



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL APPEAL NO. E070 OF 2021**

**WANJIRU YUSUF ABDALLA.....APPELLANT**

**VERSUS**

**ELIZABETH MUENI EWIN.....RESPONDENT**

*(Being an appeal from the Ruling of Hon. W. Chepseba*

*(CM) delivered on 9<sup>th</sup> July, 2021 in Malindi CMCC No. 298 of 2018)*

**Coram: Hon. Justice R. Nyakundi**

**Katsoleh Advocates for the Appellant**

**Kilonzo & Aziz Advocates for the Respondent**

**R U L I N G**

This is an appeal essentially arising from an interlocutory Ruling by **Hon. W. Chepseba**, the session Magistrate in which he declined a further adjournment to the appellant who had sought leave to admit further evidence of a witness by the name **Kupalia**.

The bone of contention as seen from the record revolved around the conduct of the proceedings by the appellant. In view of the fact that the proposed witness had not recorded any statement or affidavit on the subject matter. Secondly, it appeared to the parties that **Mr. Kupalia** an advocate of the High Court had acted as legal counsel to the disputants in considering the rival submissions by both counsel. The Learned session Magistrate exercised discretion to the effect that **Mr. Kupalia** cannot be called as a witness. His name is not in the list of witnesses, no statement filed and he acted for both parties. **“That is the gist of this appeal.”**

**The Appellants Submissions**

Learned counsel for the appellant submitted to the effect that the trial Magistrate erred in Law and fact in declining to grant a further adjournment for the appellant to prepare her defence. The appellant contended that the decision was tantamount to a denial of a right to a fair hearing. The appellant urged the Court to exercise the appeal jurisdiction to interfere and vary the order, with a direction to that trial Court to re-open the matter so as to admit further evidence.

To buttress the aforesaid submissions, Learned counsel cited the following authorities **Mbogo v Shah {1968} EA P.15 Foulkes Administrative Law 7<sup>th</sup> Edition Butterworths: R v West London Supplementary Benefit Appeal Tribunal Exparte Bullen {1976} SOL: Evans Maina MSC No. 7 of 1969: Aga Khan Hospital v Busan Munyambu KAR 378: Famous Cycle Agencies Ltd & 4 others v Masukhalal Ramji Karia SCCA No. 16 of 1994 {1995} IV KALR 100** With that Learned counsel submitted for the Court to find merit in the appeal.

**The Respondent Submissions**

On the other hand, Learned counsel for the respondent crafted the following issues as the anchor to navigate the appeal and the rejoinder in answer to the appellant submissions.

***(a). Whether the Appeal is competent before the Honourable Court.***

***(b). Whether the Learned trial Magistrate properly exercised discretion in declining to grant an adjournment.***

(c). *Whether, the Learned trial Magistrate erred in Law and fact by denying the appellant to call one Mr. Kupalia as a witness.*

(d). *Whether there was bias, attributable to the trial Court.*

On the first issue Learned counsel submitted that the leave so ordained under Section 75 of the Civil Procedure Act was never sought by the appellant. In that regard a question of procedural jurisdiction bars the Court from entertaining the appeal. The reference to this Learned counsel placed reliance to the cases of **Nyutu Agrovet v Airtel Networks Ltd {2015} eKLR: Owners of Motor Vessel Lillian ‘s’ v Caltex Kenya**. In Learned counsel’s contention there isn’t a competent appeal for adjudication by this Court.

On the second issue agitated by the respondent, Learned counsel urged the Court to give effect to the powers donated to the trial Court to control, manage, monitor and umpire the case docket throughout the stages until final decision. That unless, the exercise of discretion falls within the ambit of the principles in **Mbogo v Shah (supra)**. This Court is restrained in moving towards a direction of imposing its view on what constitutes a fair adjudication of cases in another competent organ of the Constitution.

Learned counsel also argued and submitted that the Court in its consideration of the matter be guided by the principles in **Japheth Kilunga v Mombasa Autocare Limited {2015} eKLR: H. K. Shah & Another v Osman Allu {1946} 14 EACA 45**. That the above position obtained renders the decision by the trial Court unimpeachable.

