



**Nyamote & 2 others v JAO (Suing as the next friend and mother of PH (Minor))
(Civil Appeal 48 of 2023) [2023] KEHC 23579 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 48 OF 2023
RPV WENDOH, J
SEPTEMBER 26, 2023**

BETWEEN

**CHARLES NEW NYAMOTE 1ST APPELLANT
MESHACK OTIENO SUMBA 2ND APPELLANT
HABARI NJEMA SACCO LIMITED 3RD APPELLANT**

AND

**JAO RESPONDENT
SUING AS THE NEXT FRIEND AND MOTHER OF PH (MINOR)**

(An Appeal from the Ruling and Order of Hon. Naomi Wairimu Senior Principal Magistrate (SPM) dated and delivered on 11/7/2023 in Migori CMCC No. 70 of 2019)

RULING

1. This ruling is in respect to the appellants' application dated July 19, 2023. The appellants/ applicants seek the following orders:-
 - a. Spent.
 - b. That this court be pleased to order stay of any further proceedings in Migori Civil Suit No 70 of 2019 pending the hearing and determination of this application.
 - c. That this court be pleased to stay any further proceedings in Migori Civil Suit No 70 of 2019 pending the hearing and determination of the appellants'/applicants' appeal on the ruling dated July 11, 2023.
 - d. That the application be heard inter parties on such date and time as this court may direct.
 - e. That the costs of this application to abide the outcome of the appeal.



2. The application is based on grounds found in the application and the supporting affidavit of Ms. Everlyne Okwoyo Counsel for the applicants dated and sworn on July 19, 2023. Counsel deposed that Migori Civil Suit No 70 of 2019 (the suit) was fixed for defence hearing on July 11, 2023; that on the said hearing date, they had two witnesses a doctor from Migori and a police officer; that the applicants took out summons to have Police Constable Morara to testify but instead, Police Constable Owino attended court since Police Constable Morara was said to be indisposed; that Police Constable Owino could not testify since he had already testified on behalf of the respondent; that PC Owino could not have given contradictory evidence to what he had already told the court hence the appellants could only proceed with one witness.
3. It was further deposed that the appellants' application for adjournment was declined vide a ruling dated July 11, 2023; that the testimony of the police officer I PC Morara is crucial and if the appellants are not allowed to present the said witness, they would be denied their constitutional right to fair hearing as indisposition is not a deliberate event.
4. The application was opposed. J AO (the respondent) filed a response vide a replying affidavit dated 18/8/2023. She deposed that the suit was fixed for defence hearing on July 11, 2023; that during the call over, the matter was called out and Ms. Okwoyo Counsel, intimated that she had two witnesses one of whom was a Police Officer; that the time allocated for hearing was 11.00 a.m.; that after the first witness testified, Ms. Okwoyo refused to put the other witness on the stand without an explanation; that Counsel for the applicants then made an application for adjournment which was declined and the court directed that the matter do proceed; that Counsel declined to proceed and opted to tell the court that it can proceed to close the defence case which the court did. The respondent urged this court to find that the application is not made in good faith and appeal is without merit and proceed to dismiss the application with costs.
5. The application proceeded orally. Mr Ndolo counsel for the applicant reiterated the averments by Ms Okwoyo supporting affidavit dated July 19, 2023. Counsel particularly pointed out that there was a letter "annexture EO3(b)" in which it was indicated that the abstract did not emanate from the police station. He further submitted that PC Owino in his testimony had stated that the abstract emanated from the station; that if he was to testify again for the defence, he would be giving contradictory evidence and hence the reason why they asked the court to grant them a last adjournment.
6. Mr. Abisai opposed the application. He submitted that the case was filed in 2019 and several adjournments had been granted to the applicant; ; that the facts being raised now, were not raised by Ms. Okwoyo before the trial court. Instead she opted to close the defense case. It was submitted that the letter "EO 3b" does not state that the abstract was not obtained from the Awendo Police Station instead it confirms that an accident occurred but what was missing was an OB number; that no application was made to the effect that PC Morara was indisposed and this is an application which should not be granted and the should be dismissed with costs.
7. In a brief rejoinder, Mr. Ndolo submitted that no certified copies of proceedings have been annexed but the court can determine and exercise its discretion judiciously to avoid injustice to a party. Counsel reiterated that annexture "EO3 b" indicates that the names of the respondent were not contained therein and should have been clarified. It was submitted that annexture EO1 which is the summons to the Base Commander, he directed that PC Morara do attend court since PC Owino had already testified.
8. I have considered the application, the response and the oral submissions by both Counsel.



9. The guiding principles that this court needs to consider is whether the application to reopen the case will prejudice the respondent and secondly, whether the application has been brought without delay.
10. The main contention is what transpired on July 11, 2023 when the suit came up for hearing before the trial court. I have taken the liberty to call for and consider the proceeding before the trial court on July 11, 2023. The suit came up for the defence hearing. Ms Okwoyo was present for the defence. After the doctor testified, Counsel sought for an adjournment to call for the police officer. I will produce the proceedings verbatim: -

Ms Okwoyo

“I seek adjournment to bring the police officer. I issued summons to the Awendo Base Commander and I was given the name of Corporal Morara who was to testify. He called this morning to indicate that he is unwell. PC Owino testified in the plaintiff’s case and cannot testify today. We seek for another date to bring the officer.”

