



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NUMBER 215 OF 2011

DAVID ROTICH.....APPELLANT

VERSUS

FATUMA SWALEH ALI.....RESPONDENT

RULING

1. This is a notice of motion application by the Appellant brought under Sections 3 and 3A of the Civil Procedure Act and Order 22 Rule 22, Order 43 Rule 6, and Order 51 Rule 1. The Order now sought is:

“3.That this honourable Court be pleased to stay the proceedings in Mariakani RMCC Number 84 of 2009 obtained herein pending the hearing and determination of the Applicant’s Appeal instant (sic).”

2. The application is supported by the annexed affidavit of Anyangu Okaalo. The essential elements of the affidavit are that on 11th October, 2011 the defence case was due to proceed. Their key witness, Mr. W.N. Collins, Kilifi District Criminal Investigation Officer (DCIO) was unavailable on that day as he had a prior engagement in a hearing in Kilifi SRMCC 132 of 2010. Counsel brought this matter to the attention of the court and applied for an adjournment, which was denied, and the defence case was thus closed on direction by the Magistrate. Annexed to the affidavit is a copy of a witness summons for the DCIO dated 6th October, 2011 and an Affidavit of service of the same upon him, filed in court on 11th October, 2011.

3. Upon dismissal of the adjournment application, the Appellant filed a stay of the proceedings under urgency, and temporary stay was granted by this court.

4. The application is opposed by the Plaintiff/Respondent’s vide their Replying Affidavit deponed on 8th November, 2001. The affidavit essentially sets out the history of the suit. In paragraph 23, the deponent says that she investigated the reason for the absence of the said DCIO, as Defence witness, and found out that the suit he was testifying in at Kilifi as a witness was also being handled by the defence counsel in this suit and, therefore, they ought to have known when fixing the date for the hearing in SRMCC 84 Mariakani. As such, she depones, the object of the adjournment sought was to delay the trial of the suit.

5. The Respondent filed her written submissions on 2nd February, 2012 and the Appellant filed his on 27th February, 2012. The Respondent argues that the Appellant has throughout the proceedings sought to frustrate and delay the hearing in the lower court, including filing an application in the High Court in Nairobi staying all traffic related suits against the Appellant’s insurance company, Directline Assurance

Company Limited. However, I note that some of the alleged delays occurred because the trial could not proceed when the learned Honourable Magistrate was indisposed, or the court was not sitting on the date fixed for mention (see paragraph two on page two of submissions). Other delays complained of were due to Appellants application to amend his pleadings. Counsel finally submitted that any further delay in the proceedings would prejudice the Respondent's expeditious and fair trial.

6. The Appellant's submissions are simply that their witness, the DCIO, Kilifi, was engaged in a different court on the day of the hearing as attested to by the Affidavit of Service of the witness summons to him. The refusal to allow the application for adjournment despite their explanation and closing the defence case without a hearing violated the fundamental tenets of natural justice. The dismissal of the adjournment meant that the key aspects of the defence alleging fraud and misrepresentation by the Plaintiff/Respondent in the claim was a wrong exercise of the Honourable Magistrate's discretion.

7. I have carefully considered the parties submissions on the application and considered the affidavits and annexures thereto. The Appellant has quite rightly pointed out, as held in **Mbogo and another vs Shah [1968]** EA 92 that an appellate court should not interfere with the discretion of a judge unless satisfied that the Judge or Magistrate misdirected himself. Clearly, therefore, the key will revolve around whether or not the judge or magistrate exercised his discretion judiciously.

8. The proceedings of the hearing relating to the Appellant's application for adjournment have not been availed. Consequently, I am unable to ascertain the reasons given by the honourable Magistrate for dismissal of the application. From the Appellant's Supporting Affidavit, however, it is clear that: a witness summons was issued by the court on 6th October, 2011; and that an Affidavit of Service of the witness summons was filed in court on 11th October, 2011. The affidavit states that the Witness Summons was served on 10th October, 2011, and that the DCIO said he would be engaged in Kilifi Magistrate's Court and then in Eldoret High Court. Neither the Respondent's Replying Affidavit nor submissions' indicated the reasons for the honourable Magistrate's declining the adjournment or whether the process server was examined.

9. Where a Witness Summons has been issued and the witness fails to comply, Order 16 Rule 10 applies. That rule provides:

“(1) Where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court touching the service or non-service of the summons.”

So, the procedure when the summoned witness failed to attend should have been for the Magistrate to find out whether he had been served with the summons and whether a return of service had been certified. In this case, as there was an Affidavit of Service certifying service, it was open to the honourable Magistrate to examine the Process Server as to service. If the court had reason to believe that the evidence or document to be produced was material and that the witness intentionally failed to attend in compliance with such summons, then sub rules 2 and 3 of Order 16 would be triggered and a proclamation or warrant issued requiring his attendance.

10. I have not seen any reference in the submissions or affidavits before me that Order 16 was complied with. I have not been told what the reasons for the dismissal of the adjournment were. Whatever the case, the rules of natural justice incorporate the notion of procedural due process. In the absence of any indication that resort was had to order 16, herein, I am satisfied that there is sufficient cause to order stay of the proceedings in the lower court pending hearing of the appeal.

11. I have perused the Memorandum of Appeal dated 21st October 2011 and filed on 24th October, 2011. It has only three grounds. All concern the learned Magistrates error of fact or law in disallowing the adjournment, or failing to consider the grounds for adjournment or the wrong exercise of his discretion. These are matters which have featured in my consideration of Order 16 and the application for

stay. I do not consider it a worthwhile use of judicial time that the appeal should proceed to consider the same matters. I have also taken into consideration that this is a personal injuries case filed in the lower court in 2009 and efficient and cost effective expedition thereof is critical to the proper administration of justice.

12. Accordingly, in exercise of the inherent power of the court and for the achievement of the overriding objective of expedition, cost-effectiveness, the efficient disposal of the business of the court, and the efficient use of available judicial and administrative resources pursuant to Section 1B of the Civil Procedure Act, I hereby order as follows:

1. To obviate the necessity of appeal proceedings herein, and consequential loss of time and expense, the lower court is directed to recommence the proceedings in consonance with Order 16 of the Civil Procedure Rules and in its discretion either:

(a) Allow the Appellant's witness to give evidence.

b) Examine the Process Server, Ernest M. Nyamai as to service of the witness summons and satisfy itself thereon.

2. This matter be mentioned in the lower court within fourteen days from the date of this Ruling when the Ruling shall be brought to the notice of the Honourable learned Magistrate presiding in the matter.

3. Upon recommencement of the substantive proceedings in the lower court, the appeal herein shall abate be deemed as terminated.

4. Costs in the cause.

Orders accordingly.

Dated and delivered this...29th Day of March, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1 Judge: Hon. R. Mwongo

2 Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d)