



**Ong'ang'o v Mauda (Civil Appeal 11 of 2020)  
[2024] KEHC 3364 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3364 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL 11 OF 2020  
WM MUSYOKA, J  
MARCH 22, 2024**

**BETWEEN**

**HERBERT OJIAMBO ONG'ANG'O ..... APPELLANT**

**AND**

**WILSON ONYANGO MAUDA ..... RESPONDENT**

*(An appeal arising from the ruling of Hon. RN Ng'ang'a, Resident Magistrate, RM, delivered on 9<sup>th</sup> July 2020, in Busia CMCSC No. 1376 of 2018)*

**JUDGMENT**

1. The appeal arises from ruling dated 25<sup>th</sup> July 2020, allegedly delivered on 9<sup>th</sup> July 2020. It arose from an application, dated 4<sup>th</sup> December 2019, which had sought stay of further proceedings, and registration of orders that had been issued on 23<sup>rd</sup> September 2019, orders to restrain interfering with a house of the applicant on Bukhayo/Bugengi/452, and the setting aside of the orders made on 4<sup>th</sup> October 2019.
2. That application was brought by Moses Wanyama Onyango, Advocate on behalf of his client the appellant herein. The Advocate stated that he was engaged that day in conducting proceedings at the High Court, hence he could not attend to the matter at the trial court, and that he was not free until 12.50 PM. When he checked at the trial court, at 1.20 PM, he established that the file had not been brought to the trial court. He later rushed to hospital, to take his son there. His client, the appellant, was also not available to attend court. The Advocate was called at 4.00 PM, presumably on phone, to be informed that the matter had been called out, and the application for the other side allowed. He stated that the proceedings should have been conducted orally, but the trial court handled it in a summary manner. He averred that his client had a good case.
3. Francis Nyengenyere Were, who is not party to this appeal, supported the application. He indicated that the file was not available that morning, and was being searched for at the registry, and the general understanding was that once the file was traced, the parties would be given another date for hearing.



When the file was eventually found, according to Mr Were, the respondent apparently proceeded ex parte, in the absence of the other parties.

4. The trial record reflects that the matter had come up on 16<sup>th</sup> September 2019. The matter was adjourned due to absence of the Advocate for one of the parties. The appellant's Advocate did not oppose the application for adjournment, although the respondents, in that matter, indicated to the trial court that they were ready to proceed. The matter was allocated 23<sup>rd</sup> September 2019 for hearing, and the respondents, that is to say the appellant herein and another, were condemned to pay court adjournment fees.
5. Come 23<sup>rd</sup> September 2019, the Advocate for the respondent herein was present before the trial court, but the Advocates for the other parties were absent. The respondent complained before the trial court that the other parties had been condemned to pay court adjournment fees, which they failed to, forcing him to pay, to enable the matter go forward. He argued that the date had been given by the trial court by consent of all the parties. The trial court noted that the date had been taken by consent, the matter was on last adjournment and the respondents had failed to pay court adjournment fees.
6. Can the trial court be faulted for making the orders of 23<sup>rd</sup> September 2019? I do not think so. The respondent was party to the adjournment of 16<sup>th</sup> September 2019. Having caused that adjournment, he should have striven to ensure that the matter proceeds at the next hearing on 23<sup>rd</sup> September 2019. The date had been allocated in open court, in the presence of and by consent of the parties, and the appellant was on a last adjournment. The matter was called out at 4.00 PM, according to the appellant, which meant that the appellant, or his Advocate, had all the time to arrange to be in court or to get an Advocate to hold his brief. I am not persuaded that the trial court did not exercise discretion properly. There ought to be an end to litigation. The court had bent over backwards several times to accommodate the parties. There can be no endless elasticity to lenience by the court.
7. I find no merit in the appeal herein, and I do hereby dismiss it, with costs to the respondent.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 22<sup>ND</sup> DAY OF MARCH 2024**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the appellant.

Mr. Magina, instructed by Kibet Adoli & Magina, Advocates for the respondent.

