



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 25 OF 2021

DANIEL OMWENGA ONDERI.....1ST APPELLANT

JOHN OKIBO SIBOTA.....2ND APPELLANT

VERSUS

PETER KIPKURUI RONO

(Suing on his own behalf and for the Estate of

MICHEAL KIPNGETICH RONO).....RESPONDENT

RULING

1. The Appellants filed a Notice of Motion Application dated 29th October 2021 which sought the following Orders:

I. Spent.

II. Spent.

III. THAT the Honourable Court be pleased to stay further proceedings in **Bomet CMCC 52 of 2016 PETER KIPKURUI RONO (Suing on his own behalf and on behalf of the estate of MICHAEL KIPNGETICH RONO - DECEASED) VS DANIEL OMWENGA ONDERI & JOHN OKIBO SOBITO.**

IV. THAT the costs of this application be provided for.

2. The Application was brought under Order 12 Rule 2 (a), Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules & Sections 1B 1 (a) and 3A of the Civil Procedure Act, Section 3A of the Insurance (Motor Vehicle Third Party Risks (Amendment) Act). It was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Kevin Ngure on 29th October 2021.

THE APPLICANTS CASE.

3. It was the Applicants case that a Ruling in **Bomet CMCC 52 of 2016 PETER KIPKURUI RONO (Suing on his own behalf and on behalf of the estate of MICHAEL KIPNGETICH RONO - DECEASED) VS DANIEL OMWENGA ONDERI & JOHN OKIBO SOBITO** had been delivered on 15th June 2021 where the trial court dismissed the Appellants Notice of Motion Application dated 5th July 2021. That after being aggrieved by the decision of the trial court, they filed a Memorandum of Appeal on 29th September 2021.

4. It was Applicants case that they filed an Application dated 26th October 2021 that sought stay of proceedings in **Bomet CMCC 52 of 2016 PETER KIPKURUI RONO (Suing on his own behalf and on behalf of the estate of MICHAEL KIPNGETICH RONO - DECEASED) VS DANIEL OMWENGA ONDERI & JOHN OKIBO SOBITO** pending the appeal. That the said Application was dismissed on 27th October 2021 and the matter was fixed for Mention for submissions on 3rd November 2021.

5. The Applicants stated that no appeal operated as a stay of proceedings. It was the Applicant's further case that the Appeal was meritorious with a high chance of success and unless the court granted the order sought, the Appeal would be rendered nugatory.

6. It was the Applicants case that the Appeal together with this Application were made without any unreasonable delay and that the same would not occasion any prejudice to the Plaintiff/Respondent.

THE APPLICANTS SUBMISSIONS.

7. The Applicants submitted that their Appeal raised triable meritorious issues that had high chances of success. They relied on Order 42 Rule 6 and in the cases of NBK VS GEOFFREY WAHOME MUOTIA (2016) eKLR, STANLEY KANGETHE KINYANJUI VS TONY KETTER & 5 OTHERS (2013 eKLR) and EZEKIEL MULE MUSEMBI VS H. YOUNG & COMPANY (E.A) LIMITED (2019) eKLR to support this submission.

8. It was the Applicants submission that Article 50 (1) of the Constitution provided for fair hearing with regard to any dispute that had to be solved in accordance to the law. They relied on the case of PINNACLE PROJECTS LIMITED VS PRESBYTERIAN CHURHC OF EAST AFRICA NGONG PARISH & ANOTHER (2018) eKLR to support this submission.

9. The Applicants submitted that they were not granted an opportunity to be heard by the trial court and that the Plaintiff took 5 years to prosecute this matter. That this denied them their right to a fair trial. It was the Applicants further case that they demonstrated good faith by at least availing one witness to testify and had complied with the trial court's orders of paying the advocate their adjournment fees.

10. The Applicants submitted that no prejudice would be suffered by the Respondent if this Application was allowed. That further, any such prejudice would be compensated by payment of reasonable costs.

THE RESPONDENT'S CASE.

11. The Respondent opposed the Application through a Replying Affidavit dated 15th November 2021. It was his case that the Appellants had not approached this court with clean hands as they had not attached the Order that they intended to appeal. Further, that the Appellants had not disclosed to the court that they had been given a last adjournment and they failed to call their witnesses and that they had not paid his advocate the adjournment fees as directed by the trial court.

12. The Respondent stated that the present Application was *res judicata* as the orders sought in this application were similar to those in the dismissed application dated 26th October 2021.

13. It was the Respondent's case that the court does not aid the indolent but the vigilant. It was his further case that he has always demonstrated a desire to finalise **Bomet CMCC 52 of 2016 PETER KIPKURUI RONO (Suing on his own behalf and on behalf of the estate of MICHAEL KIPNGETICH RONO - DECEASED) VS DANIEL OMWENGA ONDERI & JOHN OKIBO SOBITO.**

14. The Respondent stated that the Applicants do not stand to suffer any loss if the case proceeded and their failure to file submissions despite being ordered to do so, clearly demonstrated their mischief and lack of respect for court orders.

