 10 of the Rules and section 146 of the Evidence Act, is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. What these rules must not do is to become an end in themselves and impede a fair trial and that is why Article 159(2) (b) of the Constitution provides that justice shall be administered without undue regard to technicalities. The constitutional imperatives are further supplemented by the overriding objective enacted in sections 1A and 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya).”

15. In the premises, I find that the trial court used its discretion judiciously in allowing the witness statement to be deemed duly filed and allowing said witness statement. The appeal is hereby dismissed with costs to the respondent.

**DELIVERED VIA E-MAIL DATED AND SIGNED AT ELDORET ON THIS 24<sup>TH</sup> DAY OF MARCH 2023**

.....

**R.NYAKUNDI**

**JUDGE**

**Coram:** Before Hon. Justice R. Nyakundi

Nyairo & Co. Advocates for the Appellants

Daisy Chepkurui & Co. Advocates for the Respondent

