



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1250 of 2004

GEORGE ODINGA ORARO.....PLAINTIFF

VERSUS

ERIC GOR SUNGUH.....DEFENDANT

RULING

The hearing of this suit started on 27th July 2005.

The plaintiff closed his case on 24th October 2005 when the defence hearing started. On 14th March 2006 when the matter came up for further hearing Mr. Ojwang Agina applied for adjournment on the ground that the defendant had been taken in. The adjournment was granted and the hearing was adjourned to 21st March 2006 when the hearing continued and was adjourned to 31st July 2006.

On 31st July 2006 Mr. Asembo for the defendant applied for adjournment on the ground that Mr. Namwamba who had initially been instructed to appear for defendant before he proceeded to USA for further studies was now back into the country and would like to come and conduct the suit. He asked to be given one week to prepare.

The application was opposed by Mr. Ougo on the ground that the firm of Namwamba and Ababu have been and are still on record and that Miss Otieno and Miss Nyutu had been instructed by the same firm to appear and that was an internal arrangement which did not concern the plaintiff. Mr. Ougo further submitted that the defendant had caused two adjournment earlier.

Although the court was not satisfied with the reasons given for the adjournment, it granted the same because this was the last day of the term and there was no time to continue with hearing and the matter was adjourned to 19th and 20th of September 2006 for further hearing. Hitherto the defendant had changed counsels four times namely Miss Atieno, Miss Nyutu, Mr. Ojwang Agina and Mr. Asembo.

When the matter came up for hearing on 19th September 2006 it was now Mr. Amuga who appeared for the defendant, who applied for an adjournment on the ground that he had just come on record and he had applied for the proceedings to enable him acquaint himself with the case and the same had not been supplied to him and that it was not possible for him to proceed without those proceedings. Further that when he came on record, he had a matter in the Court of Appeal which had been fixed on the same date.

The application was opposed by Mr. Ougo on the ground that the last time this matter came for

hearing the defendant had applied for an adjournment on similar grounds, a new advocate coming on record. Mr. Ougo submitted that a party who wishes to change his advocate midstream must appreciate that his new advocate will be in a similar position Mr. Amuga was and that a hearing of a case should not be delayed simply because a party chooses the luxury of changing advocates and particularly in this case when the hearing was adjourned for similar reasons. But he concluded that out of respect for the Court of Appeal, he conceded to the adjournment and urged the court that since this case was given two days, it proceeds the second day.

In my ruling when granting the adjournment I stated that there was no sufficient reason for granting an adjournment but since counsel was appearing before the Court of Appeal protocol requires that he appears there first. I granted the adjournment with firm instructions that the hearing do continue on 20th September 2006 as had been agreed by both parties by consent on 31st July 2006.

When the matter came up for hearing on 20th September 2006, immediately after this ruling Mr. Amuga rushed to the registry and filed an application by way of Notice of Motion under Order 41 Rule 4 seeking stay of these proceedings pending the hearing of the intended appeal from the ruling of this court delivered on 31st July 2006.

The application is based on the ground that the defendant intends to appeal against this court's ruling dated 31st July 2006. The application is based on the ground that the defendant intends to appeal against the ruling dated 31st July 2006 and a Notice of Appeal has been filed; that the intended appeal is arguable and concerns an important piece of evidence for the defence and that stay of further proceedings is if not granted, the success of the appeal will be rendered nugatory since the case is fixed for further hearing on 20th September 2006.

The application is also supported by an affidavit sworn by the defendant on 19th September 2006 in which he avers that on 24th July 2006 in the course of his Evidence in Chief he tried to refer to a letter dated 1st March 2004 which was addressed to him by the Clerk of the National Assembly in his capacity as the Chairman of the Select Committee then investigating the death of the late Robert Ouko. The plaintiff's advocate raised an objection which was upheld by the court in its ruling dated 31st July 2006, that he verily believes that his intended appeal has high chances of success because:

(a) Section 19 of the National Assembly (Powers and Privileges) Act Cap 6 which the plaintiff's counsel invoked in his objection to the document he wanted to rely on and which the court upheld only deals with documents laid before the Assembly or Committee. The letter dated 1st March 2004 which he sought to rely on was never laid before the Assembly or Committee.

(b) The proceedings before the Select Committee which he chaired and which were pleaded and introduced into the proceedings before this court by the plaintiff himself were conducted in Public pursuant to a resolution of the National Assembly. The said proceedings and all matters connected therewith were therefore not covered by Section 19 of the said Act.

When the matter came up for further hearing as ordered in my ruling the day before Mr. Amuga informed the court that he was not ready to proceed with the hearing. He informed the court yesterday after my ruling he checked with the court file to find out if the proceedings he had requested for had been typed to enable file appeal and he found that they had been typed but the same had not been proofread and that is the reason why the court had not informed him that they are ready so that he would collect them.

He read them and that is when he received full instructions regarding an application for stay of further proceedings until the hearing and determination of the intended appeal. With due respect to counsel, the typing of all the proceedings was not necessary for the purposes of filing the appeal.

But counsel may be excused because he came into the matter late. The issue here was simple. Whether a communication between the clerk of a the National Assembly to the Chairman of the Parliamentary Select Committee require special leave from the Speaker before the same can be used outside Parliament.

The delay I would say was caused due to the defendant changing his advocate now and again. So far he has sacked 4 counsels. The defendant should be told and be told clearly that courts should not be used as instruments of causing delay of the hearing of cases. The defendant should be candid in prosecuting his suit. Having said that and having given leave to the defendant to appeal against this court's ruling of 31st July 2006, I allow the defendant's application in terms of prayer 2 of the Notice of Motion dated 19th September 2006.

Dated and delivered at Nairobi this 29th day of September 2006.

J.L.A. OSIEMO

JUDGE