

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
CIVIL APPEAL DIVISION**

MTG/APP/NO.00035/22

BETWEEN

SUZETTE DYER

Appellant

AND

LASHANDA THURSTON

Respondent

Before: The Honorable Madam Justice Carla D. Card-Stubbs

Appearances: E. Raphael Moxey for the Appellant
Mario Gray for the Respondent

Civil - Appeal - Conveyance - Magistrate's Court - Unstamped Conveyance - Whether magistrate erred in allowing unstamped Conveyance into evidence - Section 18 of the Stamp Act - Section 38 (G) and (H) of the Value Added Tax Act, 2019 (as amended) - Transitional Provisions – The operation of stare decisis – Power of court to subpoena/summon witnesses.

Introduction

1. This action concerns an appeal from a judgment of Stipendiary & Circuit Magistrate delivered on 21 September 2022. The learned Magistrate awarded the Respondent/Plaintiff the sum of \$380.00 and made an eviction order requiring the Appellant/Defendant to vacate an apartment on a parcel of land located on Johnson Road on the island of New Providence (“the subject property”).
2. On 25 September 2022 the Appellant filed a Notice of Appeal of the decision of the learned Magistrate on the following grounds:

- a. That the learned Magistrate erred in accepting into evidence, and relied upon, a purported Conveyance which was unstamped and unrecorded and (b) ambiguous in its contents;
- b. That the learned Magistrate failed to subpoena and bring before the Court the maker of the purported conveyance to be examined after a request was made for his attendance; and
- c. Any other ground(s) which arise(s) upon receipt of the ruling and transcript.

Background

3. Pursuant to a Summons filed 1 April 2022, the Respondent/Plaintiff claimed rental arrears in the amount of \$380.00 and an order requiring the Appellant/Defendant to vacate the premises on the subject property.
4. The Appellant denied the assertion that the Respondent was the rightful owner of the property and denied the claim.
5. In order to prove ownership, the Respondent produced and sought to rely upon a Conveyance of the property from the previous owner to herself, which conveyance was dated 30 January 2021.
6. Counsel for the Appellant raised a preliminary objection to the Respondent's use of the conveyance. Counsel objected on the ground that the conveyance which was being used as evidence that the Respondent was the legal owner of the subject property was unstamped and unrecorded and was therefore not to be accepted into evidence. Counsel for the Appellant based his objection on Section 18 of the Stamp Act (Ch.370).
7. The learned magistrate ruled that the Respondent's conveyance could be produced into evidence during trial although it was unstamped. This was on the basis that Section 18 of the Stamp Act had been revoked and was not applicable.
8. The learned magistrate held the following at paragraphs 2 and 3 of his judgment:
On the 27th July, 2022 the court ruled that the plaintiff's conveyance could be pleaded in evidence during a trial even though it was unstamped. In 2019, stamp duty was replaced by the statutory tax regime of Value Added Tax on real property transactions at the previous stamp rates (i.e. 2.5% on transactions below \$100,000 and 10% on transactions above 100,000). The court also relied on a transitional provision in the Value Added Tax (Amendment) Act, 2019 which provides "Any instrument executed before

the commencement of this Act which, by virtue of the provisions of this Act, is an instrument of the supply of real property shall be subject to the provisions of this Act, where the instrument has not been stamped under the provisions of the Stamp Act (Ch. 370)” The conveyance by way of deed of gift between Hubert Thurston to Leshanda Thurston was executed in January 2021 and was not stamped under the provisions of the Stamp Act.

The Court is satisfied that the deed of gift between Hubert Thurston and the Plaintiff is classified under the act as an instrument of supply for real property. As the instrument was unstamped the court is of the view that the conveyance falls under the mentioned provisions of the VAT Act. In the principal act there is no provision which requires the document to be stamped before it may be admissible as evidence in a court. The court is of the view that as there is no mirror [of] s 18 provisions in the VAT Act, the Plaintiff can use the deed of gift as evidence in these proceedings. Accordingly, the Court finds no merit in the preliminary objection raised by the Defendant, it is refused. The trial is to commence.”

9. The Appellant, wishing to test the authenticity of the conveyance, requested that the Court issue a summons to the alleged drafter of the conveyance, Mr. Michael Saunders for the purpose of giving evidence in the matter. Due to inadvertence on the part of the court, this was not done. The Appellant called no other witness.

GROUND OF APPEAL

Ground 1(a)

10. This court must determine whether the learned magistrate erred in admitting an unstamped and unrecorded conveyance into evidence.

