



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 50 OF 2014

FRANCIS NGOLANIA APPLICANT

VERSUS

BEATRICE MWIKALI MUTIE RESPONDENT

RULING

1. The Application dated 13/3/14 seeks orders that:-
 1. **“THAT this application be certified urgent and the proceedings in CMCC No. 464 of 2000 be stayed pending the hearing and final determination of this application or until further orders in an *inter partes* hearing of the application.**
 2. **THAT this Honourable Court be pleased to withdraw CMCC No. 464 of 2000 now pending the Chief Magistrate’s Court Machakos and thereafter transfer the same for trial or disposal to any subordinate court competent to try or dispose of the same.**
 3. **THAT the costs of this application be in the suit.”**
2. The application is supported by the affidavit sworn by the Applicant, **Francis Ngolania** on 13/3/14. The Applicant’s complaint is that the trial magistrate fixed the case for judgment without giving the Applicant the opportunity to conduct his defence case.
3. In opposition to the application, the Respondent’s counsel **L.N. Ngolya** swore a replying affidavit on 21/3/14. The Respondent accuses the Applicant of employing delaying tactics in this very old case therefore forcing the trial magistrate to proceed with the Plaintiff’s case *ex parte*. That subsequently the firm of **Nzei & Company Advocates** then on record for the Applicant applied for the setting aside of the *ex parte* proceedings and also sought leave to cease acting for the Applicant.
4. The lower court on 14/2/14 made the following orders:-
 1. **“Leave is granted to the Defendant’s advocate to cease from acting.**
 2. **The proceedings of 21/1/14 remain on record and the Defendant is at liberty to apply to re-open the proceedings.**
 3. **Defendant is allowed 14 days to make a decision on the way forward as he is now acting in person.**
 4. **Mention on 28/2/14 for further directions.”**
5. On 2/2/14, the firm of **F.M. Mulwa Advocate** filed a Notice of Appointment of Advocate on behalf of the Defendant/Applicant. Indeed the said firm of advocates was in court during the mention date on 28/2/14 when **Mr Kamolo** Advocate holding brief for **Mr F.M. Mulwa Advocate** stated that the firm of **F.M. Mulwa** had just come on the record and needed time to familiarize with the matter.
6. The application was opposed and the trial magistrate fixed the case for judgment on 25/3/14. This is what has triggered the present application.

7. Under section 1A of the Civil Procedure Act Cap 21 Laws of Kenya:-

1. **The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**
2. **The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**
3. **A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”**

8. Under section 1B (1) of the Civil Procedure Act Cap 21 Laws of Kenya:-

“For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters present before it for the purpose of attaining the following aims-

- a. **The just determination of the proceedings;**
- b. **The efficient disposal of the business of the Court;**
- c. **The efficient use of the available judicial and administrative resources;**
- d. **The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- e. **The use of suitable technology.”**

9. There is nothing at this stage of the lower court proceedings that shows inappropriate exercise of the trial court’s discretion in giving effect to the overriding objective in these proceedings. Picking on a small segment of this very old year 2000 case to stay the proceedings at judgment stage and transferring the case to another trial magistrate is in my view not the best way forward. The trial court ought to be given a chance to write the judgment, then the Applicant can explore his options on the way forward if dissatisfied. I say so bearing in mind that the court would then be in a position to look at the entire typed record and decide on the way forward.

10. Consequently, I dismiss the application with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 15th day of April 2014.

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B. THURANIRA JADEN

JUDGE