REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 28 OF 2012

DAVID NDUATI MUNGAI .....APPELLANT

VERSUS

DAVID MULWA KISOME.....RESPONDENT

(Being an Appeal from the Ruling by Hon. A. W. Mwangi (Principal Magistrate in - RMCC No. 72 OF 2009 -* David Nduati Mungai *=Vs* David Mulwa Kisome at *Kithimani Law Courts delivered on 22nd February 2012)

JUDGEMENT

1. The Appeal herein is from the ruling and orders By Honourable A. W. Mwangi Principal Magistrate in **Kithimani RMCC No. 72 of 2009** wherein the learned trial Magistrate denied the Appellant an adjournment and directing him to proceed with the case.

2. The Appellant was aggrieved by the ruling of the learned trial magistrate and has preferred the following grounds of appeal:-

(i) That the learned trial magistrate erred in law and in fact in making a finding that the Appellant did not deserve an adjournment to avail their witnesses who could not be availed on the date of the hearing.

(ii) That the learned trial magistrate erred in law and fact in by denying the Appellant an opportunity to bring all issues in dispute before the court for ventilation.

(iii) The learned magistrate erred in law and fact in wholly disregarding or failing to accord due and proper consideration to the Appellant's Counsels oral sub-missions that the Appellant could have been able to proceed were it not for recent information that had been availed to the police and thus necessitating investigations into the circumstances of the subject accident.

(iv) That the learned magistrate erred in law and fact in wholly disregarding or failing to accord due and proper consideration of the appellant's Counsel's submissions that the Appellant could not proceed with the matter as the same had been communicated to the Respondent's Advocate in advance.

(v) That the learned magistrate erred in law and in fact for failing to appreciate that the matter was coming up for defence hearing for the first time and that the Appellant had a valid reason to apply for Adjour-nment.

(iv) That the learned magistrate erred in law and fact in wholly disregarding and or failing to appreciate that this was the first adjournment sought by the Appellant.

3. Learned Counsels agreed to canvass the Appeal by way of written submissions. I have considered the said submissions as well as the cited authorities.

4. As this is an Appellate Court, its duty is to re-evaluate the evidence and decision of the trial court and to come to its independent conclusion. The gist of this Appall is to do with the ruling of the trial court dated 22/02/2012 whereby the trial court rejected the Appellant's Counsel's request for an adjournment and directed that if the appellant intended to stall the proceedings then he ought to have obtained orders of stay from a higher court and ordered him to proceed with his defence case. This prompted the Appellant to move to this court on appeal. looking at the entire proceedings of the trial court for the 22/02/2012 it was quite clear that the Appellants Counsel was seeking an adjournment on the ground that the area provincial police officer had commenced investigations regarding some cases filed in regard to the accident giving rise to several cases which were suspected to be fraudulent and that the Appellant's Counsel needed some time to get a feedback. The Appellant's Counsel's further pointed out to the court that he had already informed the Respondents Counsel in advance by way of a letter of his intention to seek an adjournment. The trial court upon hearing oral submissions by learned counsels held that any new investigations would prejudice the Respondent who had already closed his case and further held that the Application for adjournment had been made in bad faith and then disallowed the same.

5. Indeed a trial court is vested with discretionary power to grant or refuse adjournments sought by parties litigating before it. The said power should always be exercised judiciously taking into account the circumstances for each particular case and the reasons in support of the same. The Appellant's Counsel indeed brought to the courts attention the issue of the need to get a feedback from the PPO who was conducting investigations regarding the series o cases that had sprung up from the particular accident but it seems the trial court was not of the view of allowing the adjournment sought. Indeed the action of the adjournment appears to be harsh since the issue of costs would have properly taken care of the Respondent's concerns. It is noted that the Respondent's counsel had already been informed beforehand about the intended request for adjournment and hence the Appellant's side had been courteous enough and ought to have been allowed the adjournment. Even if the Appellant obtained new evidence, the Respondent's case could still be reopened in order to take in and consider the new evidence and that would be in the interest of enabling all the parties access to justice and fair hearing as enshrined under Articles 48 and 50 of the constitution.

6. It is indeed an accepted fact that adjournments are always made by litigants and their advocates for one reason or another and the courts do exercise discretion in a reasonable manner and upon proper material presented by the parties all in a bid to ensure that the parties get an opportunity to present their cases in the best way possible.

7. In the present case I find that the denial of the adjournment sought by the Appellant resulted in a miscarriage of justice in that the Appellant was thus prevented from assembling the needed evidence in support of his case. In the case of **JOB OBANDA =VS= STAGE COACH INTERNATIONAL SERVICES LTD & ANOTHER [2002] eKLR** the court held that where among others a Judge fails to apply his mind to the question whether a miscarriage of Justice might be occasioned to a party who is refused an adjournment that would constitute sufficient basis upon which an Appellate Court would be entitled to interfere with the exercise of the discretion.

8. It is noted that the trial court wondered why the Appellant had not sought orders of stay form a higher court if he felt that he did not want to proceed with the case. This was rather capricious viewed from the point that it is the trial court itself to receive Applications and requests for adjournment as it is seized with the matters. There was absolutely no point for the Appellant to move to the High Court to seek orders of stay of proceedings instead of facing the trial court with a request for adjournment. Hence it was erroneous for the learned Magistrate to have directed the Appellant to apply for stay orders from a higher court. I find therefore that the trial Magistrate erred in declining to grant the Appellant an adjournment based upon the reasons placed before him.

9. In the result it is the finding of this court that the Appeal herein has merit. The same is allowed with costs. The ruling and orders of Hon A. W. Mwangi principal Magistrate Kithimani on the 22/02/2012 are set aside and that the defence case be re-opened and the matter do proceed to hearing in the normal way.

It is so ordered.

Dated and delivered at Machakos this 18th day of January, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Miss Ngugi - for the Appellant

N/A for Mutunga - for the Respondent

Kituva - Court assistant