On the third issue, Learned counsel submitted that the bone of contention also surrounded the compellability and competence of the witness, identified by the appellant to be summoned in order to take the witness stand. According to the Learned counsel perspective, a **Mr. Kupalia** apparently had acted for both parties, and his presence in Court was likely to manifest a conflict of interest pursuant to Section 134 and 136 of the Evidence Act.

Learned counsel further submitted and related the direction taken by the appellant by referring to Rule 9 of the advocates (Practice Rules which sets limitation clauses with regard to an advocate who has had prior knowledge on matters in issue and they are a subject of the court proceedings. Learned counsel submitting on the same issue urged the Court to be guided by the principles in **King Woolen Mills & Another v Ms. Kaplan & Stratton {1993} KLR 273: Uhuru Highway Development Limited v Central Bank of Kenya & 3 others, Civil Appeal No. 286 of 2001**. Learned counsel using the principles in these authorities as a yardstick submitted that there are ethical issues allowed to the paid, **Mr. Kupalia** serving as a witness in a contentious matter currently pending before Court.

Finally, Learned counsel delved into the issue of independence and impartiality of the trial Magistrate. In familiarizing himself with the proceedings at bar Learned counsel submitted that in the entire trial the role of the session Magistrate has been to uphold the integrity of the trial including case management standards. That any reference to bias at this stage of the proceedings is only meant to derail the conclusion of the case to the detriment of the respondent.

Learned counsel further contended that there has been no erosion of confidence on the part of the trial Court to result in the deterioration of the adjudication process to determine the claim on the merits. In this regard, Learned counsel pointed out the principles in **Elizabeth Wanjiku Njoka v Juma & 2 others {2018} eKLR**. On the safeguards and respect of due process to ensure that individual rights are protected efficiently.

Having regard to the appeal, the record and submissions by both counsels, I now turn to make a findings on the myriad of issues that emerged at the closure of the appeal hearings.

### **Determination**

Although, the appeal arises from an interlocutory application, this Court only renders itself of the matter within the binder principles enunciated in **Okeno v R {1972} EA 32: Pandya v R {1957} EA 336**. To be clear I would first dispose of the issue on jurisdiction. As submitted by Learned Counsel for the respondent, this is a jurisdictional appeal. It raises the question of whether the appellant have an arguable case founded on the jurisdiction as premised and limited in terms of Section 75 (1) of the Civil Procedure Act. The Court does examine whether the lack of leave direction affected the competence of the appellant’s appeal. In this respect Order 43 Rule (1) of the Civil Procedure Rules expressly confers and bears emphasis on the orders and rules from which an appeal would lie as of right; with leave of the Court.

In Order 43 Rule (3) the Act provides interalia that:

***“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”***

The power thus granted to the Courts under Section 75 as read conjunctively with Order 43 of the Civil Procedure Act and Rules is to provide redress to the parties pursuant to grant for leave to appeal against such interlocutory orders. Neither the prescriptions of Section 75 and Order 43 of the Act and Rules was to complied with day the appellant. The availability of the process availed to the parties for the vindication of their rights on such matters as those affecting the appellant are fashioned around the question of leave. That golden stream is in my view a right of access to the appeals Court under our system of Law.

As noted within the provisions of Section 75 and Order 45 of the Civil Procedure Rules, the wordings are not that of a mere preamble or introduction but rather that of an enacting provisions which recognizes grant of leave as a prerequisite of the right to a litigant to pursue an appeal to a higher Court. The importance of observing jurisdictional issues by the Courts in relation to litigation has been adequately clarified in the owners of **Motor Vessel Lillian v Caltex: Nyutu Agrovet v Airtel Networks (supra)**.

In this case, the jurisdictional issue is whether, the appellant obtained leave from the primary Court in accordance with the well known guidance set out in the cited provisions above in the statute. This necessary step from the record was ignored. I think that the question as to whether the appeal had a real prospect of succeeding has to be answered first having regard to the overriding objective of dealing with the issue of leave. The first appeal's Court continuing jurisdiction of the case for the appellant required compliance with conditional precedent for leave pursuant to Section 75 as read with Order 43 of the Civil Procedure Rules. That in action deprived this Court of subject jurisdiction.

