



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 140 OF 2009

AGRO CHEMICAL SACCO SOCIETY LTD.....APPELLANT

-VERSUS-

VINCENT WESONGA WANDEY.....RESPONDENT

JUDGMENT

The appellant is aggrieved by the award of the Co-operative tribunal in the tribunal case no. 38 of 2008 at Kisumu. The claimant/respondent **Vincent Wesonga Wandey** sued the respondent **Agro Chemical Sacco Society Limited**. In the statement of claim dated 1st December, 2008 he sought for:-

- a) **A refund of Kshs 67,000.**
- b) **An order directing the respondent to cease any further deductions from the claimant's salary on an alleged guarantee to Stephen Onyango.**
- c) **A declaration that no guarantee did arise binding the claimant in the transaction(s) between the respondent and Stephen Onyango.**
- d) **Costs of the dispute.**
- e) **Any other or further relief.**

The respondent/appellant denied the claim by filing a statement of defence dated 9th December, 2008. Specifically the appellant challenged the claim that there was no binding guarantee between respondent and the appellant; further and without prejudice the appellant stated that the respondent voluntarily and without coercion personally guaranteed the said **Stephen Onyando**. The appellant admitted the deductions of the respondents salary but denied the same to be illegal or that the guarantee a nullity and sought for the dismissal for the claim.

The matter first came for hearing before the tribunal on the 3rd of June, 2009. Parties jointly requested for time to file their lists of documents pursuant to **L. N 59/2009** and to be heard which the tribunal sat in Kakamega. The matter was adjourned and the

tribunal gave the next hearing date as the 26th of August, 2009 at 9.30 am.

On the 26th of August, 2008 counsel for the respondent sent a representative to seek for further extension for the reason that he was yet to file his list of documents. He sought for another 30 days. The application was objected to by the claimant's counsel. The matter seemed to have been placed aside and on resumption at 1.50 pm the appellant's counsel was then present. He renewed his application for an adjournment for the main reason that the manager of the appellant was on maternity leave since late June, 2009. The respondent counsel disputed alleging that the manager was in the office. The adjournment was declined and the matter proceeded to hearing. The respondent gave evidence and was cross examined by the appellant's counsel. The parties made submissions and an award delivered on the 17th of September, 2009. In the award, the respondent/appellant was ordered to refund to the claimant/respondent Kshs 67,000 together with interest, further the appellant was ordered not to make any further deductions to the claimant/respondent's salary, costs were also awarded to the claimant/respondent.

Being aggrieved by the award, the appellant filed this appeal on the following grounds:-

Ø Learned members of the tribunal erred in law and fact by refusing to grant the appellant an adjournment and failing to appreciate the law in regard to the same.

Ø The learned tribunal members misdirected themselves in law by failing to appreciate and follow the right procedure under the Civil Procedure Rules to close the appellant's case.

Ø The learned trial members erred in their appreciation of the evidence by considering extraneous and irrelevant matters and thereby arriving at a wrong decision.

Ø The learned trial members of the tribunal totally misdirected themselves in the evaluation of the evidence produced before them and arrived at a wrong decision thereby occasioning a miscarriage of justice.

Ø The judgment is contrary to provisions of Order XX of the Civil Procedure Rules and provisions of the Evidence Act.

The respondent on his part objected to the appeal.

At the time of the appeal counsel for the appellant submitted that the appellant was shut out of the case which is a serious misdirection. He urged that the adjournment sought was refused but no reason given for the said refusal. Further that, the respondent would not have been prejudiced if the same had been started. He maintained that the tribunal did not exercise its discretion properly. That the adjournment sought was the first one and that an award of costs to the claimant would have sufficed. Counsel further submitted that the award was contrary to the evidence given since claimant/respondent had guaranteed. He submitted also that the appellant has a good defence to the claim and ought to be allowed to defend the claim.

In opposing the appeal the respondent's counsel on his part submitted that the granting of an adjournment is discretionary and that in refusing the same it meant that the tribunal did not find merit in the application as no sufficient reason was given for the request. Further that the defence on record is a sham.

This being the first appellate court it has a duty to reconsider, evaluate and analyze the evidence on record and to arrive at an independent conclusion bearing in mind that the trial court heard and saw the witness and to give an allowance for this. Having considered the record, submissions by counsel and the authority availed to court the issue for determination is whether or not the tribunal exercised its discretion properly, whether this court can interfere with the said discretion; if so under what circumstances and whether the award may be set aside and who bears the costs.

There is no dispute that the appellant sought for an adjournment to be allowed to file its list of documents, the tribunal having given the parties a chance to do so earlier. The respondent gave evidence, the tribunal having declined the adjournment.

Granting of an adjournment is discretionary and may be granted where a court is convinced that there are sufficient grounds to do so. Discretion by court has to be exercised judiciously in order to avoid harsh ship to either of the parties in a suit. In this instance case the appellant sought for another 30 days to file its papers as the manager was on maternity leave the court having adjourned the matter earlier for similar reasons. In opposing the application the respondent did indicate that he will suffer any prejudice neither did the court allude to the same. That as it may, the net effect of the refusal was that the appellant did not defend the suit. The defendant argues that he has a good defence worthy to be heard.

In the case of **Manubhai Bhailalbhai Patel vs Richard Gottfreid** E.A.C.A the court in Civil Appeal no. 10 of 1932 held:-

1. To refuse to grant an adjournment and thereby to deprive a defendant of all opportunity of making his defence is a step which can only be justified by clear and convincing reasons.

2. If an important witness is prevented by illness from attending court at an adjourned hearing at which his evidence is directly and seriously material, it is the trial judges duty to grant an adjournment if he is satisfied (1) of the medical fact and (2) that the witness's evidence is relevant and may be important unless he is satisfied that an injustice would thereby be done to the other side which cannot be remedied by costs"

The tribunal in declining the adjournment did not address itself to whether or not the respondent would suffer any prejudice if the adjournment was allowed or whether it believed that the relevant person was on maternity leave neither did it give any reason for its refusal.

In my view although the request for the adjournment given was the second, the list of document was a crucial document for the defence case. The adjournment for an extra 30 days to enable a manager on maternity leave avail the list of document was not unreasonable. Indeed the appellant offered costs to the other side. I also see no prejudice that would have been suffered by the claimant that could not be remedied by costs. However the denial of the adjournment, shut out the appellant from his case depriving it the right to a fair hearing. The decision was harsh.

For the reasons above, I allow the appeal, set aside the award of the tribunal and remit the matter back to the tribunal with directions that the appellant be allowed to file his list of documents and defend the claim.

I make no order as to costs.

Dated and delivered this 10 day of June, 2011.

ALI-ARONI

JUDGE

In the presence of:

..... present for Appellant

.....present for Respondent