

IN THE CIRCUIT COURT HELD AT AMASAMAN – ACCRA ON
MONDAY THE 12TH DAY OF DECEMBER, 2022 BEFORE HER HONOUR
ENID MARFUL-SAU, CIRCUIT COURT JUDGE

SUIT NO. C4/26/2020

BETWEEN:

SARAH BAFFOE

OFN/B/008 ATSIATO STREET

OFANKOR NORTH, ACCRA

...

PETITIONER

AND

JOSEPH MENSAH

NAA AKAABI STREET, DORMOND CLOSE

ABLEKUMA FAN MILK

...

RESPONDENT

PARTIES: PETITIONER ABSENT

RESPONDENT ABSENT

COUNSEL: CHRISTIE PEARL SABAAH ESQ. HOLDING BRIEF FOR

EMMANUEL BRIGHT ATOKOH ESQ. FOR PETITIONER

PRESENT

DORA BAWAH ASAMOAH ESQ. FOR RESPONDENT ABSENT

RULING

This is an application to recall witnesses so far called filed by counsel for Respondent on 11th November, 2022.

Applicant says that on the day on which hearing commenced and Petitioner's Attorney was to be cross examined, she was called impromptu into a case at a higher court and sent a letter the court that she could not be present. According to Applicant, counsel for Respondent was subsequently involved in an accident which affected her left arm thereby rendering her unable to represent her client's interest in the course of the case. According to her, during the legal vacation she had covid and was recently exposed to covid making it impossible for her to file the instant application earlier. She says that it is not intentional for her to fall sick to cause the matter to delay and therefore in the interest of justice prays the court to grant the application for her to cross examine the witnesses so far called.

Counsel for Petitioner filed an affidavit in opposition on 17th November, 2022. He contends that the reason given by counsel for Respondent for her absence during the trial are untenable as all lawyers are to maintain a diary and, in her absence, counsel for Petitioner could have made arrangements for her brief to be held rather than merely writing a letter without an Exhibit of the hearing notice before the Higher Court. He says that at all times counsel was absent, the Respondent was before the court and was afforded the opportunity to cross examine the witness. He contends that Respondent has not shown any exceptional circumstances necessitating the recall of the witness discharged and therefore prays the application is dismissed with punitive costs. In opposing the application, counsel for Petitioner relied on the case of **Kpekata v. Commissioner of Police [1963] 1 GLR 398.**

I am inclined to provide a background to this case before proceeding to determine the merits of the application. The case was scheduled for hearing on 4th February, 2022 on the said date, there was a letter dated 3rd February,

2022 from counsel for Respondent praying for an adjournment with the reason that counsel was “unavoidably unavailable”. On this basis, the matter was adjourned to 29th April, 2022 at 12:00pm, 13th May, 2022 at 9:00am, 20th May, 2022 at 9am and 27th May, 2022 at 9:00am in a bid to start and complete hearing of this matter. A further order was made for hearing notice and court notes to be served on Respondent and this was duly served on counsel for Respondent on 3rd March, 2022 at 3:12pm. On the first return date, Counsel for Respondent together with her client were absent without excuse and this court proceeded to take the evidence in chief of Petitioner’s Attorney and had the case stand adjourned to the next date being 13th May, 2022 to afford counsel for Respondent the opportunity to cross examine the witness. On the return date, counsel for Respondent had filed an application “for variation of dates of the court pursuant to the inherent jurisdiction of the court”. This court noting that it had no such inherent jurisdiction, proceeded to struck out the said application and adjourned the case nonetheless to 22nd July, 2022 at 11:00am to enable counsel for Respondent to appear.

On the return date, the case was called at 11:00am and counsel for Respondent was again absent. On the said date, counsel had written to the court to state that she was before the Court of Appeal and therefore prays for the case to be stood down or further adjourned. This prayer was refused, and Respondent was called upon to cross examine the Petitioner’s Attorney which he did and the Attorney was duly discharged. The evidence in chief of Petitioner’s first witness was taken with her mouth sealed to enable counsel to appear at the next adjourned date being 22nd August, 2022 at 9:00am for continuation of hearing. On the said return date, yet again counsel for Respondent was absent without excuse hence Respondent was called upon to cross examine the witness. Respondent indicated he did not know what kind of question to ask the witness, accordingly the witness was discharged. The

case was adjourned to 11th November, 2022 at 12:00pm. On this date Counsel for Respondent again wrote a letter to the court indicating that she was before the High Court Adenta at 12:00pm and attached a copy of the cause list of the said court. This prayer for adjournment was refused and the court proceeded to take the evidence in chief of Petitioner's second witness. When Respondent was presented with the opportunity to cross examine the witness, he indicated he had no questions for her. The witness was accordingly discharged with the case being adjourned to 16th December, 2022 at 12:30pm for Respondent to open his case.

