



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO E035 OF 2021**

**MARCELLUS ODHIAMBO OKIYA.....APPELLANT**

**VERSUS**

**DAVID OJWANG' DEDE.....RESPONDENT**

**RULING**

1. In his Notice of Motion dated 26<sup>th</sup> May 2021 and filed on 28<sup>th</sup> May 2021, the Appellant sought orders for stay of proceedings and or any further proceedings in **Kisumu CMCC No 60 of 2020 David Ojwang Dede vs Marcellus Odhiambo Okiya** pending the hearing of this Appeal. The prayer for a stay of proceedings pending hearing and determination of the Appeal was spent.
2. On 26<sup>th</sup> May 2021, Janet Bii, Appellant's Advocate, swore an Affidavit in support of the said application.
3. The Appellant averred that he was dissatisfied with the Ruling of Hon M. Shimenga that was delivered on 8<sup>th</sup> April 2021 in the aforesaid case and therefore preferred this appeal.
4. The deponent averred that vide a letter dated 15<sup>th</sup> July 2020, her law firm wrote to the Respondent's Advocate to refer the Respondent for a second medical examination and that vide a letter dated 20<sup>th</sup> January 2021, they also sought the Respondent's claim supporting documents and further inquired whether the Respondent had been examined by Dr Mwangi as per the referral letter date 15<sup>th</sup> October 2020.
5. She contended that it was apparent from the letter dated 15<sup>th</sup> October 2020 which letter was attached to letter dated 20<sup>th</sup> January 2021 that the Appellant's doctor, Dr. Jeniffer, had recommended a further examination by Dr Mwangi.
6. She was emphatic that despite the said letters having been written to the Respondent's Advocates, they failed to avail the Respondent for further medical examination. She stated that the Appellant was unable to proceed with the hearing of the Respondent's case on 8<sup>th</sup> April 2021 due to lack of a second medical report.
7. She asserted that upon making an application for an adjournment for the reason that the Appellant was unable to proceed with the hearing without the Respondent availing the aforementioned documents, the Learned Trial Magistrate disallowed the same and proceeded to hear the Respondent's case and slated his defence case for 5<sup>th</sup> July 2021.
8. She was categorical that the Respondent proceeded with the hearing without attending medical re-examination to ascertain his injuries contrary to Section 10 (3A) of the Insurance (Motor Vehicles Third Party Risks) Cap 405.
9. In opposition to the Appellant's application, Dorcas Akinyi Oluoch, Respondent's Advocate, swore an Affidavit on 18<sup>th</sup> June 2021 and filed on 21<sup>st</sup> June 2021.
10. The Respondent averred that he instituted the aforementioned suit on 17<sup>th</sup> February 2020 vide a Complaint dated 14<sup>th</sup> February 2020, annexing his Bundle of Documents. He was emphatic that one Moses Omondi Ogada, a court process server, effected service of the said pleadings and claim documents upon the Appellant on 11<sup>th</sup> March 2019.
11. He contended that thereafter, the Appellant entered appearance on 19<sup>th</sup> June 2020 and filed a Defence, List of Witnesses and documents on 15<sup>th</sup> July 2020 which he argued, were all filed out of time.

12. He stated that the suit came up for mention for Pre-Trial compliance on 14<sup>th</sup> September 2020 but that despite service upon the Appellant, he did not attend court and matter was fixed for hearing on 9<sup>th</sup> November 2020.

13. He asserted that the Appellant wrote to his Advocates for him to attend a second medical examination upon which he attended on 1<sup>st</sup> October 2020 and carried along all his claim documents and a passport photo as requested.

14. He was emphatic that he was re-examined by Dr Jenipher Kahuthu and that although he was willing to be examined by Dr Mwangi, he did not have facilitation money and he was further restricted from travelling to Nairobi due to the lockdown as a result of Covid-19. He was emphatic that the present application was in bad faith and that the Appellant had not demonstrated the prejudice he would suffer if the order for stay of proceedings was not granted.

15. The Appellant's Written Submissions were dated 7<sup>th</sup> July 2021 and filed on 14<sup>th</sup> July 2021 while those of the Respondent were dated 10<sup>th</sup> September 2021 and filed on 28<sup>th</sup> September 2021. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

## **LEGAL ANALYSIS**

16. The Appellant submitted that the principles that govern stay of proceedings were stated in the case of **Ezekiel Mule Musembi vs H. Young & Company (EA) Limited [2019] eKLR** where the court held that the court's discretion in deciding whether or not to grant stay of proceedings is guided by whether the applicant has an arguable case and/or whether the application was filed expeditiously.

