



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 72 OF 2020**

**GODFREY BURUGU THUO (*Suing as the personal representative and the***

***administrator of the estate of JORAM THUO Deceased*)...PLAINTIFF/RESPONDENT**

**VERSUS**

**INTRA AFRICA ASSURANCE COMPANY.....DEFENDANT/APPLICANT**

**RULING**

1. The defendant/applicant in the present instance brought the Notice of Motion dated 25<sup>th</sup> May, 2021 supported by the grounds presented on its face and the facts stated in the affidavit of **Denis Kithinji**, legal officer of the applicant. The applicant sought for a stay of all proceedings in the instant suit pending the hearing and determination of the appeal lodged in the Court of Appeal at Nyeri, namely Civil Appeal No. 182 OF 2019 (“the appeal”).
2. In opposing the Motion, the respondent put in a replying affidavit he swore on 5<sup>th</sup> July, 2021.
3. The Motion was canvassed through written submissions.
4. I have considered the grounds featuring on the face of the Motion; the facts deponed in the supporting and replying affidavits respectively; and the rival written submissions placed before me.
5. A brief background of the matter is that the respondent together with persons not before this court instituted a suit against Kaylift Services Limited (“the insured”) vide Nyeri High Court Civil Case No. 39 of 2002 as consolidated with HCCC No. 121 of 2001 (“the original suit”).
6. In the original suit, the respondent and his counterparts sought for various reliefs including general and special damages arising out of a road traffic accident.
7. Upon hearing the parties in the suit, the court in the judgment delivered on 18<sup>th</sup> October, 2017 found the insured 100% liable and awarded various reliefs to the respective plaintiffs.
8. The aforementioned judgment has triggered the present declaratory suit instituted by the respondent and against the applicant, where the former is seeking a declaratory order against the latter to assume liability of the insured in the aforementioned suit and to satisfy the decretal sum of Kshs.16,152,443.52 in the original suit plus costs of the suit and interest thereon.
9. It is clear from the instant Motion that the issue arising for determination is whether or not to grant a stay of proceedings in the present suit pending the appeal.
10. It is noteworthy that the granting of a stay of proceedings is purely a matter of judicial discretion. This was the position taken by in the case of **Global Tours & Travels Limited Nairobi H.C Cause No. 43/2000** and where the court went further on to hold that:

***“..... 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.”***

11. Moreover, the court in the case of **In re Estate of Leah Nyawira Njega (Deceased) [2021] eKLR** quoted in the submissions by the respondent listed the following as the three (3) main principles for consideration in determining an application seeking a stay of proceedings:

**“a) Whether the applicant has established that he/she has a prima facie arguable case.**

**b) Whether the application was filed expeditiously and**

**c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”**

12. The *first* principle relates to the expeditious filing of an application. While this principle was not specifically addressed by the applicant, the respondent on his part contends that there has been an inordinate delay in bringing the instant Motion.

13. Upon my perusal of the record and as earlier indicated, I note that the present suit was filed on 28<sup>th</sup> May, 2020 while the Motion was brought sometime on or about 25<sup>th</sup> October, 2021. Upon considering the passage of time in between, I am of the view that while there has been a delay in bringing the Motion, I do not find the delay to be inordinate.

14. The *second* principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success.

15. On the one part, Denis Kithinji states in his supporting affidavit that the applicant took over the matter in the original suit under the principle of subrogation and that the appeal against the impugned judgment has high chances of success.

16. In its submissions, the applicant reiterates the above and cites *inter alia*, the case of **Opiss v Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:**

**“the right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.”**

17. In reply, the respondent states and submits that the applicant was not a party to the original suit and hence the applicant has not satisfied the conditions for granting an order of a stay of proceedings.

18. The respondent further submits that the outcome of the appeal will in no way interfere with the present suit and hence the applicant has not established a prima facie appeal which will be rendered nugatory if the order sought is denied.

19. From my study of the record, it is apparent that the applicant was not a party to the original suit though it is not in dispute that the insured had taken out an insurance policy with the applicant at all material times and in respect to the motor vehicle which was involved in the material accident.

20. A reading of the memorandum of appeal relating to the appeal shows that the appeal lies between the insured and the respondent together with his counterparts. The grounds set out therein indicate that the appeal seeks to challenge the finding of the court primarily on liability.

21. In my view therefore, while it remains unclear whether the principle of subrogation was raised and considered in the original suit, it is apparent that the present declaratory suit emanates therefrom and hence the outcome of the appeal; which appeal raises prima facie arguable points of law and fact; will impact on the present suit.

22. Turning to the *third* principle on the interest of justice vis-à-vis the subject of prejudice, the applicant on the one hand is of the view that unless a stay of proceedings is granted, it stands to be greatly prejudiced while submitting that the respondent does not stand to be prejudiced in any way should an order for a stay of proceedings be granted.

23. On the other hand, it is the submission of the respondent that the applicant has not specifically shown the prejudice that will be visited upon it should an order for a stay of proceedings be denied.

24. Upon weighing the rival positions above and the foregoing circumstances, I am satisfied that the applicant has reasonably shown that unless there is a stay of proceedings during the pendency of the appeal, there is a likelihood that prejudice and hardship will be visited upon it.

25. I will also consider the *fourth* principle touching on the expeditious disposal of cases vis-à-vis proper use of judicial time. I borrow from the case of **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR** where the court held that the expeditious disposal of cases ought to be a factor for consideration in determining applications seeking an order for a stay of proceedings.

26. In the present instance, it is apparent that the suit was instituted in the year 2020 and is declaratory in nature. It is also apparent that the outcome of the appeal will determine the progression of the present suit. It would therefore only be a practical and proper use of judicial time for the relevant parties to first pursue the appeal before undertaking any further proceedings in the present suit.

27. The upshot therefore is that the Motion dated 25<sup>th</sup> May, 2021 Succeeds. Consequently, there shall be an order for stay of all further proceedings in the present suit until Civil Appeal No. 182 OF 2019 before the Court of Appeal at Nyeri is heard and determined. In the circumstances, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER,**

2021.

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE PLAINTIFF/RESPONDENT**

..... **FOR THE DEFENDANT/APPLICANT**