



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 65 OF 2017

TAHIR SHEIKH SAID GRAIN

MILLERS LIMITED (Under Administration).....PLAINTIFF

VERSUS

1. NIC BANK LIMITED

2. GARAM INVESTMENTS AUCTIONEERS LIMITED.....DEFENDANTS

RULING I

1. To adjourn a matter the court exercise discretion which must be based on reasons to meet the character expected of a judicial discretion.
2. Mr. Gikandi for the plaintiff today seeks an adjournment on the basis that he has just been instructed to take over the conduct of the matter from a former advocate and that he has not got the entire file including an Affidavit filed by the defendant showing that consent to sell the suit assets was given and that he has had to make a copy for the defendant's counsel.
3. He submits that the plaintiff has not been informed of the existence of the consent by the administrator and that this morning he has tried to reach his client in vain. He therefore pleads that he get an adjournment because the plaintiff is entitled to be heard and should not be punished on the basis of the mistake by counsel.
4. The application is opposed by Miss Mburu on the basis that what is due and pending in the suit is the determination of a single issue whether or not there was consent by the administrator for sale of the property. She says she did file the Replying Affidavit on 14/11/2018 and served it upon the plaintiffs counsel on the 15/11/2018 hence by dint of the court orders of 01/11/2018, the plaintiff was to file submissions within 30 days but had not done so. Counsel added that the debt is substantial and thus the matter should be dealt with at the earliest opportunity to arrest escalation of the debt.
5. To this court, it is the duty of the litigant and counsel to comply with court orders and directions without compromise and where an order or directions cannot be complied with a party and counsel have a duty to offer an acceptable explanation.
6. This court also proceeds for the learning that he who acts by advocate acts by self and thus it is not always the case that the court makes a distinction between counsel and client. That to this court is founded on the right to representation by counsel of own our choice.
7. Now can it said that this date having been given more than 54 days ago, and the plaintiff having failed to file submissions as ordered, the court would deny him the right to be heard by declining an adjournment sought? Can it be said that the litigant has acted towards discharge of its obligations to help court discharge its overriding objectice when it waited till the date set for hearing to change advocate? Can it still be said that being aware of todays date, the plaintiff's representative having retained a new advocate today is absent from court and cannot be reached by new counsel is acting towards discharge obligation to court to have the matter moved forward in an expedient and proportionate manner? Having failed to comply with courts orders of 11/11/2018, not being present today to instruct counsel on the way forward can the plaintiff escape the inference that it intends to get an adjournment at all costs?
8. I do answer the four questions in the negative and find that the plaintiff has not acted with candour and within its obligation to court under Section 1B Civil Procedure Act and is thus not a person deserving courts discretion in grant of an adjournment.
9. Being such a person I do find that there is no mistake of counsel for which the client is innocent and for which the client need be shielded. Indeed the case belongs to client and that it why one is free at all times to change counsel at will. This is one of those situation the court agrees with the Court of Appeal in *Tana River Development Authority vs Jeremiah Kimisho Mwakio [2015] eKLR* that there are situations

when counsels mistake must fall on the shoulders of the client.

10. I decline to adjourn and direct that the matter proceeds as ordered on 01/11/2018.

11. I may add that the court in giving this date appreciated the need to deal with the matter expeditiously and that appreciation has not been lost.

Dated and delivered at **Mombasa** this **25th** day of **January 2019**.

P.J.O. OTIENO

JUDGE