17. He reproduced the proceedings of the Trial Court on 8<sup>th</sup> April 2021 and placed reliance on the case of **Nicholas Kiptoo Arap Kori Salat vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** where the court held that justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.

18. He argued that he made his application at the Trial Court early in the day when the Respondent's case was still open and was yet to avail his evidence on quantum and most importantly, that the said application was made in good faith to further assist the court make a just determination on the quantum.

19. He was categorical that he sought leave to adjourn the matter for the Respondent to be re-examined by Dr Mwangi and that the same would not in any way prejudice the Respondent since the evidence would aid the court to make a just determination based on merit. He pointed out that in any event, the Respondent could be compensated by way of costs.

20. He asserted that as much as his doctor had seen the Respondent, she was not able to complete the medical report considering the injuries he had sustained which were best confirmed by a dentist and in particular, Dr Mwangi Kamau.

21. He added that he was willing to meet the Respondent's advocates attendance costs and those of the Police Officer. In this respect, he relied on the case of **David K Sifuna vs Emiley Kivali Mulaya & Another [2016] eKLR** where it was held that a court is to ensure that justice is done and also seen to have been done. He also invoked Section 3A of the Civil Procedure Act which enjoins Courts to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

22. He further invoked Order 18 Rule 10 of the Civil Procedure Rules, Section 146 (4) of the Law of Evidence Act and Article 50 of the Constitution of Kenya, 2010 and argued that the Respondent would not be prejudiced in any manner if the application was allowed since the above-mentioned provisions of law offered him a chance to recall witnesses for further examination, cross examination and or re-examination so as to get into the bottom of the issues raised in the amendments in the suit.

23. He further placed reliance on Article 159 (2) (d) of the Constitution of Kenya which provides that justice shall be administered without undue regard to procedural technicalities. In this regard, he relied on the case of **Republic vs District Land Registrar, Uasin-Gishu & Another [2014] eKLR** where the court held that justice is not dependent on rules of procedure. Further, he also placed reliance on the case of **Almond Resort Limited vs Mohamed Mahat Kuno [2019] eKLR** where the Court held that the power envisaged in the provisions of Order 18 Rule 10 of the Rules and Section 146 of the Evidence Act, is intended to ensure that each party is afforded a fair trial guaranteed under Article 50(1) of the Constitution. He was emphatic that his application was merited and the court should allow it.

24. On his part, the Respondent submitted that whereas courts exercise unfettered discretion in granting an adjournment, however, certain elements ought to be taken into consideration. In this regard, he relied on the case of **Savannah Development Company Ltd vs Mercantile Company Ltd CA No 120 of 1992** where the court stated that the elements to be considered in an application for adjournment include adequacy of the reasons given for the application for adjournment, how far the other party is likely to be prejudiced by the adjournment and whether the other party can be suitably compensated by award of damages.

25. He argued that the Appellant could not be heard to allege that he was not served with pleadings when he had in fact entered appearance and filed defence and witness list and documents. He was categorical that a Pre-Trial Conference was the final call for parties to make good any omissions in documents sought to be relied upon in evidence, to seek medical examination of adverse party, agree on issues arising, production of documents and experts to be called. He was therefore emphatic that no proper reason was espoused to explain the absence of the Appellant at the Pre-Trial Conference.

26. He submitted that the Appellant's conduct in not heeding the invitation and mention notices and misinforming the Trial Court that the Respondent had not attended the medical examination ought to be held against him. In this regard, he relied on the case of **Famous Cycle Agencies Ltd & Others vs Mashakhalal Ramji Karia** where the court held that the conduct of a party is an important element to consider in whether or not to grant an application for adjournment.

27. He argued that since he had demonstrated that he had been examined by the Appellant's doctor, there was inadequate information that was placed before the Trial Court to support granting of an adjournment as sought and therefore the Trial Court properly exercised its discretion based on the information before it. In this respect, he relied on the case of **Republic vs Chief Magistrate, Resident Magistrate's Court at Nairobi- Milimani Commercial Court Ex-parte Safaricom Limited & 2 Others [2014] eKLR** where the court held that even on an appeal, the law is that the decision disallowing adjournment being within the Judge's discretion on Appellate Court would be slow to interfere unless the discretion was not exercised judicially.