On whether the Learned trial Magistrate exercised his discretion correctly in turning down the adjournment. I hold the following view. The Law is evidently clear on pretrial conference on case management as embodied under Order 11 of the Civil Procedure Rules. The right to due process and protection of the Law in a litigation is multi-dimensional, broad grounded in fundamental notions of justice and the rule of Law in dispute resolution.

The safeguards against trial by ambush to deprive a litigant the basic right to a fair hearing under Article 50 of the Constitution are encompassed in the pretrial conference. The key objectives set to be achieved include:

*(a). Early identification of the real issues to the claim.*

*(b). Considering in advance issues relating to any matters on admissibility of any documentary, technical expert, pre-remanded digital or electronic evidence.*

*(c). The early identification of the number and needs of witnesses, including exchange of witness statements amongst the parties to the litigation.*

*(d). Determining the issues on disclosure.*

*(e). Schedule timelines dependent on the length of the trial to achieve certainty in concluding the proceedings within a reasonable time.*

*(f). Addressing the relevant preliminary issues including referral to mediation.*

The Court observes that the trial commenced in earnest on 9.7.2021 when the first witness for the respondent took oath to lay before Court the substratum of the claim. The suit itself was lodged in the Magistrate's Court registry on 18.9.2018 and subsequently amended on 3.2.2021.

For my part, I think all the preliminary or pretrial issues had been resolved to give way for the trial of the dispute. Despite that position as reflective of the record, in the present appeal, the appellant moved the trial Court to be given leave to introduce a witness who was not part of the structured scheme at the pretrial conference. I must say that this motion by the appellant came at the time when the respondent had already closed its case and as stipulated the appellant case had been admitted by receiving the identifiable evidence of the witness.

In the view of the Court, any further adjournment was ill advised and as shown in the facts of the case the dock statement on adjournment was denied in iota. The general rule on case management powers is provided under Section 1A and 1B of the Civil Procedure Act on canons of overriding objective. The positive features to be taken into account include the just, expeditious, proportionate and affordable resolution of the civil disputes. There are no exceptions to the general conceptual framework on overriding objective. A trial Judge or Magistrate has a residual discretion to entitle both parties the justice of the matter. A careful review of this appeal rests squarely on the judicial discretion exercised by the session **Magistrate Hon. Chepseba**. A summing up by **West's Encyclopedia of American Law Edition 2** gives a broader legal and social context of judicial discretion as follows:

***“Judicial discretion is the power of judicial officers to make decisions on some matters without being bound by precedent or strict rules established by statutes. On appeal, a higher Court will usually accept and confirm decisions of trial Judges when exercising permitted decisions, unless, capricious showing a pattern of bias or exercising discretion beyond his or her authority. It is an exercise of judicial power to act within procedural Law during adjudication of disputes.”***

The **Learned Author of Black's Law Dictionary** defines Judicial discretion as:

***“The exercise of Judgment by a Judge or Court based on what is fair under the circumstances and guided by the rules and principles of Law, a Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right.”***

Additionally, **Jowitts Dictionary of English Law** defines discretion as:

***“Discretion is a man's own Judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind. So a Judge or Court often has a discretion in making orders or imposing conditions on litigants. Discretion however, is to discern by the right time of Law, and not by the crooked cord of private opinion, which the vulgar call discretion.”***

The basic a rule in deciding whether to grant or refuse an adjournment is to exercise discretion as a measure of litigation to facilitate the management or streamlining the adjudication of cases.

It is therefore equally important that adjournment as a foot to achieve efficient and effective case docket disposal should not be granted without sufficient good cause. It follows from the principles formulated in **Savanna Development Co. Ltd v Mercantile Finance Co. Ltd**

