



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CIVIL APPEAL E018 OF 2021

OCHOMO GODFREY.....APPELLANT/APPLICANT

OBED TSUMA.....2ND APPELLANT/APPLICANT

VERSUS

MICHAEL BARASA LUSWETI.....RESPONDENT

(Being an Application for stay of proceedings in Kapsabet CMCC No 106 of 2017

Michael Baraza Lusweti v Ochomo Godfrey & Obed Tsuma pending the

hearing and determination of this application)

RULING

1. This is the ruling on the Notice of Motion Application dated 27th September 2021 by the Appellants seeking stay of proceedings in Kapsabet CMCC No 106 of 2017, Michael Baraza Lusweti v Ochomo Godfrey & Obed Tsuma pending the hearing and determination of the appeal (HCCA E018 of 2021). The application is expressed to be brought under Order 51 Rule 14 (1) (c) of the Civil Procedure Rules 2010, and is premised on grounds set out therein and supported by an affidavit sworn by Everline Ogato, the Applicants' advocate on record on 27th September 2021.

2. The Applicants are appealing a ruling delivered on 30th August 2021 that dismissed their application dated 5th May 2021. The said application had sought to have the plaintiff undergo a second medical examination but the application was rejected by the trial court.

3. The Respondent opposed the application vide grounds of opposition filed on 2nd November 2021 stating that the application has been brought in bad faith and is a device to buy time. He argues that the appellants do not have an arguable appeal and that no legal ground has been urged as to why the proceedings before the trial magistrate should be stayed.

4. The Applicants filed submissions on 8th November 2021, while the Respondent filed submissions on 11th October 2021. Briefly, the Applicant reiterated the grounds in the application and maintained that there was sufficient cause for grant of orders of stay. On the other hand, the Respondent submitted that the application had not met the threshold for stay of proceedings as established in law and precedent and that the intended application was only meant to delay the hearing of the instant case.

Determination

5. Having considered the instant application and the rival submissions filed by the parties, I have identified the following issues for determination;

a) Whether the order for stay of proceedings should be granted

6. The principles considered in granting stay of proceedings as set out by Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** are;

a) Whether the Applicant has established a prima facie case

b) Whether the application has been filed expeditiously

c) Whether it is in the interest of justice to grant the orders sought

b) Whether the applicant has established a prima facie case

7. The Applicants seek to appeal the ruling delivered on 30th August 2021 by the trial court that dismissed their application seeking orders to compel the plaintiff to undergo a second medical surgery and leave to amend the defense to plead fraud-non injury.

8. It is evident from the email correspondences between the advocates that the Respondent underwent the second medical examination on 9th November 2020 but the Applicants have failed to furnish him with the medical report to date. It is not in dispute that there is a consent as to liability recorded on 26th February 2018 and the same has not been set aside or varied. What then would be the consequence of amending the defence to plead fraud non-injury? There would be none as liability has already been determined. What remains is the determination of damages to which the amendment has no bearing. In the premises the Applicants have failed to establish a prima facie case.

c) Whether the application has been filed expeditiously

9. The ruling appealed against was delivered on 30th August 2021. The application was filed on 1st October 2021. Inordinate delay is relative depending on the circumstances of the case. I deem that the two-month period to file the interlocutory application is inordinate in the circumstances.

d) Whether it is in the interest of justice to grant the orders sought

10. It is not in the interest of justice to grant the orders sought as the purpose of the application is clearly to delay the matter in the trial court. In the premises, I find that the application fails on all limbs and stands dismissed with costs to the Respondent.

Dated and delivered in Eldoret this 23rd day of November 2021.

E. K. OGOLA

JUDGE