



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 654 OF 2019

NDICHU ANTHONY.....1ST APPELLANT/APPLICANT

DANCAN KIARIE2ND APPELLANT/APPLICANT

DAVID KOIYA KARAGU.....3RD APPELLANT/APPLICANT

VERSUS

FRANCIS MANYIBE TONGI.....RESOPONDENT

RULING

The appellants in this appeal have applied for an order to stay proceedings in CMCC No. 4912 of 2019 pending the determination of their appeal. The appeal is against the ruling of the lower court in CMCC NO. 5784 OF 2013. The application is supported by grounds set out and also the supporting affidavit of the 1st appellant Antony Ndungu Ndichu. It is brought under Sections 1A, 3A, 63 (e) and 75 of the Civil Procedure Act, Orders 51 and 43 rule 1 of the Civil Procedure Rules.

A brief background is important. The respondent in this appeal sued the appellants in the lower court following a road traffic accident. Upon service of summons to enter appearance through registered post, no appearance was entered or defence filed and therefore, an interlocutory judgment was entered against the appellants. The appellants filed an application to set aside that judgment but the application was dismissed. The present appeal then followed.

Following the said default judgment, the respondent filed CMCC No. 4912 of 2019 against Britam Company Insurance Limited to enforce the judgment by way of a declaratory suit. It is that suit the appellants seek to have stayed. The application is opposed and the respondent has filed a replying affidavit stating, *inter alia* that, the appellants have no *locus standi* to bring such an application. Parties have also filed their respective submissions which I have read alongside several authorities cited therein.

A grant of an order such as the one sought by the appellants puts a stop to the litigants quest for seeking justice, hence should be sparingly granted considering that, such orders are sought before the rights of the litigants are determined.

In Halsbury's Laws of England, 4th 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.

It is true that the appellants herein are not parties to the case they want stayed. There is no application for them to be joined as parties to that suit. Whereas it is true there could be a nexus between the judgment in the lower court, where the appellants are the judgment debtors, and the declaratory suit where the defendant is their insurer, that alone is not sufficient ground for them to be allowed to litigate in the manner they want yet they are not parties. It is instructive to observe that the defendant in CMCC No. 4912 of 2019, Britam Insurance Company Limited has not filed any application to stay those proceedings.

It is curious that the appellants have not filed any application to stay the execution of the ruling of the lower court which is the subject of the appeal. One therefore wonders why they have abandoned their right under the Civil Procedure Rules in this appeal as provided under Order 42 Rule 6 of the Rules, and decided to lodge an application in a matter where they are not parties.

I also observe that if CMCC No. 4912 of 2019 were to succeed in favour of the plaintiff therein, who is the respondent in this appeal, against the defendant who is Britam Insurance Company Limited, the defendant would be compelled to satisfy the decree on behalf of its insured, the appellants.

That responsibility cannot be transferred or taken over by the appellants and no loss can be justified.

Whatever the case anyway, I am not persuaded that the appellants have any legal standing to move the court and secure an order to stay proceedings where they are not parties. The application is therefore dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of February, 2021.

A.MBOGHOLI MSAGHA

JUDGE