



**Tuko Media Limited v Ngiciri (Civil Appeal E849 of 2021)  
[2024] KEHC 4831 (KLR) (Civ) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4831 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E849 OF 2021**

**DAS MAJANJA, J**

**APRIL 24, 2024**

**BETWEEN**

**TUKO MEDIA LIMITED ..... APPELLANT**

**AND**

**NICHOLUS KAMAU NGICIRI ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon.D. O. Mbeja, PM dated 26th November 2021 at the Nairobi Magistrates Court, Milimani in CMCC No.E3940 of 2020)*

**JUDGMENT**

1. This is an interlocutory appeal from the ruling and order of the Subordinate Court allowing the Respondent's application to recall the plaintiff for further examination in chief and cross-examination for the purpose of producing a USB flash drive of documents which were contained in the Respondent's list of documents dated 05.08.2020. The trial court granted the application on the basis that parties to a suit are entitled to be heard on the documents presented before the court and on record.
2. In its memorandum of appeal dated 24.12.2021, the Appellant complains that the trial magistrate erred in allowing the Respondent to produce more evidence after the closure of his case and more so after extensive cross-examination. That the application was allowed in order to allow the Respondent fill gaps in his case. It further complains that the trial magistrate ignored its submissions and allowed the re-opening of the Respondent's case.
3. I have considered the parties' submissions and I take the following view of the matter. The court has broad discretion to permit the recalling of parties for examination and cross-examination. Section 146 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that, "The court may in all cases permit



a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

4. From the record, the Respondent had called its witnesses, PW 1 and PW 2, who had been examined in chief, cross-examined and re-examined. The Respondent then filed the application to produce the USB drive containing the video clips of the documents subject of the suit. I note that these video clips were already referenced in the list of documents provided by the Respondent but had not been furnished to the Appellant by the time of the hearing.
5. The court is guided by substantive justice and in deciding whether or not to allow a party to be recalled. It must have regard to the nature of the case and the prejudice caused to the other party. Section 146 of the Evidence Act does not limit the circumstances under which the court may recall a witness, what is necessary is for the court to afford the other party the right to cross-examine the witness. In this case, the Respondent had filed the USB drive hence its contents were already known to the Appellant therefore mitigating the element of surprise. Further, the opportunity to recall the witness arose after the Respondent’s witness had testified but before the Appellant’s case. Given that the Appellant would have the opportunity to cross-examine the Respondent on the contents of the videos, I do not think that the Appellant would be unduly prejudiced.
6. I therefore dismiss the appeal. I however order the Respondent to pay the costs of the application before the Subordinate Court as the failure to produce the evidence at the earliest opportunity was its fault.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**D. S. MAJANJA**

**JUDGE**

S. M. Munoko and Company Advocates for the Appellant.

Mungai Kalande and Company Advocates for the Respondent.

