



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 251 OF 2020**

**BENARD NJOROGE MWANGI.....APPELLANT**

**VERSUS**

**DIRECTLINE ASSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

The appellant filed an application by way of Notice of Motion dated 6<sup>th</sup> July, 2020 seeking several orders, some of which have been spent leaving one substantive prayer No. 3 to the effect that, pending the hearing of the appeal, this court do issue orders staying proceedings in the lower court in Milimani CMCC No. 4726 of 2014. The application is supported by grounds set out on the face thereof and the supporting affidavit sworn by the appellant.

The application is opposed and there is a replying affidavit sworn by Isabella Nyambura, the legal counsel for the respondent. The respondent had sued the appellant in the lower court claiming a refund of some money advanced to the appellant when he was in the employment of the respondent. The appellant denied the respondent's claim and also raised a counter claim.

Subsequently, the suit was set down for hearing but it transpired the appellant had not filed his witness statement to facilitate the hearing. An adjournment was sought on behalf of the appellant which was granted. It is instructive to note that, when an adjournment was sought the appellant was absent. That notwithstanding, the lower court allowed the appellant the final opportunity to file his witness statement and comply with pre-trial directions within 7 days. The lower court was specific that, that was the **"last adjournment"**.

When the matter later came up for for hearing after that last adjournment, the appellant had still not complied with the order to file his witness statement, neither was he present in court. The respondent's witness gave evidence and closed their case. The appellant's advocate sought another adjournment on the grounds that he (the appellant) was absent and was yet to execute the witness statement. The lower court declined to allow the adjournment.

The appellant then filed an application to set aside the proceedings in the lower court which was opposed by the respondent. That application was dismissed in a ruling delivered on 29<sup>th</sup> May, 2020. It is that ruling that provoked this appeal and application.

Both parties have filed submissions and cited several authorities which I have considered. Order 7 rule 5 of the Civil Procedure Rules provides as follows,

**"5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—**

- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;**
- (b) a list of witnesses to be called at the trial;**
- (c) written statements signed by the witnesses except expert witnesses; and**
- (d) copies of documents to be relied on at the trial.**

**Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11."**

The requirements under that rule are mandatory except the proviso thereunder. It is clear therefore that, the appellant was in breach of the said rule right from the beginning. Despite the breach, the record shows that on several occasions he was given an opportunity to comply

with the said provisions but failed. It is true that anyone who comes to court should be given an opportunity to present his case. The appellant was given that opportunity and the record confirms this.

Apart from failing to comply with the pre-trial directions, the appellant missed court attendance for reasons that were not convincing. The decision to deny the appellant to re-open the lower court proceedings was based on the discretion of the court. To interfere with such discretion it must be shown the lower court proceeded upon wrong materials or principles.

In Halsbury's Laws of England, 4<sup>th</sup> Edition Vol 37 page 330 it is stated,

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis on the substantive merits of his case, and therefore the court's general practise is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”**

At page 332 it is stated,

**“This is a power which it has been emphasised ought to be exercised sparingly and only in exceptional cases.”**

In the case of **Daniel Walter Rasugu vs. Johana Nyakwoyo Buti & 2 others (208) e KLR** the Court stated,

**“Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interest of justice depending on the facts of each case. Of course the discretion has to be exercised judiciously and not whimsically.”**

See also in the matter of **Global Tours And Travel Limited Winding Cause No. 43 of 2000 at Nairobi and David Motoron Silversein vs. Atsango Chesoni (2002) e KLR.**

From the year this suit was filed in 2014 to date, a period of six years has elapsed. The appellant pleaded a counter claim but even then, he was not keen to prosecute that counter claim. It is not hard to read deliberate conduct on the part of the appellant to delay these proceedings. What I see in this record is a profile of inexplicable absenteeism and inaction on the part of the appellant.

Going by the requirement that justice shall not be delayed, the orders sought by the appellant may not be allowed without resultant injustice on the part of the respondent. I am not inclined to give the appellant any more indulgence which he has in the past declined to utilise when offered by the lower court. The end result is that this application is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of February, 2021.**

**A.MBOGHOLI MSAGHA**

**JUDGE**