



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ORIGINATING SUMMONS 15 OF 2017

SAMUEL KIBUTHA KAMAU.....APPLICANT

-VERSUS-

CATHERINE CHAO NYANGE....RESPONDENT

RULING

1. On 3rd December, 2020, this file was placed before me for purposes of fixing a hearing date. In the presence of M/s Osino appearing for the applicant and Mr. Kitonga counsel for the respondent, the matter was fixed for hearing on 17th February, 2021. Come 17th February, 2021, the court was engaged elsewhere hence could not sit. As is the practice, parties were notified of the Judge's absence hence advised to take another hearing date at the registry.
2. On that day, a court clerk representing the firm of Osino and company advocates appeared before the registry and took an ex parte hearing date for 18th March, 2021. From the record, there was no representation from the firm of Kitonga advocates. Never the less, the firm of Osino served Kitonga advocates with a hearing notice dated 5th March, 2021.
3. On 18th March, 2021, Ms Osino appeared for the applicant. M/s Kamau held brief for Mr. Kitonga for the respondent. M/s. Kamau informed the court that Mr. Kitonga was not ready to proceed as he was engaged before the Employment and Labour Relations Court. In response, M/s Osino told the court that Mr. Kitonga had called her in the morning indicating that the hearing date was not convenient for him. She however urged the court to adjust time for hearing to enable Mr. Kitonga finish his engagement with the Employment and Labour Relations Court and then attend the hearing before this court. In response, M/s Kamau requested the court to set aside the file for 10 minutes to enable her consult Mr. Kitonga.
4. Having acceded to the request, the court gave M/s Kamau 10 minutes to consult Mr Kitonga as to the convenient time he was to be available for hearing. At 10.00 am, the court called out the file to confirm from M/s Kamau on the convenient time Mr Kitonga was to appear. Ms/ Kamau told the court that Mr Kitonga was not picking her calls. She therefore requested the file to be rescheduled to 2.30 pm. She promised to look for Kitonga personally. M/s Osino requested the matter to be mentioned at noon to confirm whether Mr Kitonga was prepared to proceed. Again the court accepted and directed for the matter to be mentioned at noon.
5. At noon, Mr Kitonga appeared and informed the court that the date was taken ex parte hence it was not convenient for him to proceed. He however admitted that he had finalized his appearance before the Employment and Labour Relations Court. M/s Osino apposed every attempt to adjourn the matter arguing that although the date was taken ex parte, it was Mr Kitonga's fault as his office did to turn up on 17th February, 2021 to fix a proper hearing date as directed by the court. Further, that Mr Kitonga was notified of the hearing date within reasonable time.
6. Having considered parties' arguments, the court rejected the prayer for adjournment. The court directed parties to prepare and be ready to proceed at 2.00 pm. At 2.00, both counsel appeared. Mr Kitonga claimed that he had attempted to reach his client to no avail. He further stated that he had no instructions to proceed with the hearing. He insisted that he could not proceed without his client. M/s Osino vehemently opposed the attempt to get the matter adjourned.
7. Having considered the ground for adjournment and the objection thereof, the court rejected the application and directed for the applicant to proceed with his case and thereafter adjourn to enable the respondent attend and tender evidence for her case. After taking the evidence of the applicant, Mr Kitonga refused to cross examine the witness claiming that he had no instructions to participate. The applicant having closed his case, the court adjourned the matter to 27th May, 2021 to enable the respondent attend court and present her case or tender her testimony.
8. On the same day, the firm of Kitonga advocates filed a notice of motion dated 18th March, 2021 seeking to cease acting for the respondent. Subsequently, on 31st March, 2021, the firm of Gichuki Thiaka & co. Advocates filed a notice of change of advocates thus replacing the firm

of Kitonga advocates.

9. Vide a Notice of Motion dated 21st May, 2021 and filed on 24th May, 2021, the applicant through Gichuki and company Advocates sought for orders that;

(1) Spent;

(2) This honorable court do grant a stay of the proceedings herein pending hearing and determination of this application interpartes.

(3) This honorable court do issue orders expunging proceedings as recorded on 18th March, 2021 and have the matter set for hearing afresh.

10. The application which is the subject of this ruling is anchored on grounds stated on the face of it and averments contained in the affidavit in support sworn by Catherine Chao the respondent, /applicant. The applicant averred that on 17th February, 2021 when the matter did not take off, her advocate Mr Kitonga informed her that, he was to let her know of the court hearing date. That Mr Kitonga later called and informed her that the matter had been fixed for 18th March, 2021 but the date was not convenient for him and that he was to let her know of the new date. That she was shocked when she got informed that the matter had proceeded ex parte in her absence. She urged the court to allow her application. As proof of her innocence, she attached affidavits sworn by M/s Kamau advocate and Mr Kitonga advocates explaining what happened in court on 18th March, 2021.

11. In reply, the respondent filed a replying affidavit sworn on 26th May, 2021 by M/s Osino counsel for the applicant who stated that; the matter did not proceed ex parte as the respondent was duly represented by counsel who deliberately decided not to participate; that the ex parte date was taken after the respondent /applicant's counsel refused to send a representative to take a convenient date; the court reserves the discretion to adjourn a matter; counsel for the respondent /applicant was given sufficient time after several adjournments; counsel had been on record since inception of the suit hence had sufficient instructions; the matter was adjourned to enable the respondent testify hence posing no prejudice on her part. Lastly, that the respondent has come to court with dirty hands.

12. During the hearing, Mr. Thiaka, reiterated the averments contained in the affidavit in support of the application. He urged the court to re-open the case to allow him cross examine the applicant and that counsel's mistake should not be visited on a litigant.