28. He further argued that Appellant held onto the letter dated 15<sup>th</sup> October 2020 close to four (4) months and only served the same upon the Respondent on 1<sup>st</sup> February 2021. He added that no explanation had been given by the Appellant to explain the delay. He contended that the matter was fast-track in nature and that he sustained both bone and soft tissue injuries for which he required further treatment of approximately Kshs 340,000/=. He was categorical that each day his suit delayed in court predisposed him to further deterioration of his well-being as he awaited for funds to better his medical state.

29. He further asserted that the witnesses may suffer loss of memory to material facts of this suit owing to effluence of time and contacts with the said witnesses might be lost with great prejudice to him which prejudice might not be compensated by way of costs. In this regard, he relied on the case of **Japheth Pasi Kilonga & 8 Others vs Mombasa Autocare Limited [2015] eKLR** where the court held that the single most drawback in the administration of justice in this jurisdiction was the delay in determination of cases.

30. He invoked Article 159(2) (b) and (d), Section 14(5) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Order 17 Rule 1 of the Civil Procedure Rules, where the common thread in the said provisions was that justice should not be delayed.

31. He added that he was willing to attend Dr Mwangi's Dental Clinic for a further examination but had no facilitation. He asserted that around that time there was a lockdown covering Kisumu and other western regions due Covid-19 which made it impossible for him to attend Dr Mwangi's Clinic in Nairobi.

32. He contended that Section 10(3a) of the Insurance Motor Vehicle Third Party Risks Act Cap 405 Laws of Kenya compelled a respondent to attend a second medical examination but did not provide that that should be done at the respondent's costs. He was categorical that the Appellant was not denied a chance to be heard as alleged as after the Trial Court's Ruling his Advocate logged out of the virtual court and the matter therefore proceeded *ex parte*.

33. Notably, this court noted that the Respondent delved into issues that if determined in this Ruling, the same would be pre-empting the judgment on Appeal as they went to the core matter of this Appeal. Having said so, the court limited itself to the question of whether or not to grant an order for stay of proceedings.

34. The conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified under Order 42 Rule 6 of the Civil Procedure Rules. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal.

35. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.

36. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. An arguable appeal only needs to raise a single *bona fide* point worthy of consideration as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR**.

37. Further, the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR** that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

38. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.

39. Notably, the prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.

40. Parties did not submit on the issue of delay. As this Appeal was lodged on 16<sup>th</sup> April 2021 and the application was filed on 28<sup>th</sup> May 2021, this court was of the considered view that the same was filed within reasonable time.

41. A perusal of the Memorandum of Appeal dated 9<sup>th</sup> April 2021 and filed on 16<sup>th</sup> April 2021 led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court exercised its discretion correctly in overruling the Appellant's prayer for an adjournment.

42. In the event the court did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would be rendered unnecessary, even though an appropriate order for costs could be made to remedy that.

43. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises. As was held in

the case of Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, the Court of Appeal rendered itself as follows:-

**“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”**

44. Accordingly, having considered the affidavit evidence and the Written Submissions and the case law by the respective parties, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory.

#### **DISPOSITION**

45. Accordingly, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 26<sup>th</sup> May 2021 and filed on 28<sup>th</sup> May 2021 was merited and the same be and is hereby granted in terms of Prayer No (3) in the following terms:-

**1. THAT the DR High Court Kisumu facilitates the typing of the proceedings and placing of the lower court file herein within ninety (90) days from the date of this Ruling.**

**2. THAT the Appellant shall file and serve his Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.**

**3. THAT in the event the Appellant shall default in the order given in Paragraph 45(2) hereinabove, the order of stay of proceedings will automatically lapse and the Respondent will be at liberty to move the lower court as provided by the law to proceed with the hearing and determination of Kisumu CMCC No 60 of 2020 David Ojwang Dede vs Marcellus Odhiambo Okiya.**

**4. Costs of the application will be in the cause.**

**5. Either party is at liberty to apply.**

46. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021**

**J. KAMAU**

**JUDGE**