Musili v Scania East Africa Limited (Commercial Case 123 of 2016)
[2023] KEHC 24598 (KLR) (Commercial & Admiralty) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

COMMERCIAL CASE 123 OF 2016

MN MWANGI, J

JULY 28, 2023

BETWEEN

JOHN MAKAU MUSILI ..... PLAINTIFF

AND

SCANIA EAST AFRICA LIMITED ..... DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 29th January, 2021 brought under the provisions of Sections 3 & 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules, seeking the following orders -

    i. That the Honourable Court be pleased to set aside the evidentiary proceedings conducted on 7th February, 2019 and 14th February, 2019, respectively, and that taking of evidence or recording of evidence do start*de novo*;

    ii. Alternatively, that the plaintiff's witnesses be recalled and the defendant be given an opportunity to cross-examine such witnesses, to present his case; and

    iii. That costs be in the cause.

2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by John Makau Musili, the plaintiff herein. In opposition thereto, the defendant filed a replying affidavit sworn on 12th May, 2021 by Githaiga Kamwenji, the Human Resource Director, of the defendant company herein.

3. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of E.K. Mutua & Company Advocates on 24th January, 2022 while the defendant's submissions were filed on 14th February, 2022 by the law firm of Issa & Company Advocates.

4. Mr. Mutua (SC), learned Counsel for the plaintiff submitted that when the Trial Judge concluded the plaintiff's case and having been aware that he was to be transferred to another Division before concluding the matter, he directed the parties herein to take directions on further hearing before the incoming Judge and for proceedings to be typed. He explained that this meant that the matter would start afresh before the new Judge so that the said Judge would be able to have an opportunity to observe the demeanor of the witness during the hearing, and thereby arrive at a just decision. Senior Counsel expressed the view that the plaintiff would be highly prejudiced if the matter does not commence *de novo*. He stated that both parties hail from Nairobi and would not incur high costs in attending Court to testify.

5. He stated that the main suit involves a colossal amount of money hence it would be in the interest of fairness if the Trial Court gets an opportunity to hear all the witnesses and parties before arriving at a just decision. He also stated that when parties to a case that is partly heard do not agree on how to proceed further with the case, such a case would have to start *de novo*. To this end, Mr. Mutua (SC) relied on the case of *Farm Wine Distributors Limited v Simon John Muthama* Nairobi HCCC No. 1095 of 1987.

6. In submitting that the Court has inherent jurisdiction to start a case *de novo* in order to achieve justice and for the interest of justice, Senior Counsel cited the case of *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR and the Court of Appeal case of *Kenya Power Lighting Company v Benzene Holdings Limited t/a Wyco Prints* [2016] eKLR, where it was held that inherent jurisdiction is a residue intrinsic authority which the Court may resort to, in order to put right that which would otherwise be an injustice.

7. Mrs. Maina, learned Counsel for the plaintiff cited Order 18 Rule 8(1) of the *Civil Procedure Rules*, 2010 and the case of *Hussein Khalid & 16 others v Attorney General & 2 others* [2020] eKLR, where the Supreme Court addressed the principle of hearing of cases *de novo*. She submitted that this Court should proceed with this matter from where the predecessor Judge left off. She relied on the case of *Joseph Lekamario & 24 others v African Wildlife Foundation & 4 others* [2016] eKLR and stated that typed proceedings were availed to the parties herein on 2nd December, 2020 and that the said proceedings are regular, reliable and a true reflection of the evidence recorded. Counsel contended that since the plaintiff has not challenged the proceedings or identified any gaps/omissions in them, there is no valid reason for hearing the case *de novo*.

8. She submitted that the plaintiff's only reason for requesting for the case to start *de novo* is for the Judge to have an opportunity to observe the demeanor of the witnesses during trial but pursuant to the provisions of Order 18 Rule 7 of the *Civil Procedure Rules*, 2010, a Court records any remarks that it thinks is material regarding the demeanor of witnesses. Mrs. Maina referred to the case of *Ezekiel Karanja Mugo & 63 others v Daudi Mbugua Kiiru & 5 others* [2007] eKLR and submitted that considering that the typed proceedings are reliable and intelligible, and that any remarkable demeanor of a witness would have been recorded by the predecessor Judge, this Court should proceed with the case from where it has reached.

9. Mrs. Maina relied on Article 159(2)(d) of *the Constitution* of Kenya, 2010, Sections 1A & 1B of the *Civil Procedure Act*, Cap 21 Laws of Kenya and submitted that this Court and the parties herein have a duty to further the overriding objective of the Court. She stated that the instant application offends the overriding objective of this Court, and that cases should be determined expeditiously and the Court should ensure the efficient use of available judicial resources. She contended that since the hearing of the plaintiff's case took three days to complete, it would not be a proper use of judicial time to set aside the evidence already taken in those three days and incur another three days to take the same evidence.

She stated that the transfer of Judges is an administrative practice that should not interfere with the hearing and determination of suits.

10. Mrs. Maina referred to the case of *Kenya Anti-Corruption Commission v Michael K. Gituto* [2015] eKLR and stated that allowing the instant application will violate Article 159 of *the Constitution* of Kenya, 2010, Sections 1A & 1B of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and will occasion further delays in a case that has been pending in Court for seven years. She further stated that the defendant has only one witness to call and is entitled to an expeditious resolution of the dispute between the parties herein. She indicated that the pendency of this suit has caused the defendant to suffer unnecessary anxiety. Counsel contended that the instant application is an attempt by the plaintiff to seal loopholes in his case having had the benefit of the questions asked by the defendant's Counsel in cross-examination and it is in the interest of justice for the hearing of this case to proceed from where it has reached.

Analysis And Determination.

11. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is if the case between the parties herein should start *de novo*.

