



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 309 OF 2013

UNIVERSITY OF NAIROBI.....PLAINTIFF

- VERSUS -

N.K. BROTHERS LIMITED.....DEFENDANT

RULING

1. The trial of this case was concluded on **16th April 2018**, when the court ordered parties to file and serve each other with their final submissions.

2. The plaintiff has filed a notice of motion dated **22nd June 2018** brought under Article 50 (1) and Article 159 (2) (d) of the constitution, Section 3A of the Civil Procedure Act Cap 21 and Section 146 of the Evidence Act Cap 80. The plaintiff by that application seeks the following prayers:

“(1). That the Applicant be granted leave to recall

Engineer George Muthuuri to produce a certified copy of the Executive Summary of the Pending Bills Closing Committee Report.

(2) That alternatively to prayer 1 above, a certified copy of the Executive Summary of the Pending Bills Closing Committee Report be produced as part of the documents of the Plaintiff.”

3. What the plaintiff seeks is to have the witness recalled, who was the plaintiff witness no. 2 (PW2) to produce certified copy of the documents entitled **‘Executive Summary of the Pending Bills Closing Committee Report’** herein after referred to as the certified document. That document was part of the plaintiff’s bundle of documents which was produced during trial but the copy that was produced was not certified. The plaintiff’s prayer is to recall PW2 to produce the same document as the one produced during the trial but this time to produce the one which is certified.

4. Learned counsel for the plaintiff **Ms Kethi Kilonzo** submitted that the plaintiff will suffer prejudice if it is not permitted to call PW2 to have him produce a certified copy of the document. Learned counsel submitted further that the uncertified document, similar to the certified one, was in the plaintiff’s bundle of documents at pre-trial and the defendant did not object to its production. Further that no prejudice would be suffered by the defendant if PW2 is recalled to produce the certified document. That it was due to the defence cross examination of PW2 which led to doubt of the authenticity of the document produced and out of abundance of caution, the plaintiff decided to have certified copy of that document to be produced.

5. The defendant opposed the recalling of PW2 and the production of the certified document through its learned counsel **Mr Were**. **Mr Were** submitted that there would be no difference in the production of the certified document since the document had already been produced in evidence; that the plaintiff had not indicated who certified the document; and because this is an old matter and the plaintiff was guilty of latches.

6. I have considered the affidavit evidence and the submissions of parties and I am of the view that the interest of justice require that the plaintiff be granted leave as sought. Section 146 (4) of cap 80 empowers this court to permit witnesses to be recalled either for examination in chief or further cross examination. Although the defendant submitted that this is an old matter that requires to be concluded the fact is that the trial was concluded on **16th April 2018**. Parties were then requested to file their final submissions and attend court on **22nd June 2018**. It is on that date that the plaintiff filed the present application. The plaintiff therefore has not delayed the conclusion of this matter since the application was filed not long after the trial was concluded.

7. It is also pertinent to state that the plaintiff is seeking to produce a document already on record which would be considered by the court

when the court delivers its judgment in this matter. The plaintiff therefore is not producing a document alien to this matter.

8. The plaintiff's learned counsel may have erred in not producing the certified document but that is not a reason for this court not to accede to the plaintiff's application. That was the holding in the case of **Cropper Vs Smith [1884] 26 Ch.D.700 at p 710** where **Bowen L.J.** when considering an amendment said:

“Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and i do not regard such amendment as a matter of favour or of grace.”

9. Accordingly the orders of the court are as follows:

*a. The plaintiff is granted leave to recall **Engineer George Muthuuri (PW2)**, on a date to be given at the reading of this ruling for the purpose of producing the Executive Summary of the Pending Bills Closing Committee Report.*

b. The defendant shall be permitted to cross examine the said PW2.

*c. The defendant is awarded costs of the notice of motion dated **22nd June 2018**.*

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE