



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE 1043 OF 2003**

AFPIC INTERNATIONAL IN THE UK LIMITED.....PLAINTIFF

VERSUS

ALICE MAGIRI JUKES .....1<sup>ST</sup> DEFENDANT

ACTION FOR PEOPLE IN CONFLICT (AFPIC).....2<sup>ND</sup> DEFENDANT

**RULING**

This case first came up before me on 17.10.05 whereat learned counsel, Mr. D. Ingosi held brief for Mr. Karago for the plaintiff; learned counsel, Miss E.W. Kinyenje represented the 1<sup>st</sup> defendant; and learned counsel, Mr. C.O. Adipo represented the 2<sup>nd</sup> defendant.

Mr. Ingosi said that his instructions from plaintiff's counsel were to seek adjournment on the grounds that the parties had not agreed on issues; that the parties had not exchanged documents; and that no discovery or inspection of documents had been done. He proceeded to tell the court that on 02.12.03 Aluoch, J had directed that the case should not be confirmed for hearing until agreed issues had been filed and documents exchanged. That after 17.10.05 was taken for hearing of the case, there was a call-over on 22.09.05 and the case was taken out of the hearing list for 17.10.05 but the 1<sup>st</sup> defendant had the case mentioned before a Judge after the call-over and it was confirmed for hearing on 17.10.05.

In response, counsel for 1<sup>st</sup> defendant told the court that, contrary to what Mr. Ingosi had said, issues were filed on 07.07.04; that the 1<sup>st</sup> defendant had, with respect to discovery, filed her list of documents on 04.12.03 and also filed a supplementary list of documents on 19.07.04. Counsel for 1<sup>st</sup>

defendant informed the court that it is the plaintiff who had not complied with court orders on discovery. Counsel for 1<sup>st</sup> defendant pointed out that there are two orders : the one by Aluoch, J alluded by Mr. Ingosi and another by K. Kariuki, J made on 15.07.04 and that the plaintiff had not complied with those orders.

On the issue of call-over, counsel for 1<sup>st</sup> defendant said that the case was in fact confirmed for hearing at the call-over of 22.09.05 by the Duty Judge (Njagi, J). In this connection, counsel asked the court to scrutinize the call-over list to verify what she was saying, i.e. that the case had been confirmed for hearing at the said call-over. Counsel added that the 1<sup>st</sup> defendant had traveled from the U.K. for this case; that on 29.07.04 Mugo, J had ordered the plaintiff to pay costs of adjournment plus costs of air ticket and accommodation of the 1<sup>st</sup> defendant as a result of the adjournment of that day before the next hearing date and, as I understand it, that the plaintiff did not pay the adjournment costs and cost of air ticket and accommodation of the 1<sup>st</sup> defendant as ordered.

Counsel for 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's suit.

For his part, counsel for 2<sup>nd</sup> defendant informed the court that the 2<sup>nd</sup> defendant runs a girls orphanage in Thika and that as a result of this case donors have not injected money towards expansion of the orphanage. Counsel pointed out that the order of K. Kariuki, J was categorical, that it had not been complied with by the plaintiff and that the plaintiff's suit should be struck out.

In reply, Mr. Ingosi said he had nothing else to say as his instructions from plaintiff's counsel were limited to seeking adjournment, for the reasons he had given.

The court record shows as follows:-

- (a) That on 02.12.03 Aluoch, J made the undermentioned orders
  - (i) **The parties to agree on issues for determination at the hearing. These issues to include issues in the application dated 08.10.03.**
  - (ii) **Thereafter parties to exchange lists of documents and to conduct discovery and inspection of documents.**
  - (iii) **Thereafter parties to take hearing dates from the registry**
- (b) That on 15.07.04 K. Kariuki, J made the undermentioned orders:-

- (i) **The suit be heard before the end of that term on 28.07.04 at 9.00 a.m.**
  - (ii) **The plaintiff to file and serve its list documents within the next seven days thereof.**
- (c) That on 29.07.04 Mugo, J made the following undermentioned orders:-
- (i) **Suit marked stood over generally.**
  - (ii) **The plaintiff to pay to both defendants costs of this attendance including any costs incurred by the overseas witnesses as necessitated by such attendance.**
  - (iii) **The said costs to be assessed by the Registrar of the High Court and to be paid prior to a hearing date being allocated.**
  - (iv) **Any injunctive orders obtaining herein are hereby vacated.**
  - (v) **The plaintiff shall bear court adjournment fees.**

Counsel for 1<sup>st</sup> defendant told the court that, contrary to plaintiff's counsel's contention that the parties had not agreed on issues, issues were filed on 07.07.04; that the 1<sup>st</sup> defendant had, with respect to discovery, filed her list of documents on 04.12.03 plus a supplementary list of documents on 19.07.04. I have not been able to find in the court file the agreed issues said to have been filed on 07.07.04 but the 1<sup>st</sup> defendant's list of documents filed on 04.12.03 plus her supplementary list of documents filed on 19.07.04 are available in the file. I have not, however, been able to find corresponding documents filed by the plaintiff. I have also not found evidence of compliance by the plaintiff with the orders made by Aluoch, J, K. Kariuki, J and Mugo, J alluded to above. It would appear that the plaintiff is the person principally in default. I also note that plaintiff's counsel did not deem it fit to inform the court through Mr. Ingosi who held his brief when this case came up before me on 17.10.05 why he (plaintiff's counsel) did not attend court.

There is another matter raised at the session of 17.10.05 when this case came up before me which I wish to comment on for the record. This relates to the issue whether this case was or was not confirmed for hearing on 17.10.05 at the call-over of 22.09.05. I called for the call-over list for 22.09.05 and the endorsements made by hand against this case are: "**Priority**" and "**AFTER CALL OVER WAS DONE**". I surmise from these endorsements that the case was confirmed for hearing on 17.10.05 *after* the call-over of 22.09.05 on the basis that the case warranted hearing on priority basis. If the plaintiff

considered the manner in which the case got confirmed for hearing as a major issue, the said plaintiff should have made an appropriate application to challenge it early. This was not done.

The overall picture emerging from the events or omissions outlined herein is that the plaintiff was casual in its pursuit of this case and, more fundamentally, that the said plaintiff failed or neglected to comply with the various court orders alluded to above. This is not acceptable and the plaintiff shall bear the consequences of its want of diligence in this matter. The plaintiff's suit is hereby struck out with costs.

**Orders accordingly.**

**DELIVERED at NAIROBI this 24<sup>th</sup> day of October, 2005.**

**B.P. KUBO**

JUDGE