12. In the affidavit filed by the plaintiff, he deposed that the case between the parties herein is part-heard, having been previously heard by Hon. Justice James Makau who has since been transferred to the Constitutional Division. He stated that the proceedings have since been typed pursuant to the directions given by Hon. Justice James Makau on 14th February, 2019 but he is desirous that the matter starts *de novo* since his evidence was heard before a different Judge and he would be highly prejudiced if the matter proceeds from where it had stopped.

13. The plaintiff averred that by the case starting *de novo*, the Court will have a chance to observe the demeanor of witnesses, and in any event, the defendant has not yet testified and its Counsel will be given an opportunity to cross-examine him and his witness, thus the defendant will not be prejudiced in any way in the event the instant application is allowed.

14. The defendant in its replying affidavit deposed that there were no evidentiary proceedings recorded/ taken on 7th February, 2019 for setting aside by this Court. It deposed that the hearing of the plaintiff's case commenced on 3rd December, 2018 with the plaintiff testifying and being cross-examined and the plaintiff's second witness testified on 6th February, 2019 and was cross-examined on 6th and 14th February, 2019. That thereafter, the plaintiff closed his case.

15. The defendant averred that on 14th February, 2019, the Trial Judge informed the parties that he has been transferred to the Constitutional & Human Rights Division and directed that proceedings be typed and directions on the hearing of the defence case be taken on 26th March, 2019. The defendant further averred that Order 18 Rule 8 of the *Civil Procedure Rules*, 2010, empowers this Court to proceed from where Justice Makau reached, on the basis of the typed proceedings.

16. The defendant contended that the mere fact that this Court did not see the witnesses testify will not affect the Court's appreciation of the case and ability to render justice to the parties. The defendant asserted that the taking of the plaintiff's evidence *de novo* would be prejudicial to it.

If The Case Between The Parties Herein Should Start *de novo*.

17. The plaintiff's prayer to have the hearing of this suit start *de novo* and/or its witnesses recalled for purposes of cross-examination by the defendant is based on the fact that the plaintiff's case was heard by a different Judge thus if the matter is not heard afresh, this Court will not have an opportunity to observe the demeanor of the plaintiff and his witness during the hearing and thereby arrive at a just decision. The defendant opposes the application herein on grounds that the application offends the overriding objective of the Court which is to hear and determine matters expeditiously and it is an attempt by the plaintiff to seal loop holes in his case having had the benefit of the questions that were asked by the defendant's Counsel in cross-examination.

18. The test on whether or not to proceed with a matter from the stage at which the Trial Judge left it or start the hearing *de novo* was laid down by the Court in the case of *Mandavia v Rattan Singh* [1968] EA 146 as hereunder -

> " ...the proper test is whether the successor judge is in as a good position as his predecessor would have been to evaluate the evidence and submissions which have been put forward and to continue the hearing on that basis."

19. The plaintiff does not dispute being in receipt of the typed proceedings and he has not alleged that the said proceedings contain any gaps or omissions. This therefore leads to the logical conclusion that the typed proceedings supplied to the parties herein are a true reflection of the evidence recorded and are reliable. The provisions of Order 18 Rules 7 & 8 of the *Civil Procedure Rules*, 2010 state as hereunder –

> " Rule 7- Remarks on demeanour of witness
>
> The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.
>
> Rule 8- Power to deal with evidence taken before another judge
>
> 1. Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.
>
> 2. The provisions of sub rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act."

20. Based on the above provisions, the fact that this Court will not have an opportunity to observe the demeanor of the plaintiff and his witness during the hearing of the case is not a valid reason to start the said case *de novo*. Secondly, the plaintiff has not demonstrated valid and sufficient reasons as to why the plaintiff and his witness should be recalled for purposes of cross-examination by the defendant.

21. Parties to a suit have a duty to assist the Court to further the overriding objective enunciated under Article 159 of *the Constitution* of Kenya, 2010 and Sections 1A & 1B of the *Civil Procedure Act*, Cap 21 Laws of Kenya. The typed proceedings supplied to the parties herein bear a true reflection of the evidence given by the plaintiff and his witness and recorded by the Court, it is thus reliable. This suit was filed in the year 2016 and the plaintiff and his witness testified on 3rd December, 2018 and 14th

February, 2019, respectively. The defendant averred that the plaintiff's case took three days to complete, a fact which was not disputed by the plaintiff.

22. In view of the time already expended in hearing of the case and the stage at which it has reached, I find that the defendant will be prejudiced if this matter was to start afresh since it will be subjected to payment of additional costs to its Advocate and the plaintiff will have an undue advantage over the defendant as he had the benefit of the questions asked by the defendant's Counsel in cross-examination. For this reason, I hold that a retrial will not be in the interest of justice to both parties. Further, in the absence of any compelling reason as to why the case should start *de novo*, an order for this matter to start *de novo* in order for this Court to have an opportunity to observe the demeanor of the witnesses during the hearing of the same, will not have the effect of furthering the overriding objective of the Court, but will instead be contrary to the provisions of Article 159(2)(b) of *the Constitution* of Kenya, 2010 which provides that justice shall not be delayed.

23. In the case of *Stephen Boro Githia v Family Finance Building Society & 3 others* Civil Application No. Nai 263 of 2009 cited by the Court in the case of *Wycliffe Mwavali Ondari v County Council of Narok & another* [2022] eKLR, Nyamu J stated the following–

> "…….A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all cobwebs hitherto experienced in the civil process and to weed out as far as practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner……."

24. The upshot is that the application dated 29th January, 2021 has no merit. It is dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kalii h/b for Mr. E.K Mutua SC for the plaintiff

Mrs Ahomo h/b for Mr. Issa for the defendant/respondent