Parties' Submissions

Appellant

11. The Appellant argued that that the learned Magistrate failed to take into consideration sections 18 and 19 of the Stamp Act. They submitted that the learned Magistrate allowed for the Respondent an opportunity to have the

document stamped and recorded and to produce same at the next adjourned date. However, the Respondent did not have the document stamped and recorded, such failure said to be due to financial constraints. as such the learned Magistrate ought not to have allowed the document into evidence.

12. The Appellant further submitted that section 38G of the VAT Amendment Act requires that before the conveyance could be entered into evidence it must be stamped and recorded.

Respondent

13. The Respondent argued that there is no dispute that the conveyance was unstamped and unrecorded. However, the Respondent submitted that the VAT Act, as amended, replaced the Stamp Act and was followed by the VAT Amendment Act 2022. The Respondent submitted that the learned Magistrate was correct in that the VAT Act held no provision which required property documents to be stamped and recorded prior to its admittance into evidence.

14. The Respondent argued that the Appellant failed to raise any issues with regards the VAT Amendment Act 2022.

15. The Respondent submitted that at the time that the matter was commenced in the court below, the VAT Amendment Act 2022 had not yet come into force and that the statute could not have a retroactive effect, without clear wording to that effect in the provisions of the statute. The Respondent relied on the case of *Wilson v First County Trust Ltd [2003] UKHL 40* for this point.

Admissibility into evidence of an unstamped document

16. Prior to the entry into force of the Value Added Tax Act ('VAT') 2014, Sections 18 and 19 of the Stamp Act dealt with the admissibility into evidence of an unstamped document. Those sections provide:

18. No instrument which is required by any Act to be stamped shall be pleaded or given in evidence in any court unless the said instrument shall be duly stamped and the stamps thereon cancelled, except as hereinafter provided.

19. (1) Upon the production in evidence in any court or judge's chambers of any instrument required by any Act to be stamped which is not duly stamped and the stamps thereon cancelled, the judge or

presiding magistrate may impose a penalty of five hundred dollars on the person required by any Act to stamp the said instrument and on payment thereof together with the stamp duty, or upon payment of the stamp duty only at the discretion of the judge or presiding magistrate, by such person or by the party producing such instrument the said instrument shall (saving all just exceptions on other grounds) be admissible in evidence. The judge or presiding magistrate may, in his discretion, grant any adjournment necessary for the proper stamping of any instrument.

17. Therefore, pursuant to sections 18 and 19 of the Stamp Act, an unstamped instrument was not admissible into evidence unless its presentation was accompanied (and cured) by the procedure set out in section 19. This procedure involved the imposition of a penalty and payment of the stamp duty (or at the discretion of the judge or magistrate, payment of the stamp duty only). The procedure therein set out sought to cure the omission (i.e. the failure to stamp the document). Only after such a procedure where the consequence was to have pay the stamp duty and have a stamped document, could the document be entered into and received into evidence.
18. The Value Added Tax Act, No. 32 of 2014 (“the principal act”) overtook the regime for the stamping of conveyances and for real property transactions. Since its enactment the principal act has seen several amendments.
19. In two such amendments, VAT Amendment Acts of 2019 and of 2021, transitional provisions were included for instruments that did not comply with the Stamp Act prior to the coming into force of the principal act. Unstamped instruments were captured under the section 27 (2) of the principal act which reads:

27 (2) Any instrument executed before the commencement of this Act which, by virtue of the provisions of this Act, is an instrument for the supply of real property shall be subject to the provisions of this Act where the instrument has not been stamped under the provisions of the Stamp Act (Ch.370).”
20. Before 2022, there was no express provision in the principal act which mirrored Section 18 of the Stamp Act. Therefore, although the VAT Act addressed the imposition of a statutory fee/duty, there was no provision which explicitly addressed the effect of producing an unstamped document in evidence.

21. Effective July 1, 2022 the principal act was amended to include the insertion of Sections 38G and 38J. The relevant amendment provides:

“The principal Act is amended by the insertion, immediately after section 38F of the following new sections –

38G. Unstamped instruments not to be given in evidence.

No instrument required by this Act to be stamped shall be pleaded or given in evidence in any court unless the said instrument shall be duly stamped, except as provided in section 38H.

38H Production in evidence of unstamped instrument.

(1) Upon the production in evidence in any court of any instrument required by this Act to be stamped which is not duly stamped, the judge or presiding magistrate may request the Comptroller’s advice as to the VAT due for the stamping of the instrument.