Section 79 of the Evidence Act, 1979 NRCD 323 deals with recalling witness. It provides as follows:

“Section 79—Recall of Witness.

After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave granted by the court in its discretion.”

It is apparent from section 79 of NRCD 323 that recalling of a witness is at the court's discretion. In the case of **KPEKATA v. COMMISSIONER OF POLICE [1963] 1 GLR 398** the court held as follows:

“It is important that when an application is made for the recall of a witness the court should enquire from counsel or the applicant the nature of the evidence the witness was being called to give and if it appears that the evidence intended to be given is not an explanation of something he has already said, the application should be refused unless, in very exceptional cases, it would not be in the interest of justice to do so.”

Usually when a Judge recalls a witness, it is to explain some point, or to corroborate or refute some item of evidence (*See. R. V. EGWUATU 6 WACA 79*). In this case, counsel is seeking to have witnesses recalled because counsel was unable to appear before the court “she was called impromptu into a case

at a higher court and sent a letter the court that she could not be present". It is trite that the grant of an adjournment is within the discretion of the trial court. (See. **SEATEC LTD. v. PENTON HOOK FARMS LTD. AND ANOTHER** [1984-86] 1 GLR 605). The background to the case clearly shows that counsel for Respondent together with Respondent were afforded opportunities to cross examine the witnesses.

In the case of **MENSAH AND OTHERS V MENSAH AND OTHERS** [1992 – 93] 4 GBR 1432; CA, the court held that "*...there was no rule of law or practice in our courts to the effect that a case ought to be adjourned because counsel was in another court...*". Therefore, an excuse that counsel was to appear impromptu before a higher court and a letter written to the court is not reason enough to cause the court to have a matter adjourned. In fact, 'a court of law is not bound to adjourn a case on the grounds that a lawyer for the party applying for the adjournment had officially written to the trial court to ask for an adjournment on stated grounds.' (See. **REPUBLIC V HIGH COURT; (FAST TRACK DIVISION) ACCRA; EX PARTE SIAN GOLDFIELDS LTD (AUREX MANAGEMENT & INVESTMENT AGSA LTD INTERESTED PARTY)**, [2009] SCGLR 204).

Trial courts are to exercise discretion in adjournments of cases pending before the courts. Being mindful of the case load of this court and the fact that an entire hour was blocked in the court's diary for the witness to be cross examined with the agreement of counsel for the Respondent, this court proceeded to afford the Respondent the opportunity to cross examine the said witness. Therefore, there was no violation of the audi alteram partem rule which I consider would have been fatal and an exceptional circumstance where a witness ought to be recalled.

In the case of **ALI YUSUF ISSA (NO 2) V THE REPUBLIC (NO 2)**[2003-2004] SCGLR 174 it was held as follows:

“Likewise, adjournments are within the sole discretion of the court and the mere refusal by a judge to grant the Appellant’s applications for adjournments cannot, of itself, constitute a denial of the right to a fair trial...”

It is a basic principle which calls for no argument that every court must be respected and counsels acting for parties have a duty to abide by the dates and times agreed upon by counsel. Where a lawyer reneges on a duty to appear before the court on a date agreed upon and an opportunity is presented to his/her client to conduct the case in person and he fails to do so, that same person cannot be heard to claim to have a witness recalled in the interest of justice as in the instant case.

The issues raised by the instant application are not exceptional for which reason the witness needs to be called upon to reappear before the court. I must reiterate that Respondent was given ample opportunity to cross examine the witness without any fetters.

Based on the foregoing, I hereby proceed to dismiss the application.

**H/H ENID MARFUL-SAU
CIRCUIT JUDGE
AMASAMAN**