15. It was the Respondent's case that he stood to suffer great prejudice as the case has taken more than 5 years and he continues to facilitate the high fee charged by his advocate.

RESPONDENT'S SUBMISSIONS.

16. The Respondent submitted that ever since this court granted the stay order in **Bomet CMCC 52 of 2016 PETER KIPKURUI RONO (Suing on his own behalf and on behalf of the estate of MICHAEL KIPNGETICH RONO - DECEASED) VS DANIEL OMWENGA ONDERI & JOHN OKIBO SOBITO**, the Applicants have not acted diligently to ensure that their Application is heard and determined. That on 20th January 2022, the Court Administrator wrote a letter to the Deputy Registrar indicating that the party who had filed the Appeal had not paid for the proceedings therefore it was impossible to forward the lower court file to the High Court.

17. It was the Respondent's submission that the case was filed over 6 years ago and that litigation had to come to an end. It was the Respondent's further submission that the failure by the Applicants to pay costs was an abuse of the court process.

18. The Respondent submitted that a lawyer has a duty to the court and there was always need to create electrical boundaries within an adversarial system. That it was expected that any tactics used must be legal, honest and respectful to the court and any action must ensure that it promotes public confidence in the administration of justice. It was his submission that the Application herein was unfair to the Respondent and to the court.

19. It is salient to note that the Applicants filed a Supplementary Affidavit where they attached the Ruling of the trial court dated 15th September 2021 that was marked as "KN-2". They also stated that they had paid the advocates costs and attached a Remittance Advice from DTB Bank to S B Mbeche & Company Advocates indicating a payment of Kshs 4000. From the record, the firm of S B Mbeche & Company Advocates appear for the Respondent. These attachments negate the averments contained in the Replying Affidavit dated 15th November 2021.

20. I have read through and considered the Notice of Motion Application dated 29th October 2021, the Replying Affidavit dated 15th November 2021, the Supplementary Affidavit dated 8th December 2021, the Applicants Written Submissions dated 8th December 2021, the Respondent's Written Submissions dated 22nd March 2022 and they raise one issue for my determination:

Whether the Applicants should be granted the order for stay of proceedings in Sotik PMCC No. 47 of 2020.

21. In the case of KENYA WILDLIFE SERVICE VS JAMES MUTEMBEI (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent”.

22. I am further persuaded by the case of GLOBAL TOURS & TRAVELS LIMITED; NAIROBI HC WINDING UP CAUSE NO. 43 of 2000 where Ringera J held as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

23. The Court of Appeal in the case of DAVID MORTON SILVERSTEIN VS. ATSANGO CHESONI (2002) eKLR held that:

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

24. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. In the case of CHRISTOPHER NDOLO MUTUKU & ANOTHER VS CFC STANBIC BANK LIMITED (2015) eKLR the court observed that:-

“What matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice”

25. The right to be heard is a principle of natural justice and fair trial. Fair trial is one of the rights under the Constitution which cannot be limited as provided under Article 25 (c) of the Constitution. Also under Article 50 of the Constitution, it is provided that;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”

The right to be heard however is one that is equally available to all parties in a dispute and it is the duty of the court to balance the scales of justice accordingly.

26. A cursory look at the Ruling dated 15th September 2021 reveals the trial court's refusal to adjourn the matter. The reasoning of the trial court was very clear, that the Applicants had been granted several chances through adjournments to present their witness but they did not comply.

27. The present application if granted will further delay the expeditious determination of the suit. As stated by Chepkwony J, in the case of **PETER KARIUKI MBURU & ANOTHER V NEEMA SHAH (2021) eKLR,**

“The provisions of Article 159(2)(a)(b)(c) and (d) of the Constitution of Kenya as read with Sections 1A and 1B of the Civil Procedure Act, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties”.

28. I am conscious that due regard must be given to time in order to avoid delaying this matter any further. In the case of MUCHANGA INVESTMENTS LIMITED VS. SAFARIS UNLIMITED (AFRICA) LTD & 2 OTHERS (2009) eKLR, the Court of Appeal stated that:

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice”.

29. It is my finding of this that the Applicants are trying to hide their indolence in the guise of an appeal. They have not shown sufficient cause for the grant of the stay of proceedings.

30. Clothed by the discretionary power of this court, it is my finding that the Notice of Motion Application dated 29th October 2021 has no merit and it is dismissed with costs to the Respondent. The Interim Orders of this Court granted on 1st November, 2021 are hereby vacated.

31. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL, 2022.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered virtually in the presence of the Accused, Mr. Mbeche for the Respondent, Ms. Aguko for the Appellant/Applicant and Kiprotich (Court Assistant).