(2) On payment of the VAT into the court by the party producing such instrument. The said instrument shall be admissible in evidence.

(3) The Registrar, clerk of the court or the presiding magistrate shall, upon payment to him of the VAT due on the instrument give a receipt for the amount of the VAT.

(4) The Comptroller shall, upon the production to him of a receipt under subsection (4), cause the instrument to be stamped in the amount of the VAT paid.

(5) The Registrar, clerk of the court or presiding magistrate, shall, as soon as practicable, pay the said VAT to the Comptroller.

(6) The decision of the Comptroller as to the necessity for stamping of any instrument or as to the amount payable as VAT due thereon shall be final.

(7) No instrument shall in any criminal proceeding be inadmissible in evidence for want of a stamp.”

22. The tenor of the provisions of Sections 38G and 38J of the VAT Act, as amended in 2022, matches the tenor of Sections 18 and 19 of the Stamp Act which previously applied to unstamped conveyances. The law and purpose of the provisions in each case appears clear. No unstamped conveyance is to be admitted into evidence. However, upon the production of an unstamped instrument, the condition may be rectified upon production by the payment of the requisite statutory fee/duty.
23. With the ushering into being of the principal Act, there was no express provision in that principal act which mirrored Section 18 of the Stamp Act. Therefore, although the VAT Act addressed the imposition of a statutory fee, there was no provision which explicitly addressed the effect of producing an unstamped document in evidence. This remained the situation until July 1, 2022. On that date, the law changed with the passage of the Amendment which introduced Sections 38G and 38J.
24. It is on this basis that the Respondent submitted that the doctrine of *stare decisis* binds the Court to the law as it was prior to the 2022 Amendment. The Respondent submitted that “courts are bound by previous decisions of higher courts on the same issue, and that consistency and predictability in the law are important. This means that the law that applies to a case is the law as it stands when the case starts, and not new law that comes into effect after the case started.” The Respondent relied on the decision of *Wilson v First County Trust Ltd [2003] UKHL 40* for that proposition.
25. In the case of *Wilson v First County Trust Ltd [2003] UKHL 40*, the House of Lords held that amendments to the Consumer Credit Act could not be applied retroactively to affect consumer rights. In that case there were pending proceedings when the Act was passed. The Court further noted that statutes were not to be given retrospective effect unless the language of the statute was clear and unambiguous or necessary to give effect to the intention of the legislature.
26. In that case, the Court was concerned with whether legislation passed after the entry into an agreement by parties who were involved in pending proceedings applied to such agreements. The Court opined at paragraphs 16 to 19:
- 16 In the ordinary course this sequential approach goes without saying. Courts will interpret legislation, as they are required to do, in accordance with section 3. Only when they have done this will any question of a declaration of incompatibility arise. But the present case is exceptional because of its transitional nature: the agreement was made pre-Act, and

the Court of Appeal was interpreting the legislation post-Act. Hence the all-important question: is section 3 applicable in such a case?

17 On its face section 3 is of general application. So far as possible legislation must be read and given effect in a way compatible with the Convention rights. Section 3 is retrospective in the sense that, expressly, it applies to legislation whenever enacted. Thus section 3 may have the effect of changing the interpretation and effect of legislation already in force. An interpretation appropriate before the Act came into force may have to be reconsidered and revised in post-Act proceedings. This effect of section 3(1) is implicit in section 3(2)(a). So much is clear.

18 Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of section 3, were always to apply to pre-Act events. It would mean that parties' rights under existing legislation in respect of a transaction completed before the Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 2 October 2000. The outcome in one case involving pre-Act happenings could differ from the outcome in another comparable case depending solely on when the cases were heard by a court. Parliament cannot have intended section 3(1) should operate in this unfair and arbitrary fashion.

19 The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests...

27. After due consideration, the House of Lords held that amendments to the Consumer Credit Act could not be applied retroactively to affect consumer rights. In that case there were pending proceedings when the Act was passed. The Court further noted that statutes were not to be given retrospective effect unless the language of the statute was clear and unambiguous or necessary to give effect to the intention of the legislature.

