REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 119 OF 2012

MAMBO MREMA……………..…………………………….…………. APPELLANT

V E R S U S

WESLEY KIBOR ………..………………………….……………...RESPONDENT

(An appeal from the decision of Honourable A. M. Obura (SRM) delivered in Kwale on 20th June 2012 in PMCC No. 77 of 2010)

JUDGMENT

1. This is an appeal against the trial Court's refusal to grant Appellant an adjournment in **Kwale PMCC NO. 77 OF 2010**, a running down matter.

2. From the outset I need to state that when this appeal was before me for direction I did ask Learned Counsel for the Appellant whether Appellant would consider withdrawing the appeal on the basis an adjournment had defacto been granted, meaning that Appellant had indeed obtained the adjournment he had sought when he filed this appeal. To date that trial has not progressed any further because of this appeal.
3. What led to the refusal of adjournment? Appellant, who is the Plaintiff in the Kwale Case, was informed by the learned Trial Magistrate and indeed it was an order of the Court on 18th January 2012, as his trial was proceeding, that he had been given the last adjournment. The case resumed for hearing on 20th June 2012 when Appellant called Plaintiff witness No. 3 his doctor. At the end of the doctor's testimony the Court record shows the following-

   "Ms. Osino

   I seek adjournment to refer to C.C. No. 71(b) of 2010 (MSA) which is related and having been concluded.

   Mr. Okalo

   I am unaware of the case.

   Court: I find the application peculiar. A last adjournment was granted to the Plaintiff. The Plaintiff will be at liberty to make relevant application at any stage of the proceedings herein. Application for adjournment declined.

A. O. Aminga, RM

Ms. Osino

I apply for leave to appeal against the ruling.

Court: Thirty (30) days leave to appeal granted.

A. O. Aminga, RM"

The lower Court proceedings ended there and that case has not progressed to date.

4. The learned author of Mullar The Code of Civil Procedure 16th Ed discussing a rule, in the Indian jurisdiction, requiring a case to be heard continuously stated-

   "This rule gives a discretion to the Court to grant time to the parties and to adjourn the hearing of a suit. On the one hand, no adjournment should be granted if no sufficient cause is shown. On the other hand, the Court should not refuse an adjournment if sufficient cause is shown …. What is sufficient cause is a question of fact in each case. The granting of adjournment being a matter within the discretion of the Court, the Supreme Court will not interfere with its exercise nor the High Court." (emphasis mine)

5. Similarly under our jurisdiction Appellant Court will not lightly interfere with exercise of discretion of the lower Court. This was stated in the case **PETER GICHUKI KING'ARA v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS [2014]eKLR**-

   "The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the Court process. Judicial discretion is never exercised capriciously or whimsically. See the cases of; MBOGO & ANOTHER v SHAH 1968 EA 93 at page 95, Sir Charles Newbold P. held-

   "… a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice …"

   MATIBA –Vs- MOI & 2 OTHERS, 2008 1 KLR 670, where the Court of Appeal held that-

   "The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision."

6. I have looked at the proceedings of the lower Court reproduced above. The Learned Counsel for the Appellant did not give a basis for the trial Court to exercise its discretion in applying for adjournment. It was not enough for Counsel to say, for the first time that she needed to refer to another case. She needed to give information of its relevance to the case before Court. No wonder the trial Court found the application "***peculiar***". I cannot find any misdirection on the part of the Learned trial Magistrate. There is no ground shown which can lead this Court to interfere with order of that Court.

CONCLUSION

7. This is an appeal that should not have been filed. It is the likes of this appeal that clog up the Judicial system and cause back log. In consequence to my finding this appeal is dismissed with costs to the Respondent.

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE