



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ELC CIVIL APPEAL CASE NO 8 OF 2021**

**MAGDALINE KISORIO.....APPELLANT**

**-VERSUS-**

**MARRY JEPKEMBOI KEMBOI.....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the Ruling and order of Hon. D. A. Ocharo (PM) dated and delivered in Kapsabet PMCC No. 33 of 2019 – MARY JEPKEMBOI VERSUS MAGDALENE KISORIO on 19/5/2021).**

1. This is an appeal from ruling and order dated 19<sup>th</sup> May, 2021 by the Hon. D. A. Ocharo (Principal Magistrate) who disallowed an application for adjournment made by appellants' counsel.
2. The background of this appeal is that the Respondent herein sued the Appellant for an order of permanent injunction restraining the Appellant or their agents from trespassing onto land parcel number Kapsabet Municipality/461.
3. The Appellant filed a statement of defence denying all the allegations contained in the Plaintiff.
4. The Trial was first set down for hearing on 22<sup>nd</sup> April 2020. From the record, there are no proceedings relating to this day. The matter was then set down, for hearing on 30<sup>th</sup> September 2020 indicate that the matter was coming up for mention to fix a hearing date. A hearing date was then fixed by consent for 28<sup>th</sup> October, 2020.
5. On 28<sup>th</sup> October, 2020, Counsel for the Appellant requested for an adjournment on grounds that the appellant was yet to comply with Order 11 of the Civil Procedure Rules for reasons that the Appellant was an old lady aged 90 years and was consulting the family to substitute the witness. An adjournment was granted and another hearing date for 19<sup>th</sup> May 2021.
6. On 19<sup>th</sup> May, 2021, Counsel for the Appellant made an application for adjournment on grounds that they intended to file an application for joinder of the Land Registrar as an interested party. Further, Counsel indicated that they also intend to file an application to amend defence to include a counter claim. This application was opposed by Respondent's counsel for reasons that the adjournment was intended to delay the matter and that the Appellant had sought for several adjournments previously.
7. The Trial Magistrate declined to grant the adjournment and the matter proceeded for hearing of Respondent's/Plaintiff's case. At close of Respondent's case, counsel for the Appellant sought leave to appeal against Court's refusal to grant adjournment which leave was granted. This appeal is therefore against the order of the Court made on 19<sup>th</sup> May 2021 declining adjournment.
8. The appeal was heard by way of written submissions pursuant to directions taken on 31<sup>st</sup> January 2022. I have considered both submissions by Counsels and it is worth mentioning that the only question for determination in this appeal is whether or not a case has arisen that requires this court to interfere with the decision of the trial Court in refusing to grant an adjournment.
9. The case law to regard to adjournments and instances when an appellate Court will interfere with discretion of a Trial Court to grant or not to grant an adjournment was set out by the Court of Appeal in Mbogo -vs- Shah (1968) E A 93 where it was stated that;

**“I think it is well settled that this Court will not interfere with eh exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it had misdirected itself or because it had failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

10. The elements the Trial Court ought to have taken into consideration while dealing with adjournments are the adequacy of reasons given for the application, how far, if at all the other party is likely to be prejudiced by the adjournment, and how far such other party can be suitably compensated by the order against the applicant to pay costs. These elements were laid out in the case of Job Obanda -vs- Stagecoach International Services Ltd and Another Civil Appeal No. 6 of 2001.

11. Under the Civil Procedure Rules, Order 17 Rule 1 provides that: -

**“Once a suit set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the Court that it just to grant the adjournment.”**

12. From the foregoing, it is clear that the Court has a wide discretion as to whether or not to grant an adjournment. I agree that the appellant, just like the Respondent, was entitled to fair hearing of their case as enshrined in Article 50 of the Constitution of Kenya. Bearing in mind as well the provision of Section 1a and 1b of the Civil Procedure Act relating to the overriding objective of the Court.

13. Given the age of the case, the number of times that the matter was adjournment and reasons advanced by Appellant’s Counsels in support of the application for adjournment, I am satisfied that the Trial Court misdirected itself in disallowing the adjournment,. The Respondent could have been compensated by way of costs.

14. In the circumstances I proceed to allow the appeal, set aside the order appealed from as well as decree of the Court issued on 22<sup>nd</sup> December 2021 and order a retrial of the case.

15. The matter shall be heard denovo by any other Court apart from Hon. D. A. Ocharo (PM) who was the Trial Court.

16. Appellant will have costs of the appeal.

17. Judgement accordingly.

**DELIVERED AND DATED AT KAPSABET THIS DAY OF 21ST MARCH, 2022.**

**HON. M. N. MWANYALE**

**JUDGE**

In the presence of Ms. Kesei for the Appellant

Ms. Chelimo for the Respondent