28. It is my opinion that *Wilson v First County Trust Ltd* [2003] UKHL 40 is distinguishable in this instance.

29. The argument of the Respondent is that they had a right to proceed on the law as existed at April 1, 2022 when the matter was filed. I find that that argument is misconceived and that *Wilson v First County Trust Ltd* is misconstrued in that respect. In *Wilson v First County Trust Ltd*, the parties had entered into binding obligations which they understood to mean a certain thing at the time of their entering into a contract and at the time they commenced proceedings. Their binding obligations were therefore to be construed without reference to a subsequent enactment of Parliament that they did not have in their contemplation at the time that they undertook their obligations. If the subsequent enactment were to be applied, it would affect their rights and obligations. That situation cannot be compared to the instant case where no right vested by statute or an enforceable obligation (viz, a contract) is being interfered with. In this case, the Respondent was not being hampered in its presentation of evidence. At the commencement of the case, statute existed which provided for the stamping of the Conveyance. The Respondent chose not to comply with same. Had there been no requirement – no statutory duty – to have a document stamped, then this case may have had some similarity to the *Wilson v First County Trust Ltd* case. However, in this case, procedural requirements changed between the time of the filing of the matter and the commencement of the trial. I note that the legislation was in place before the trial commenced and before evidence was tendered.
30. Parliament has the power to make and amend laws from time to time. This includes the power to create new rights and to do away with vested rights. However, it is generally accepted that where legislation may affect vested rights, that such legislation ought to be strictly construed as to whether retroactive effect was intended.
31. It seems to me that there would be grave uncertainty and upheaval in the law if the applicable law in each case depended on when a party filed a matter in court. That cannot be the meaning of *stare decisis*. As has been said elsewhere, “No one has a vested right to continuance of the law as it stood in the past...” per Dickson J in *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 SCR 271, 282–283.
32. In particular, it is trite law that a party does not have a vested right in procedure. Procedural rules govern process and do not affect vested rights although such rules may regulate the proof of such rights.
33. To my mind, the regulation of a production of a document into evidence is a procedural matter.

34. In this case, no substantive right of the Respondent will be infringed if the amendment is held applicable to this case. The amendment does not affect whether the Respondent is the owner of the property but in this case it will impact whether the Respondent can prove that she does.
35. I find that no vested rights were affected in this matter. Further, the Magistrate adjourned the matter for the Respondent to have the conveyance stamped to prove that she owned the property. However the learned magistrate erred in subsequently admitting the unstamped conveyance into evidence.
36. It seems to me that the Magistrate should have applied the law as it stood on the date that the law was being engaged. The trial was first fixed for June 8, 2022 when the preliminary objection was taken. However, the court did not give a ruling until after July 1, 2022. The trial did not proceed until after July 1, 2022. The amendment came into force on July 1, 2022. As it transpired, the conveyance was admitted into evidence after the court gave its ruling and after July 1, 2022. The court's ruling was made on July 27, 2022. The court gave its ruling after the amendment had already taken effect. Therefore, at the time that the conveyance was adduced into evidence, the amendment had taken effect. This means that the procedure adopted by the learned magistrate did not comply with law governing the admissibility of the conveyance at the time that he engaged the law to admit the conveyance into evidence.
37. Laws are amended from time to time and litigants may be caught in its procedural cross-hairs. It seems to me that on such occasions a court can exercise certain powers to give litigants time to comply with any requirements that may have taken them by surprise. One such power is to adjourn a matter.
38. I note that in this case, the learned magistrate did give the Respondent time to comply with what was the new procedure under the Act. The Respondent did not comply. On resumption of the matter and in proceeding to trial, the Magistrate should have followed the new and current law as to the introduction of evidence. Such provisions, i.e. sections 38 G and 38H of the 2022 amendment, sought to enforce compliance with already existing law as to the incidence of the duty to stamp a conveyance.
39. In conclusion, I find that the doctrine of *stare decisis* is inapplicable in this case, that no vested right existed in the Respondent which would disapply the application

of sections 38G and 38H of the VAT Act and that the learned Magistrate erred in not applying the applicable law.

40. The Respondent also that argued that the Appellant did not make submissions on the 2022 Amendment to the magistrate at the time of trial notwithstanding that the Appellant seeks to rely on the amendment now.
41. It is clear that the Appellant could made submissions on the 2022 Amendments, and ought to have done so, on July 7 2022 and again on July 27, 2022 – prior to the court making a ruling on the preliminary objection. The failure to draw the new amendment to the court’s attention really only represents a failure in duty on counsel’s part to provide a court with the current law that concerns his or her case.
42. The oversight of a relevant legal provision cannot provide justification or jurisdiction to ignore it. As the maxim goes, “Ignorance of the law is no excuse”.
43. It is clear that the learned Magistrate failed to take into account Sections 38G and 38H of the Vat Amendment Act, 2022. In the absence of a provision to the contrary, the object of Parliament was that the sections would take effect immediately. Although the trial had technically commenced, as at July 1, 2022, the matter was not completed and the conveyance had not been admitted into evidence.
44. On July 1, 2022, the court’s duty was to interpret and apply the law as it then existed. On July 27, 2022 when the decision was made as to whether the conveyance should be admitted into evidence, the existing law was the 2022 amendment. The court and the parties were bound by the new 2022 amendment.

