

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 549 OF 2019

PAUL NDUNGUAPPELLANT

VERSUS

DS (Suing as next friend and Father to MM (Minor).....RESPONDENT

RULING

By an application dated 1st July, 2020 the appellant seeks orders that the ruling of the lower court delivered on 29th May, 2020 be stayed and or set aside, and that the time to file an appeal against the said ruling be extended. The appellant also seeks an order that one Charles Chege Mwangi be enjoined in the proceedings at the High Court.

The application which is brought under Sections 1A, 1B, 3 and 3A, 65 (1) (b) and 79 (c) of the Civil Procedure Act and Orders 42 and 51 of the Civil Procedure Rules is supported by grounds set out on the face of the application, alongside a supporting affidavit sworn by the appellant. The application is opposed and there is a replying affidavit sworn by the respondent. There is another application on record dated 2nd June, 2020 seeking stay orders of a judgment delivered on 13th September, 2019 by the same lower court. It would appear that that application was never prosecuted and from the contents of that application, it related to the judgment that concluded the matter in the lower court which prompted an application before the same lower court dated 24th September, 2019. The ruling that followed is the subject of the application before the court dated 1st July, 2020.

I see no conflict in addressing the two applications at the same time because they relate to the same proceedings. The ruling dated 29th May, 2020 was said to have been sent to the applicants by email and received on 29th June, 2020. If that be the case, and this has not been disputed by the respondent, then the application dated 1st July, 2020 was made without delay.

In the lower court, one Charles Chege Mwangi was the 1st defendant but a notice to withdraw the respondent's claim against him was filed by the respondent. There is no evidence that the withdrawal was brought to the notice of the appellant who insists that at the time of the accident, which is the subject of these proceedings, the motor vehicle was owned by the said Charles Chege Mwangi.

It will be noted that the notice of withdrawal was filed on 14th May, 2018, five years from the date the suit was filed in the lower court. From the contents of the application and the memorandum of appeal, the appeal lodged by the applicant appears arguable. He should not therefore be locked out having demonstrated his desire to be heard.

The issue of ownership of the motor vehicle and liability is crucial in this matter and should be determined after hearing all the relevant parties. That notwithstanding, there is no evidence that Charles Chege Mwangi was served with this application which seeks to join him as a party. The applicant shall ensure that the said Charles Chege Mwangi is served with the application to address the order of joinder.

To do justice in this matter, I hereby allow stay of execution of both the judgment and the ruling of the lower court. Going by the memorandum of appeal filed on 23rd September, 2019 it is not necessary to extend any time because it was filed timeously, the judgment of the lower court having been delivered on 13th September, 2019.

I am unable to assign any blame on the applicant at this stage and therefore each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 11th day of February, 2021.

A. MBOGHOLI MSAGHA

JUDGE