*“Adjournment is only granted on the most compelling of reasons laid bare for anyone to see, that indeed adjournment is called for, given the circumstances of the particular case. This is a principle always acted upon, and for good reason. It is in the interest of justice that litigation must be got on with at reasonable speed – reasonable expedition, the wise say; not too quickly; not too slowly. In the administration of civil justice proceeding at break-neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceedings sluggishly fossilize it. Has it not come down to us through the ages from men of old and wisdom, that justice delayed is justice denied? Delay is often brought about by adjournments – often adjournments which can be avoided without much exertion of effort. But sometimes they may be unavoidable. Recognizing such occurrence the rule-making authority laid down some allowance and stated that an adjournment may be granted where it is “necessary for reasons to be recorded.” The first question a judge must address his mind to is whether there are reasons, to be recorded, which make an adjournment “necessary.” Though discretionary, the power to grant an adjournment must not be idiosyncratically exercised. It is a judicial power – a power beyond whim and caprice; a power beyond benevolence and sympathy. It is to be exercised selectively. That it is only possible when the Court is satisfied on the adequacy of the reasons given for seeking the adjournment, the extent to which an adjournment may cause prejudice, and on whether the opposite party can be suitably compensated by mulcting the applicant in costs. These elements are only too well-known to require citation of supporting authority. Courts have also laid down that an application to postpone a hearing must be made timeously, and not at the very last minute. A postponement will not be granted to a plaintiff where the need for it has come about as a result of circumstances or happenings which the plaintiff, at the time of setting down the suit for hearing could have, and should have foreseen. It has been said in the books that costs are ordinarily a panacea which heals all ills of adjournment. The Court is yet to be presented with datal information in this respect. Litigational anxiety, the damaging effects of looming or actual but suspended litigation over one’s head, especially if he is a professional or in business requiring integrity and clean reputation, wasted opportunities elsewhere, and psychological trauma of suit, are imponderables incapable quantification in money for compensation purposes. So, when one offers costs, it is upon him to show that the costs he offers to pay will reasonably compensate the other party in all these and other respects. Transport expenses, hotel bills and attendance costs from the witness or the advocates, are but an aspect of costs, but they are not the only ones. The opposite party may be prejudiced in more ways than mere monetary loss incurred in travelling, food, accommodation, and attendance. It is not for the opposite party to prove the loss in the first place; it is for the applicant to show no loss or reasonably compensable loss. (See also Odunga’s Digest on Civil Case Law and Procedure pg 17-18 Para 2-3)*

In the instant case, appellant contends that the Learned trial Magistrate committed a reviewable error by failing to consider the application for adjournment and therefore prejudicing the rights to a fair hearing. The respondent provided the litigation history of the matter from the time of lodging the claim, pretrial conference, disclosure, amendment of pleadings and scheduling the matter for trial. In the circumstances of the case, the respondent was of the view that an adjournment was a tactic to sufficiently delay the adjudication of the issues on the merits within a reasonable time. The material provided by the record corroborates the assertion by the respondent, that all the components of receiving the evidence of **Mr. Kupalia** had not been complied with by the appellant.

For instance, the respondent raised the issue on the conflict of interest by the advocate who apparently seemed to have acted for both parties. He was desirous of appearing for the appellant, may be to scuttle the respondent case who had no opportunity to address the issue during her evidence in chief or cross-examination on that piece of evidence contemplated to be adduced.

On this contentious issue and my appreciation of the facts of the case and the Law, I take the following view. The Learned trial Magistrate order to decline an adjournment and the order to exclude evidence is not a matter which is subject to appellate interference, in this particular case. The widest possible discretion as the precedent setting cases frame it is subject to appellate interference only if the trial Magistrate misdirects herself or himself or if his decision is clearly wrong as to amount to an injustice. (See **Mbogo & Another v Shah {1968} EA 15**). From the record, the Learned trial Magistrate reviewed the matter carefully, and accurately, considered the application for a further adjournment and rejected that alternative of receiving the evidence of a **Mr. Kupalia**. He found that execution of that evidence was particularly necessary as no witness statement had been filed and more importantly he acted for both parties to the dispute. This issue of permitting an advocate to be called as a witness must be dealt with at the pre-preliminary hearing conferences. The simple fact is that an advocate of the High Court occupies a special position in our administration of justice. The information which comes into his or her possession is privileged by Law.

That can be clearly seen from the provisions of Rule 9 of the Advocates Practice Rules as read with Section 134 and 136 of the Evidence Act. It is generally accepted in Law that an attorney, solicitor, or advocate or the High Court who has represented or is representing a party is not a compellable and competent witness in a contested claim at a judicial trial in which the issues arising are of nature that cannot into his or her possession as an advocate or solicitor. When an advocate or lawyer is required to testify as a witness for his client/the party he or she is representing leave of the Court should be sought and any such formal contents of the witness statement be shared with the adverse party in advance.

