



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 81 OF 2011

SOLOMON MONYENYE..... 1ST APPELLANT

JANET MONYENYE..... 2ND APPELLANT

VERSUS

ESTELLE F STRIZHAK.....RESPONDENT

(Appeal from the Judgment and decree of A K NDUNGU, SPM in Nairobi Milimani CMCC NO. 3546 OF 2009)

J U D G M E N T

This appeal arises from a judgment of the subordinate court which was entered against the Appellants for Ksh.1,204,375/- in favour of the Respondent, after the court heard only the Respondent (Plaintiff). The Defendant did not adduce any evidence because they were absent from court. The counsel for the Defendants from the record, is indicated, to have been away in Southern Sudan on urgent mission. The Counsel Mr. Kanake who held brief for Mr. Kurgat for the Appellant/Defendant, sought adjournment of the hearing to another date when Mr. Kurgat and the Defendants would attend court to defend the suit. It was the first application by the Defendants for adjournment.

The record shows that the application for adjournment was opposed by counsel for the Plaintiff/Respondent, Mr. Odero. The basis for opposition was that the Plaintiff was an American citizen who had come all the way from the USA and would find it expensive to go back and later return again for the case. Mr. Odero had however conceded and stated that the court could make an order for refund of the USA – Kenya Air Travel Expenses on granting the adjournment, provided the same were paid before the next hearing date after adjournment.

In rejecting the application for adjournment, the trial magistrate noted that 1st Defendant/Appellant was said to be ill and that his counsel Mr. Kurgat, was in Juba in Southern Sudan. The trial magistrate nevertheless, concluded that even if those facts were true, the absence in Southern Sudan would not be more important than attending court for his client as his court understands it. It is also clear from the record that the fact that Mr. Kurgat did not priorly inform the Plaintiff's counsel before the hearing date, did not go well with the court. Hence the court rejected the adjournment application without even independently considering the concession from the Plaintiff's counsel to the effect that adjournment could be granted so long as there was an order that Defendants meet the travel expenses to and from U.S.A.

As earlier stated, the court thereafter allowed the Plaintiff/Respondent to testify in support of his case and the Defence despite the presence of counsel could not participate.

The judgment which resulted aggrieved the Defendants who filed this appeal on grounds which effectively can be summarized as follows: -

That the claim of the Plaintiff was not proved sufficiently on the balance of probabilities. The Appellant also raised a procedural ground to the effect that the trial court's refusal to adjourn the suit, was wrong in law and effectively denied the Defendants their constitutional right of being heard in defence of the claim against them.

I have carefully perused the record of appeal and the written submissions by both sides based on the grounds of appeal and on the proceedings and judgment of the lower court. For the reason I shall hereafter record, I find it proper and convenient to first consider the procedural grounds of appeal in the Memorandum of Appeal. Such ground can be summarized as follows: -

“whether the Learned trial magistrate erred in law and fact by failing to give the Appellants a chance to participate in the proceedings when he denied them adjournment.”

As earlier herein recorded, the application for adjournment was promptly made by an advocate Mr. Kanake on behalf of Mr. Kurgat who was representing the Defendant in the suit. Mr. Kanake told the court that Mr. Kurgat was in South Sudan and the 1st Defendant was also out of the country while the 2nd Defendant who appears from the record to be the 1st Defendant's wife, was in hospital undergoing a cancer treatment. These facts were as the record shows, were not really disputed by the Plaintiff's counsel who only complained that he should have been warned before coming to court.

The record however, also shows that although he opposed the adjournment sought, he had no objection to it being granted on condition the court considered and granted the Plaintiff's travel expenses before the next hearing date. The fact that Mr. Kanake, holding brief for Mr. Kurgat, did not support the application with documents, appeared to create some doubt in the trial magistrate's mind as to the authenticity of those facts but he cleared the way by stating clearly that even if the reasons for adjournment were true, he nevertheless would not accept the trip of Mr. Kurgat to South Sudan as a good reason to supersede the court's powers, although it is not clear what he meant. The learned magistrate also thought Mr. Kanake should have expressly undertaken to pay the travel expenses raised by the Plaintiff's counsel.

I have carefully considered these facts. It is true that adjournment is a discretion of the trial court. It is to be exercised, the like any other discretion, fairly and justly on reasonable grounds which must be properly recorded. The purpose of granting an adjournment, inter alia, is to give a party seeking it, an opportunity to be in a position to properly present his case or defence. The court has power to refuse favourable exercise of this discretion where it thinks the applicant is taking a advantage of the existing situation or abusing the court process in any way as may be demonstrated by the facts before it. It should also be observed that the main purpose of court during a trial, is to sustain the suit by giving the parties full opportunity to prosecute or defend their cases.

It is trite also and in tenor to the immediately above principles, that a trial court would normally grant an adjournment if in doing so should give the party seeking it a fair opportunity to fully put its case and if in the view of the court, the party has not before, abused a similar court's discretion. Moreso, since the trial court has power to order compensatory costs in favour of the party who was ready to proceed with the trial of the case but for the adjournment.

In this case, in the court's view, the defendant's application, was a first one and there is no indication that they had abused any court's favourable discretion before. The Defendant's counsel was away in South Sudan and his wife was in hospital attending a cancer treatment while the Defendant was out of the country. Why Mr. Kurgat would be away in Sudan was an issue to be explained by himself if requested when he returned. It might be that his air flight failed for one reason or another. All these were good reasons for adjournment. The trial court also got an outlet when the Plaintiff's counsel conceded that on condition that his client's travel expenses would be met. In offering this concession the Plaintiff's advocate recognized the Defendants basic right to have opportunity to defend the suit in a further date.

The court of course had power and discretion to order an adjournment with compensation in costs to the Plaintiff which would include air travel expenses for the Plaintiff.

All considered, therefore, the learned trial magistrate erred in law and fact in exercising his discretion unreasonably under the prevailing circumstances. While it is proper to complete a suit quickly, doing so by denying a party opportunity to fully put up his defence was not in accordance with main overriding objectives, mission, and vision highlighted under Section 1A and 1B of the Civil Procedure Act, Cap 21. This ground of Appeal therefore, has merit and I hereby allow the appeal on that procedural ground alone.

In conclusion, I find it unnecessary to consider the appeal on the other ground concerning evidence and merit, as that will interfere with the retrial which I intend to order for.

ORDER

- 1. The appeal is hereby allowed on a procedural ground only.**
- 2. The trial and judgment and decree of the lower court is hereby set aside with costs in the cause.**
- 3. A retrial is hereby ordered before a magistrate with jurisdiction to try the claim.**

D A ONYANCHA

JUDGE

Dated and delivered at Nairobi this 18th day of November, 2015.