13. On her part, M/s Osino also adopted the content contained in her replying affidavit thus contending that the court judicially exercised its discretion by rejecting an adjournment. She submitted that on 18th March, 2021, the matter did not proceed ex parte as counsel for the applicant was present throughout the entire proceedings but opted keep quiet. Lastly, counsel submitted that the issue of adjournment and reopening of proceedings is now res-judicata. In support of the proposition that courts are managers of court proceedings and that adjournments are at the discretion of the court, counsel referred to the holding in the case of **Odoyo Osodo Vs Rael Obara Ojuok and 4 others (2017) e KLR and Gulf Energy Limited Vs East African Safaris Air Express Limited (2020) e KLR**.

Determination

14. I have considered the application herein, affidavit in support and the response thereto. I have also considered oral submissions by counsel. Issues that arise for determination are;

a. Whether the proceedings of 18th March, 2021 were conducted ex parte and therefore should be expunged from the court record.

b. Whether the court should reopen the applicant's case to allow the respondent to cross examine the applicant.

15. From the record, it is clear that the hearing date for 18th March, 2021 was fixed ex parte by the applicant's /respondent's counsel after the respondent /applicant failed to turn up at the registry on 17th February, 2021 when the court did not sit and matters were taken off the cause list with instructions that fresh hearing dates be taken at the registry.

16. It is also clear that on 18th March, 2021, the court indulged Mr. Kitonga by rescheduling the hearing period to enable him finalize his alleged hearing before the Employment and Labour Court. Although no proof was submitted by Mr. Kitonga that on the day he was before the Employment Court he turned up at 12.00 midday and sought for more time which the court allowed and scheduled at 2.00pm. When the matter came up at 2.00pm, he attended but refused to cross examine the witness who had testified; Mr Kitonga admitted that he was served with the hearing notice in good time. His main contestation was that the date was taken ex parte and that it was not convenient.

17. It is clear that the court did over indulge Mr Kitonga by giving him sufficient time to appear which he eventually did. He took part in the proceedings but refused to play his role as counsel. An advocate is deemed to be fully and duly instructed upon taking a brief from his client. The lawyer had been on record since the inception of the case. He cannot claim lack of sufficient instructions. It is a fallacy for the applicant to claim that the matter proceeded ex parte when her counsel appeared and pensively sat listening to the applicant's case but chose not to cross examine. These cannot be ex parte proceedings. Counsel decided to abandon his client at the hour of need by refusing to play his role. He deliberately ignored court's directions and orders.

18. It is trite that where an advocate refuses to render his professional services at will, the court cannot be accused of any misdeed for properly and judicially exercising its discretion. Further, it is trite that the question whether to grant or not to grant an adjournment is a discretion bestowed upon the presiding judge or court to ensure orderliness, certainty and predictability in the management of court

business. See Odney Osodo Vs Rael Obara Ojuok and 4 others (Supra) where the court held that;

...However, in the instant matter I am not persuaded there was any genuine mistake and/or error. Lack of diligence and/or casualness or sloppiness cannot be equated to genuine mistake or error ...”

19. I am alive to the fact that not all counsel’s mistakes are excusable or condoned in the pretext or cover of client’s interest. The interest of justice is well taken care of when it is balanced against both parties. The applicant /respondent equally has a right to have his case determined expeditiously. An advocate who deliberately exposes his client to foreseeable risks should not hide behind the interest of a client. Instead, such counsel should bear full responsibility by indemnifying his client where applicable.

20. In support of the above holding, I am guided by the holding in the case of Ketteman & others Vs Hansel Properties Limited (1988) 1All ER 38 in which the court held;

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings. Needless to say, the application to amend a defence on the basis of an inadvertent mistake by counsel was disallowed. To our mind, this is the most proximate way to balance interests of both parties to the suit”.

21. Similar position was held in the case of Tana and Athi Rivers Development Authority Vs Jeremiah Kimigbo Mwakio & 3 others (2015) e KLR where the court commented on mistakes of counsel as follows;

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.....under this duty, counsel is unequivocally obliged to exercise candor not to aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependant on the circumstances of a case, as a custodian of justice, the court must always stay a live to the interests of both parties. This is of paramount importance”.

22. See also Christopher Muriithi Ngugu Vs Eliud Ngugu Evans (2016) e KLR where the court of appeal held that litigants should pursue the interests of obtaining justice in situations where errors of counsel are reasonable but not out of negligence .

23. In the instant case counsel acted improperly by refusing to cross examine a witness even when the court had promised that it was to adjourn after the applicant’s case to enable the respondent tender her evidence. Mr Kitonga forcefully wanted an adjournment at all costs which the court did not find reasonable to grant. Counsel should have cross examined the witness as he had all the necessary brief and materials from his client prior to taking directions for hearing. To claim lack of instructions is to say the least lack of seriousness and was out of disrespect to court’s discretion or management of court affairs. I do not find any reasonable excuse in counsel’s refusal to cross examine the applicant/respondent. I must add that counsel had a chance but he opted for the most risky option.

24. To stay this proceedings and or re-open the applicant’s case will be a travesty of justice. It is trite that proceedings can be stayed specifically and only in circumstances that will not render the determination on substantive justice a mockery.

25. In view of the above finding, I do not find any merit in this application. The respondent has an opportunity to tender her evidence and thereafter counsel shall submit. On the same vein, the applicant cannot be recalled to re-open his case as he was not to blame for the respondent’s counsel’s inexcusable mistake. Accordingly, the application is dismissed with costs to the applicant/respondent. Hearing shall proceed with the respondent’s case.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JUNE, 2021

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J. N. ONYIEGO

JUDGE