In my view except under the doctrine of necessity for the essentials to meet the ends of justice a lawyer or an advocate of the High Court should avoid testifying in Court of Law on behalf of the same client he has been representing as a legal counsel. The correct approach to me is to ask whether the testimony relates to an uncontested issue or the testimony sought to be adduced relates to the nature and value of legal services rendered in the case. The practice of acting for a client/party and when a judicial trial is opened, one turns on as a witness has been consistently frowned upon and discouraged in the fair administration of justice.

Occasionally, lawyers or advocates may be called upon as witnesses in a particular case, however there must be a balancing act by the Court when such situations arise, for the twin roles of advocate/witness and the likelihood of conflict of interest. It becomes more easily impeachable to advance a course for disqualification of an advocate as a witness on behalf of the same client he or she has represented. The advocate – witness rule is rooted in evidence Law and also now a matter of legal ethics. The interception of **Mr. Kupalia** by the appellant and demanding of the Court to allow receipt of his testimony without complying with the initial pretrial conference parameters under Order 11 of the Civil Procedure Rules along with the entire and breadth of the continuum of a fair hearing remains very disturbing in that judicial process. Unsurprisingly, that was a trial by ‘ambush’ which if permitted was highly prejudicial to the respondent.

From the outset, the appellant never, made known in advance, the elements on which **Mr. Kupalia** was to produce evidence in rebuttal to the session Magistrate against the respondent evidence adduced without the input of **Mr. Kupalia** witness statement. The feature of inclusion of **Mr. Kupalia** at the tail end of the trial infringed the principle of equality of arms and the right to an adversarial trial before the Court below. It is not acceptable under the principle of equality of arms to litigate by instalments in answer to the case of the opponent. It should be emphasized that a right of access to Court may be subject to a legitimate waiver, which may be established on the basis of unequivocal conduct on the part of that person concerned. At the root of this appeal, is the severability of the salient issue to compel **Mr. Kupalia** to address the Court on other aspects of the case which came into his knowledge while representing the disputants to the suit at the trial Court. It therefore means without a prior witness statement his perspective could as well delve into privileged information shared during his role as an advocate for both parties. The question, then which represents itself in this case, is whether **Mr. Kupalia** was to be called in the case in chief or ought to be called in rebuttal by the defence. This, strangely implies that in some instances he will easily enter into the province of instructions issued by the respondent. I think from the record the trial Court took the necessary step to protect the interest of the parties in a timed manner to minimize prejudice which may result from the testimony of their counsel. Whether an advocate ought to testify ordinarily is a discretionary function of the trial Court based on the considered evaluation of all pertinent factors including inter alia the significance of the matter which might be testified, the weight his or her testimony might have in resolving such matters and the evidence by which these matters may be independently established. One wonders if indeed **Mr. Kupalia** had some distinctive value to the case why the decision to enlist him as a witness was uniquely sneaked after the close of the respondent case. The cornerstone of the rationales presented in the Law is the assertion that the role of advocates and witnesses are inconsistent with one another. The possibility in that trial existed that the testimony by **Mr. Kupalia** in the case may lead to a presumption that his evidence was to distort the truth.

In the case at bar, applying the above principles although the Learned trial Magistrate did not set out a number of factors that he took into account in declining on adjournment and to exclude evidence of legal counsel he did explain himself how he arrived at the impugned decision.

Having considered all of these factors individually, and unavoidably at some great length it is my Judgment that the refusal of an adjournment and exclusion of the evidence by the previous legal counsel to the parties did not prejudice the ongoing trial of the case. Recognizing that tinkering around the edges of the Court process is not enough for the parties, I propose that in their relationship which has been put to the test by this litigation it may find justice at last in our system of Courts to settle those issues to ensure fairness for both of them. For all I have argued above, the appeal as crafted and taken as a whole lacks merit and it is good for dismissal with costs to the respondent.

**DATED, SIGNED ON 15<sup>TH</sup> DAY OF SEPT 2021 and DISPATCHED via email ON 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mulwa advocate holding brief for Kilonzo & Aziz Advocates
2. The Respondent

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