

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1095 OF 1987

FARMWINE DISTRIBUTORS LTD..... PLAINTIFF

VERSUS

SIMEON JOHN MUTHUMA..... DEFENDANT

RULING

This Ruling springs from submissions made before me on 05.07.05 by the parties' counsel, i.e. Mr. Kiragu Kimani for the plaintiff and Mr. Phiroze Nowrojee for the defendant. The case was part-heard before Hayaga, J (as he then was) who has ceased to exercise jurisdiction in the case.

Plaintiff's counsel urged that the case continues from where it had reached before Hayaga, J because Order XVII rule 10 permits continuation of a case part-heard by one Judge before another Judge. In plaintiff's counsel's view, the nature of this case is such that this court will not be disadvantaged if it continues with the case from where Hayaga, J left off. Plaintiff's counsel added as under. The case is very old. The claim is for money the defendant is said to have taken from the plaintiff company where he was a director and in counsel's view the case turns heavily on documents which are in the file and that this court is in as good a position as Hayaga, J would have been in evaluating the evidence. Counsel pointed out that if the case starts afresh, parties will be put to unjustifiable substantial expense and trouble. Counsel said the plaintiff was operating in Nyeri and his witnesses live in Nyeri as does also the defendant and that the parties had to make numerous trips to Nairobi for the case. In plaintiff's counsel's view, there is no need for a repeat of such trips. He referred to *Mandavia –vs- Rattan Singh* [1968] E.A. 146 as a guide on the test to be applied in deciding whether the succeeding Judge should exercise the discretion to proceed with the case from where his predecessor had reached or to start hearing it afresh. Plaintiff's counsel pointed out that there are many cases pending hearing before the courts; that this case should be off-loaded from the list of cases for fresh hearing; and that no injustice will be occasioned to the defendant if the case proceeds from where it had reached before Hayaga, J

On the other hand, defendant's counsel opposed the proposal for the case to continue from where it had reached before Hayaga, J. Counsel urged that it starts de novo because, in this view, this court will not be in the same position as the Judge who part-heard it. Defendant's counsel pointed out that plaintiff's witnesses testified and were cross-examined before Hayaga, J while the defendant started his examination-in-chief which would have to continue before this court if the hearing continues from where it ended before the previous Judge. In counsel's view, this court will in such a scenario form a one-sided impression of the performance of witnesses as it did not see the witnesses who testified before Hayaga, J and will start seeing the defendant testify midstream and thereafter also see such witnesses as the defendant may call. This, in defendant's counsel's view, will mean the parties will not have been accorded equal opportunities in presenting their respective cases and trying to create a favourable impression of themselves. Counsel said he would have had no problem in the case continuing from where it had reached before Hayaga, J if all evidence had been tendered before Hayaga, J but that is not the case here. Defendant's counsel referred to *Kaggia & Another -vs- Republic* [1969] E.A. 451 to make the point that the way in which a witness stands up to cross-examination is something which does not always appear clearly from the record and that it is a matter in which the trial Judge has a more than ordinary advantage over the succeeding Judge who has not seen the demeanour of the witnesses who testified before the preceding Judge. Defendant's counsel acknowledged that the case is old but added that that is not the parties' fault and urged that hearing starts afresh to give the defendant an equal hearing and that considerations of costs should not take away considerations of fair and equal hearing for both parties.

In reply, plaintiff's counsel sought to distinguish Kaggia's case alluded to by defendant's

counsel. He pointed out that Kaggia's case was criminal, where the burden of proof is higher and that the demeanour of witnesses assumes very important proportion. Counsel also pointed out that Kaggia's case was an appeal where witnesses cannot ordinarily be recalled. He said in the present, case which is civil and where the burden of proof is lower, there is oral testimony to be weighed against documentary evidence. There would in his view not necessarily be prejudice occasioned to the defendant merely because he would be cross-examine before a different Judge. In any case, plaintiff's counsel added, Order XVII rule 12 empowers this court to recall any witness if necessary since this is a hearing and not an appeal. Plaintiff's counsel reiterated his earlier submissions.

I have given due consideration to the parties' rival submissions including the authorities cited by their counsel.

The typed proceedings confirm that the case was part-heard before Hayanga, J. The plaintiff company called three witnesses on its behalf and they testified and were cross-examined. Thereafter the defendant started testifying but did not complete his evidence-in-chief. The court record shows that defendant's counsel indicated he would call three witnesses. The line of cross-examination of plaintiff's witnesses suggests that this court, or whichever succeeding court will continue with the case, is likely to be urged by defendant's counsel to treat plaintiff's witnesses as unworthy of belief while plaintiff's counsel is likely also to launch an onslaught on the credibility of the defendant and his witnesses. Such scenarios are commonplace in trials and when they arise, the trial Judge can call to his aid his impressions of the witnesses during the live shows we call trials. If such a situation were to arise in the present case, the succeeding Judge would have to rely partly on impressions founded on his observations arising from the live shows before him and partly on historical records with regard to evidence tendered before another Judge in deciding which evidence to believe and accept and which evidence to reject. Such a situation poses some kind of dilemma for the succeeding Judge.

What is to guide the court in deciding whether or not to continue a case from where it had reached before another court or to start hearing it afresh? I share the observations made by Duffus, J.A. in Mandavia's case (supra) when he said:

“... it seems to me that the proper test is whether the successor Judge is in as good a position as his predecessor would have been in to evaluate the evidence and submissions which have been put forward and to continue the hearing on that basis.”

In the present case, the parties are sharply divided as to the course the case should take. Plaintiff's counsel urges that the case continues from where it had reached before Hayanga, J. Counsel's reasons included considerations of expenses involved if the case were to start de novo. He said that the plaintiff operated from Nyeri; that its witnesses live in Nyeri as does also the defendant; that the parties had to make numerous trips to Nairobi for this case and that there is no need for a repeat of such trips. I find this particular ground very curious indeed. There was a High Court in Nyeri at the time of filing this case, yet the plaintiff filed the case in Nairobi. How can the plaintiff now complain that making trips to Nairobi is a tiresome and expensive affair? Plaintiff's counsel says there will be no prejudice to the defendant if the case continues from where it reached. Defendant's counsel disagrees and points out that the defendant will find himself in the position of coming under the scrutiny of the succeeding Judge who will eventually decide the fate of each party's evidence while his (defendant's) opponents will escape such scrutiny, the Judge who observed the opponents' demeanour having ceased to exercise jurisdiction over the case. Defendant's counsel maintains that continuation of the case from where it had reached would in the circumstances of this case amount to according to the parties unequal hearing opportunities and he sees prejudice in such a course.

The case is clearly old. It is also true that there are many cases pending hearing before the courts. I appreciate that if this case does not go for fresh hearing from start, judicial time would be saved but this advantage has to be weighed against the principle that justice must not only be done but also be manifestly seen to be done. There may not be actual prejudice if the case continues from where it had reached before the previous Judge but as long as the defendant is of the perception that his opponents had an unfair advantage over him, having started their testimony way back in 1995 nearer the time of the

events in question, the defendant will not see justice as being done – particularly if he loses. Plaintiff's counsel seemed to acknowledge, albeit reluctantly, that occasion could arise requiring some witnesses to be recalled if the court deemed it fit. If some witnesses can be recalled by the succeeding Judge, why not all?

Having considered all the circumstances of this case, I am persuaded that there is a good case for it to start de novo and I so direct.

Orders accordingly.

Delivered at Nairobi this 18th day of July, 2005.

B.P. KUBO

JUDGE