Ground 1 (b)

45. **This court is asked to determine whether the learned magistrate erred in accepting into evidence, and relying upon, a purported Conveyance ambiguous in its contents.**
46. Appellant’s submissions
The Appellant submitted that the purported conveyance is ambiguous as to what property is being conveyed and that such ambiguity is fatal to ascertaining the clear intention of the parties. The Appellant argued that the purported conveyance in Clause B which references the Schedule contains three parcels of land making it ambiguous and hard to determine which parcel of land was purportedly being conveyed to the Respondent.

47. Respondent's submissions

The Respondent argued that the Appellant failed to raise any issue as to the validity and drafting of the conveyance in the lower Court and cannot seek to raise new points of law in the appeal stage. The Respondent further argued that the Magistrates Court Act s. 52 does not give the learned Magistrate jurisdiction to deal with matters where there is a dispute of title.

Jurisdiction of the Magistrate

48. Section 52 of the Magistrates Act provides:

52. Subject to the provisions of section 15 and section 23 of this Act, a magisterial court shall have no jurisdiction to try summarily any case in which title to land or any interest therein is directly or incidentally in dispute: Provided that this section shall not apply to the following cases —

- (1) where the claim to such title is impossible in law;
- (2) where, in the opinion of the court, the claim to such title is not set up in good faith;
- (3) where, in the opinion of the court, the act complained of was not done in assertion of the title claimed;
- (4) where the main point at issue is a dispute as to the correct position of the boundary line of the land in respect of which the action is brought.

49. Section 52 of the Magistrates Act prohibits the Magistrate from dealing with disputes as to title save for the exceptions noted. There is no jurisdiction in that court to entertain and deal with the submissions now newly put forward by the Appellant.

50. Further, appeals are to be made on matters raised before the tribunal whose decision is being impugned. The ambiguity of the conveyance was never raised by Counsel for the Appellant before the lower court and therefore it was not a matter before the learned magistrate. No description of land was provided to the Court, nor was it mentioned in the ruling of the learned Magistrate.

51. In light of the foregoing, this court will not entertain this ground of appeal as a reason for disturbing the judgment of the learned magistrate.

Ground 2: This court must determine whether the learned magistrate erred by continuing with the case after failing to subpoena a witness for the appellant.

Parties' submissions

52. Appellant's submissions

The Appellant had requested that the Court summon the maker of the purported conveyance to be examined. The Appellant submitted that the magistrate erred in proceeding to hear the case and to make a ruling without having the benefit of hearing additional relevant evidence.

53. Respondent's submissions

The Respondent argued that despite the learned Magistrate not calling Mr. Saunders to be a witness, the Appellant equally did not call any witnesses in the trial. Further, the Respondent pointed out that the judgement of the learned Magistrate at paragraph 4 states that counsel for the Appellant indicated that the Appellant would not be giving evidence or calling any witnesses.

Failure to summon a party's witness

54. In the course of a matter before the court, assistance can be sought from the Court for the attendance of witnesses. Section 169 of the Evidence Act provides:

169. Any person present in court, whether a party to the proceedings or not, may be called upon and compelled by the court to give evidence and produce any document then and there in his actual possession, or in his power, in the same manner and subject to the same rules as if he had been summoned to appear and give evidence, or to produce the document, and may be punished in like manner for any refusal to obey the order of the court.

55. Section 41 of the Magistrates Act deals with the power of compulsion on witnesses.

That Section provides:

41. Any person summoned to give evidence or to produce any document, and failing or refusing to obey such summons, and any person present and required to give evidence refusing to be sworn or to give evidence, shall (unless he satisfies the magistrate that he has a reasonable excuse for so failing or refusing) be liable to pay a fine of twenty dollars.

