



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 317 OF 2014

JACK AND JILL SUPERMARKET.....PLAINTIFF

VERSUS

VIKTAR MAINA NGUNJIRI.....DEFENDANT

R U L I N G

This ruling is in respect of an objection that was raised by the counsel for the Defendant on the 20th September, 2016. On the said date, the matter came up for further hearing when the counsel for the Plaintiff through PW 2 sought to produce a Video C.D. as an exhibit in the case. An objection was taken by the counsel for the Defendant on the basis that he had just been supplied with the said video C.D. which is different from what he had been supplied with earlier on. According to him, the one that he had been supplied with is dated 23rd day of March, 2009, going by the supplementary list and bundle of documents dated the 6th day of February, 2015.

Counsel for the Defendant submitted that, the list of documents does not contain the video C.D. that the witness sought to produce. That according to that list, item No. 2 is a Video C.D. dated 2013 and this cannot be said to be the same as the one dated 25th May, 2015.

On his part and in response to the objection, counsel for the Plaintiff submitted that by inadvertence both the 2009 and 2013 Video C.D.'s were put together and it was clear that the Plaintiff intended to produce the said video C.D. as the court file has a video C.D. of 2013.

It was submitted that the production of the video C.D. was canvassed in court and a ruling has already been made on its production. According to him, the counsel for the Defendant proceeded with the trial with the knowledge that there is a video C.D. of 2013. It is contended that the C.D. provide for the date while the list of documents provide for the year. He averred that, it is not in dispute that the cause of action arose in the year 2013 and the video was taken on the date the cause of action took place and that there is no material distinction between the description provided in the bundle of documents and that provided in the video C.D. and in any event the witness can confirm that it is the C.D. he took on the material day. He submitted that the Defendant would suffer no prejudice if the video C.D. is produced.

According to him, the defence has not taken time to look at the evidence presented before it so that it could claim that they are being misled.

In his reply, the learned counsel for the defendant submitted that the counsel for the Plaintiff is blaming the Defendant for not having perused the documents beforehand yet it is his case and whoever alleges must prove. That the video C.D. that he was served with is the basis of proceedings between the Plaintiff herein and other parties who are tenants to the same premises. According to him though he raised an

objection on the production of the C.D. and the court made a finding, the C.D. being produced is dated 2013 and it does not indicate what particular month of the year the C.D. relates to but it was simply submitted by the counsel for the Plaintiff that it is dated 2013. That the Defendant should be supplied with the whole evidence in good time as that is his constitutional right.

The court has considered the submissions by the parties herein. AS submitted by the counsel for the Defendant, this court made a ruling on the 24th March, 2016 on an objection to the production of the video C.D. following an objection raised by the counsel for the Defendant. This court, appreciates that the basis of his objection herein is not the same. Counsel for the Plaintiff admitted that by inadvertence both video C.D's were put together and that the C.D. intended to be produced was the one dated 2013. The counsel for the Plaintiff made a mistake by not providing the correct Video C.D. to the Defendant's counsel. In the case of **Belinda Murai & Others Vs Amos Wainaina , [1978] LLR 2782** Madan J.A. (as he then was) described what constitutes a mistake in the following words: -

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule....”

In the case of **Philip Chemowolo & Another -Vs- Augustine Kubede (1982-88) KAR 103 at 1040,** Apalo J. A (as he then was) poised: -

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

This court on being guided by the wisdom of the two Judges in the above two case, do find that the mistake by the counsel for the Plaintiff, is one that can be excused and I do hereby excuse it. It is noted that the witness who is seeking to produce the video C.D. is the one who took the footage and the Defendant will have an opportunity to cross-examine him on the contents of the same and in the circumstances, the Defendant will suffer no prejudice if the video C.D is produced. The objection is hereby dismissed.

Dated, signed and delivered at Nairobi this 10th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **For the Plaintiff**

..... **For the Defendant**