Mr Abisai

“We oppose the application. Last adjournment was given in this matters bearing in mind this is a 2012 matter. We closed the plaintiff’s case in March. The excuse that the officer is the same is not a reason to seek adjournment. The officer they needed is in court and he can testify and we can proceed. The defendant has sought adjournments so many times. We seek that the discretion is not exercised in their favour.”

Ms. Okwoyo

“It will not be fair to the defendant for the same officer who testified for the plaintiff to testify today. We had called Corporal Morara. If PC Owino testifies, it will put him in compromised position. In the interest of justice, we pray for two weeks.”

Court:-

“Having considered the arguments by Counsel for the plaintiff and the defendant. I would be inclined to disallow the application for adjournment. The defendant has had ample time to prepare their defence and last adjournment order was given. Defendant to proceed with their case.”

11. Ms Okwoyo then asked for 30 minutes to do a pretrial briefing. When the court resumed at 12.50 pm Ms Okwoyo informed the court that the witness had stated that he was not comfortable with proceeding and left the court to make a determination on the issue. The court then proceeded to close the defendant’s case.
12. On September 12, 2022, PC Owino had testified on behalf of the respondent. It was therefore not plausible to expect that PC Owino would have again taken the stand to testify on behalf of the applicants. There is likelihood that the testimony of PC Owino would not have come to the aid of the defence who were seeking to prove claims of alleged fraud or it, would have been contradictory.
13. Mr. Abisai contended that the appellants had been granted several adjournments. Though filed in 2019, the suit first came up for hearing on November 22, 2021. Both parties did not proceed because the respondent had not undergone through a second medical report. On February 16, 2022, when the matter came up for hearing again, the respondent testified and the matter was adjourned for further hearing on April 18, 2022 to enable the respondent call its witness and summons to issue in the Base Commander. The next time the suit came up for hearing was on September 11, 2022, when PC



Owino testified and the matter was adjourned at the instance of the respondent for further hearing on November 2, 2022 but the court was away on official duties.

14. On November 13, 2023, the matter proceeded to hearing when PW3 testified and the respondent closed its case. The hearing of the defence case was set for 5/5/2023. The matter did not proceed on the aforesaid date since Ms. Okwoyo had just resumed from maternity leave and are asked for more time. The matter was marked as the last adjournment but the court directed that summons be issued. From the history of the matter, the adjournments were occasioned by both parties. One party cannot be asking blamed for more adjournments than the other.
15. In the summons issued to the Base Commander, there is no indication of the name of the police officer who was to appear in court, Ms. Okwoyo told the court that she had called for PC Morara. I do not think that the applicants would have deliberately called PC Owino knowing very well that he had testified on behalf of the respondent. In addition, contrary to the assertions made by Mr. Abisai, the record shows that Ms. Okwoyo told the court that PC. Morara was indisposed on the said date. It may have been an oversight on the part of the Awendo Police Station to send PC Owino who had already testified on behalf of the respondent.
16. In exercising its judicial discretion, the courts should exercise the said discretion judiciously. The courts should balance the rights of the parties to the matter before it, and not cause hardship and/or prejudice one party. In this instant, the trial court should have taken judicial notice of the unique facts before it, especially the fact that the witness who had appeared to testify on behalf of the applicant had already testified on behalf of the respondent and the overall effect it should have occasioned on the applicants' case. In the interests of justice, the trial court would have granted an adjournment to the applicants and penalize the appellants to pay court adjournment fees or costs. I also observe that the court had marked it as a last adjournment. However, even when the court grants a last adjournment, the same is not cast in stone. Given good reason another adjournment may still be given by the court.
17. The other consideration is whether the application was bought without delay. The adjournment was denied on July 11, 2023 and this application was filed on July 24, 2023, 13 days later. It was filed timeously.
18. In the end, I find that the applicant's application dated July 19, 2023 is merited and the same is allowed. So as not to delay the matters from which this application emanates the court grants the following orders:-
uly
 - a. The ruling and order of Hon N Wairimu (SPM) dated and delivered on July 11, 2023 is hereby set aside;
 - b. There be stay of further proceedings in Migori CMCC No 70 of 2019;
 - c. The applicant's defence case is hereby reopened to enable the relevant Police Officer PC Morara to testify;
 - d. The applicants will not be granted any further adjournment on the date when the suit comes up for hearing.
 - e. Defence be heard within 30 days hereof;
 - f. Applicant to bear costs of the application;
 - g. There will be no orders as to costs.
 - h. The orders will apply in HCCA Nos 49 of 2023 and 50 of 2023.



i. File closed

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF SEPTEMBER, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Ndolo for the Applicant.

Mr. Singei holding brief Mr. Abisai for the Respondent.

Emma & Phelix Court Assistants.