56. It is apparent from the ruling of the learned magistrate that the Appellant sought the attendance of a witness through the aid of the court. However, the court, through inadvertence, did not summon the witness.
57. At paragraph 4 of his ruling, the learned magistrate wrote:
“Mr. Moxey requested for Michael Saunders to appear by way of Summons and the court adjourned for him to be called to appear. On the 21st September 2022 by way of inadvertence the court was unable to summons Mr. Saunders to appear. Mr. Moxey indicated that the Defendant would not be giving evidence or calling any witnesses.”
58. The Appellant complains that the Magistrate proceeded to determine the case after failing to subpoena a witness whom the Appellant wished to be present.
59. This ground does not appear to reflect accurately what happened in the proceedings. After the court pointed out the inadvertence, the Appellant’s counsel indicated that the Appellant “would not be giving evidence or calling any witnesses”. Therefore, when called upon, the Appellant chose not to offer any evidence.
60. The onus is on each party to advance its case and to discharge any evidential burden that it assumes. The process of the court may be deployed to help with securing the witness but the burden of mounting and meeting a case remains on the party.
61. It is curious that the Appellant, after it learnt of the inadvertence, did not seek an adjournment for the omission (the failure to summon the witness) to be cured. The learned magistrate’s judgment shows that the Appellant chose to proceed without calling any evidence at all. Having made that determination, and in the absence of a request for an adjournment to allow for the attendance of the witness, it seems to me that the learned magistrate was correct in proceeding with the matter. What else was he to do? The Appellant never protested then and did not insist on the calling of the maker of the conveyance. I do not think that the Appellant can be allowed to insist on that now.
62. It was for the Appellant to lead her case below and she took a risk in proceeding without calling any evidence. The risk was that the learned magistrate would find in favour of a conveyance where the Appellant did not

challenge its authenticity by confronting the maker of the conveyance. The Appellant chose to proceed without any witness and the learned magistrate was entitled to proceed to a determination based on the only evidence that he had before him.

63. When the Appellant learnt of the court's failure to summon Mr. Saunders, she did not protest. She cannot do so now.

Conclusion - The Grounds of Appeal

64. Grounds 1 and 2 of the Notice of Appeal are:

- i. Ground 1: The learned Magistrate erred in accepting into evidence, and relied upon, a purported conveyance which was (a) unstamped and unrecorded and (b) ambiguous in its contents.
- ii. Ground 2: The learned Magistrate failed to subpoena and bring before the Court the maker of the purported conveyance to be examined, after a request was made for his attendance.

65. Re Ground 1(a)

Having regard to my findings and consideration of the law, I find that the magistrate erred in failing to consider the existing legislation at the time of his decision to admit the conveyance into evidence. Counsel for the Appellant failed to draw the amended legislation to the attention of the learned magistrate. However, the failure to submit on applicable legislation cannot justify a decision made in ignorance of it. That failure does not bar counsel from now making a submission on the applicable law. Had the magistrate considered the 2022 amendment, he ought to have concluded that a tendered unstamped conveyance ought not to be allowed into evidence unless its presentation was cured by the procedure set out in sections 38G and 38H of the 2022 amendment.

66. For this reason, and on this ground, the appeal is allowed.

67. Re Ground 1(b)

For the foregoing reasons, this is not a matter that the Magistrate could have entertained and this was not a matter raised before the learned magistrate. This ground is dismissed.

68. Re Ground 2

The onus remains on a party to make the relevant applications and call the relevant evidence, where necessary, in support of its case. Where it seeks the aid of the court in securing witnesses, then the party is entitled to pursue that assistance. If it waives that assistance and chooses to forego that process, it cannot afterwards complain if an adverse finding or decision is made against it. This ground is dismissed.

Costs

69. The general rule is that costs follow the event. That rule may be departed from in an appropriate case and I find this to be such a case.

70. In this appeal, the Appellant pursued grounds on matters not pursued before the court below. The Respondent was put to task with responding to such grounds.

71. In this appeal, the Appellant was successful on only one ground.

72. In this appeal, the successful ground was as it concerns the applicable law. As this ruling shows, the Appellant while successful on the submissions on the applicable law in this court, failed to make similar submissions to the court below.

73. In the circumstances, I am not of the opinion that the Respondent ought to bear the costs of the Appellant. Each party will bear its own costs of this appeal.

ORDER

74. The order and direction of this Court are as follows:

1. The appeal is allowed. The judgment of the learned Magistrate of September 21, 2022 is overturned and is hereby set aside.
2. Each party will bear its own costs.

Dated this 18th day of September 2024



**Carla D. Card-Stubbs
Justice**