



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 150 OF 2012

SULTAN HARDWARE LIMITED.....APPELLANT

VERSUS

WILLIAM MURITHI KIMANI.....1ST RESPONDENT

CHARLES ODONGO.....2ND RESPONDENT

[Being an appeal from the Ruling of the Chief Magistrate in Kisumu CMCC No. 205 of 2009 L. Gitari - CM]

J U D G M E N T

1). This is an appeal from the ruling dated 5-12-2012 by the Chief Magistrate who refused the application by the appellant for adjournment to call a witness to testify before it could close its case. The appellant was the 2nd defendant in the case where the 1st respondent had sued it alongside with the 2nd respondent to recover general and special damages under the Fatal Accidents Act and the Law Reform Act. The suit followed an accident on 15-2-2009 along Kondele – Kakamega road in which motor vehicle registration number KAA 099N knocked and fatally injured the deceased Patrick Kuiru Murithi. The 1st respondent was the father of the deceased. He obtained letters of administration and filed the suit on his behalf and that of the estate claiming that the accident had been negligently caused by the driver of the vehicle. He pleaded that vehicle was registered in the names of the appellant and the 2nd respondent.

2). The appellant and the 2nd respondent each filed a defence to deny the fact of accident, the ownership of the vehicle and the allegation that they were negligent in any way. Each in the alternative, blamed the accident on the deceased. Further, the appellant pleaded, again in the alternative, that it had by the time of accident sold the vehicle to AK Enterprises Limited who had subsequently sold it to the 2nd respondent.

3). Hearing commenced on 22-6-2011, the suit having been filed on 15-5-2009. The 1st respondent was represented by Mr. Odeny, the 2nd respondent by Mr. Onsongo and the appellant by Mr. Anyumba of L.G. Menezes Advocates. The 1st respondent testified and called a witness Benjamin Otieno Alando (PW2) who had witnessed the accident. Mr. Odeny successfully got the case adjourned to call more witnesses. On 26-7-2011 the evidence of corporal Meshack Muyendo (PW3) and that of accountant/auditor Jared Odhiambo Odindo (PW4) was tendered. The case was adjourned again at the request of Mr. Odeny. On 1-9-2011 he called Rosemary Kegode (PW5) and Emily Akinyi Agina (PW6). The case was adjourned to bring an audit report. When the matter came on 16-9-2011 counsel instead closed the case. Mr. Onsongo asked for adjournment for the defence case. That was granted.

4). On 29-11-2011 Mr. Oguso for Mr. Onsongo asked for adjournment saying that they had written to

their client who had, however, not attended. Counsel for the appellant was present. He did not oppose the request. Mr. Odeny opposed, but the request was granted. It was ordered that that would be the last adjournment for the defence. On 25-1-2012 the case came for hearing. Mr. Onsongo informed the court that they would not offer evidence and closed their case. Mr. Olando for the appellant asked for adjournment. He stated that he was not aware that an order for last adjournment had been made. He indicated that his request for adjournment would be the last one. Despite Mr. Odeny's opposition, a final adjournment was granted.

5). The matter came on 16-8-2012. Mr. Okoth held brief for Mr. Menezes who was said to be attending the L.S.K annual conference, and for that reason adjournment was sought. His witness was however, present. Mr. Odeny opposed the request. The court granted adjournment on the basis that, despite the lawyer's absence, the witness was present. On 8-11-2012 the matter came up for hearing. The appellant's witness Kayan Sabjal Visram (DW1) testified. Mr. Anyumba then asked for adjournment to call a witness from KRA. Mr. Odeny and Mr. Onsongo opposed the request on the basis that the case was old, an order for last adjournment had been given and that the case was becoming too expensive because of adjournments. The court, nevertheless, allowed adjournment, indicating that it would be the last one. The matter was ordered to be heard on 5-12-2012. When the day came, Mr. Nyamweya for the appellant asked for adjournment saying that he had communicated with his witness who had said that he would not attend without court summons. Both Mr. Odeny and Mr. Onsongo opposed the application. The court declined the request on the basis that sufficient opportunity had been given to the appellant to present its case and that, in any case, an order for last adjournment had been made. Mr. Nyanga informed the court that he wanted to appeal the order. He was granted leave and the request for typed proceedings. The court then ordered the appellant's case closed and ordered the parties to prepare for submissions. This appeal is against the order refusing adjournment.

6). Counsel filed written submissions on the appeal. It is clear that each appreciated the law in regard to adjournments. An adjournment is granted by a court in the exercise of its judicial discretion. Such discretion will be based on the reasons given by the party applying and on the particular circumstances of the case. An appellate court will not normally interfere with the exercise of such discretion unless it has been shown that the discretion was not exercised judiciously (Kiriisa –VS- Attorney General & Another [1990-1994] EA 244. In Mbogo & Another –VS- Shah [1968] EA 93 It was held that the appellate court will not interfere with the exercise of discretion of a court unless it is satisfied that it misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the court was clearly wrong in the exercise of the discretion and that as a result there had been injustice. The elements the trial court should take into consideration in dealing with the question of adjournment are the adequacy of reasons given for the application, how far, if at all, the other party is likely to be prejudiced by the adjournment, and how far such other party can be suitably compensated by the order against the applicant to pay costs (Job Obanda –VS- Stagecoach International Services Ltd & Another, Civil Appeal No. 6 of 2001).

7). I agree that the appellant was entitled to the fair hearing of its case as enshrined in Article 50 of the Constitution of Kenya 2010. The right was, however, enjoyed by all the parties to the case. Under Article 50 (2) (e) all the parties were entitled:

“to have the trial begin and conclude without unreasonable delay.”

8). Lastly, I agree with the point that was made by Mr. Onsongo that the parties were required to bear in mind the provisions of section 1A and 1B of the Civil Procedure Act relating to the overriding objective of the court. The parties were required to assist the court to attain the following aims-

- a. the just determination of the proceedings;
- b. the efficient disposal of the business of the court;
- c. the efficient use of available judicial and administrative resources;
- d. the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
- e. the use of suitable technology.

The question that the trial court was dealing with when considering the application to adjourn was whether the appellant, in seeking to have the suit adjourned, was acting in furtherance of the overriding objective of the court.

9). Given the age of the case, the various times that the matter had been adjourned to accommodate the appellant, and the last adjournment orders that had been given, I am unable to find that the court misdirected itself in any way in exercising its discretion to refuse to allow a further adjournment. I find that the appellant was dragging the case and unfairly not allowing the case to be concluded in a timely and cost-effective manner. These are the reasons why I dismiss the appeal with costs.

Dated, signed and delivered at Kisumu this 7th day of May, 2014.

**A.O.
JUDGE**

MUCHELULE