



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO.11 OF 2018**

**BETWEEN**

**THE MONARCH INSURANCE COMPANY LIMITED.....APPELLANT**

**AND**

**MILLICENT ACHIENG.....RESPONDENT**

**AND**

**SILIVESTER MBAKA.....1<sup>ST</sup> DEFENDANT**

**RANA AUTOSELECTION LTD.....2<sup>ND</sup> DEFENDANT**

*(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 553 of 2015 by Hon. H.Adika (SRM) on 19<sup>th</sup> September, 2016)*

**JUDGMENT**

**Introduction**

1. On 19<sup>th</sup> September, 2016, the Appellant's application dated 21<sup>st</sup> July, 2016 seeking orders to stay the proceedings and to be enjoined as an interested party was dismissed for want of attendance by Appellant's counsel.
2. The Appellant faults the learned trial magistrate for failing to consider the application on merit.
3. I have considered the appeal in the light of the pleadings on record and the submissions by counsel for the Appellant and the Respondent.
4. In the case of **Mbogo & Another – v- Shah [1968] EA 93**, the predecessor to the Court of Appeal held that:  
  
**“a court on appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”**
5. The discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised.
6. The court record demonstrates that the court had by an order made on 19.09.16 dismissed Appellant's application dated 27.07.16 for want of attendance. The record further reveals that the application was reinstated by an order made on 05.12.16. The application was subsequently fixed for hearing on 27.03.17 and was dismissed for failure of Appellant's counsel to attend court.
7. From the record, the Appellant's counsel's conduct of failing to attend court appears to me to have been intended to delay the hearing of the main suit.
8. From the foregoing, I find that the trial magistrate discretion to decline any further delay on the part of the Appellant was judiciously exercised and I decline to interfere with that discretion.

9. The foregoing notwithstanding, I have taken the liberty to consider if the application dated 27.07.16 was tenable.

10. In **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR**, the Supreme Court stated as follows regarding an interested party:

**‘Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his [or her] cause is to ensure that a legal and legitimate decision is achieved.’**

11. In the case of **Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2017] eKLR**, the court stated that a party seeking to be enjoined as an interested party must first demonstrate that it is a necessary party to the suit.

12. The Respondent’s claim against the Defendants is for damages for injuries she suffered while traveling in M/V KCB 282 G owned by the Defendants.

13. At the hearing, the duty of the trial court will be to determine whether or not the Respondent shall have proved negligence on the part of the Defendants and not whether or not the Appellant is entitled to avoid liability to pay and indemnify the 1<sup>st</sup> Defendant against any claim arising from the accident

14. From the foregoing analysis, I have come to the conclusion that the Respondent is not a necessary party to the determination of the issues in **Kisumu CMCC No. 553 of 2015** between the Respondent and the Defendants and that its application for stay the proceedings and to be enjoined as an interested party was untenable made purposely to confuse issues, delay the conclusion of the case and thus increase costs.

#### **Disposition**

15. From the foregoing analysis, I find that the interest of justice tilts in favour of dismissing the appeal to avoid further delay in the hearing and determination of **Kisumu CMCC No. 553 of 2015** which has been pending for the last more than 5 years.

16. Consequently, this appeal is found to be unmeritorious and it is dismissed with costs to the Respondent.

**DATED AND DATED IN KISUMU THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2020**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Amondi/Okodoi**

**For the Appellant - N/A**

**For the Respondent - N/A**