REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 144 OF 2019

KENYA ALLIANCE INSURANCE CO. LTD.....APPELLANT

AND

ANNABEL MUTHOKI MUTETI.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court of Kenya at Machakos delivered on the 17th October, 2019 by Honourable E. H Keago (SPM) in Machakos Chief Magistrate's Civil Case No. 246 of 2019)

ANNABEL MUTHOKI MUTETI.....PLAINTIFF

=VERSUS=

KENYA ALLIANCE INSURANCE CO. LTD.....DEFENDANT

RULING

1. This appeal arises from an application filed by the appellant in Machakos Chief Magistrate's Civil Case No. 246 of 2019. Before me however is an application dated 19th November, 2019 by which the Appellant is seeking a stay of proceedings in the said case pending the hearing and determination of this appeal.

2. The proceedings before the lower court were commenced by way of a plaint dated 17th April, 2019. According to the Respondent, who was the Plaintiff, being the registered owner of motor vehicle registration no. KCM 003N she insured the same with the Appellant herein which insurance was in force by the time the said vehicle got involved in an accident on 14th October, 2018 resulting into loss and damage to the Respondent. Though the Respondent reported the said loss to the Appellant, the Appellant refused to satisfy the Respondent's claim and compensate the Respondent.

3. By Chamber Summons dated 14th May, 2019, the Appellant applied for reference of the said dispute to arbitration and sought that during the pendency of the said arbitral proceedings, the proceedings before the trial court be stayed.

4. In his ruling dated 17th October, 2019, the learned trial magistrate stayed the said proceedings in order for the parties to agree on an arbitrator within 30 days and in default the matter be referred to Court Annex mediation.

5. The appellant is aggrieved by the part of the ruling directing that the matter be referred to court annex mediation which in its view effectively returns the matter back to court in the event that the parties are unable to agree on a mediator. The applicant contends that the said period of 30 days having lapsed without the parties agreeing on a mediator, it was apprehensive that the matter would now proceed to the Court Annex Mediation as directed by the lower court the pendency of this appeal notwithstanding. That course, according to it, would violate the provisions of the Arbitration clause in the insurance policy between the parties as well as the provisions of the ***Arbitration Act***, No. 4 of 1995. In the event that this was to happen, this appeal would be rendered nugatory as the dispute would be finally determined in the meantime.

6. The application was opposed by the Respondent. According to her, though there was a mediation and arbitration clause in the policy document, there were set timelines within which each mode of dispute resolution mechanism would be applicable, which timelines had lapsed by the time she instituted her legal proceedings. She accused the Appellant of having failed to refer the dispute to the Chairman of the Charted Institute of Arbitrators pursuant to the said policy document. According to her the intended appeal is against reference to mediation

which is a mode of dispute resolution provided for under the said policy document. It was therefore her view that the grounds set out in this appeal do not evince any chances of success and that since the dispute is liquidated in nature, the Applicant has not shown any damage or loss that it can suffer if the amount is paid over to her. It was further noted that the Applicant has not offered any security during the pendency of the appeal. She disclosed that since she has already paid the costs of repair she is a person of means capable of refunding the whole sum if paid over to her in the unlikely event that the appeal succeeds.

7. In its submissions, the Applicant relied on the case of **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** cited by in **Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR)** and contended that there is a prima facie arguable appeal, the main concern is not whether the appeal will succeed or not but whether the same is an arguable one. It was submitted that the application that was before the court was based broadly on the provisions of section 6(1) of the ***Arbitration Act*** and that in **Mt. Kenya University vs. Step Up Holdfing (K) Ltd [2018] eKLR**, the Court of Appeal laid out the obligation of the court when faced with such an application. Reliance was also placed on the case of **UAP Provincial Insurance Company Ltd vs. Michael John Beckett (2004) eKLR**, and **Eunice Soko Mlagui vs. Suresh Parmar& 4 Others [2017] eKLR.** Consequently, it was submitted that the obligation of the lower court when faced with the application that was before it was to consider whether the appellant had placed itself within the threshold set by the Court of Appeal above. Once it satisfied itself that indeed the threshold had been reached, the court had no alternative but to stay proceedings and refer parties to arbitration and no more. In this case it was contended that the learned magistrate was so satisfied and was therefore statutorily bound to indefinitely stay all proceedings in the case before him and refer parties to arbitration but could not invent, as he did, other orders which are not legislated under Section 6 of the ***Arbitration Act***.

8. In the Applicant's view, the order for referral of the dispute to court annexed mediation merely meant that if there was no agreement on an arbitrator within 30 days, the matter would be referred back to the court process yet there is nothing under section 6 of the Act that allows the court to do so. In fact, save for the limited instances where the court is allowed to intervene in the arbitration process, a court has no jurisdiction to interfere in matters arbitration. A court cannot refer parties to arbitration and then purport, through judicial craft, to bring the dispute back to court as the lower court did since the arbitration regime is only subject to court intervention in very limited circumstances which are expressly provided for in the Act. In other words, a court has no powers to intervene in the arbitration process except as provided under the ***Arbitration Act***. In this regard the Applicant relied on the Court of Appeal's decision in the case of **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR** and submitted that it is arguable that the learned magistrate had no jurisdiction under the Act to limit the stay period as he did. Moreover, the court also directed that in default of agreement on an arbitrator, the matter be referred to court annexed mediation. This meant that arbitration would no longer be pursued. The order was an interventionist one in so far as the intended arbitration was concerned because the court had already referred parties to arbitration. It was submitted that if parties were unable to agree on an arbitrator, the insurance policy provided that either party would refer the issue of appointment of an arbitrator to the Chairman of Chartered Institute of Arbitrators whose decision would be binding on the parties. Consequently, it was the applicant's case that it is arguable that the court could not give such orders as it did hence the appellant has a prima facie arguable appeal.

9. It was further submitted that the application was filed expeditiously and without inordinate delay since the impugned ruling was rendered on 17th October 2019, the appeal was filed on 13th November 2019 well within the thirty days period allowed for appeals and six days later, the application herein was filed.

10. Based on the cases of **Mark Omollo Agencies & 2 Others vs. Daniel Kioko Kaindi & Another [2004] eKLR**, **Shantilal Vaghjishah vs. Nyanza Spinning & Weaving Mills Limited [2004] eKLR, Permanent Secretary Ministry of Roads & Another vs. Fleur Investments Limited [2014] eKLR,** it was submitted that if the proceedings before the lower court are not stayed, the effect will be that the matter will proceed to court annexed mediation which is contrary to the agreed mode of dispute settlement in the insurance policy and in the event that mediation fails, the dispute will go back to court for adjudication still contrary to the agreed mode of dispute settlement provided for in the policy. In that case, there will be nothing preventing the lower court from finally determining the dispute in the Respondent's favour even before the conclusion of this appeal in which event there will be nothing to stay or refer to arbitration even if the appeal succeeds. In that event, the appellant, which chose arbitration as the mode of dispute settlement, shall suffer irreparably notwithstanding that it may in the end succeed in this appeal and this appeal will just be a trifling appeal. Worthless. It will indeed be rendered nugatory.

11. It was further submitted that Section 1A of the ***Civil Procedure Act*** requires this court to give effect to the overriding objective to facilitate among others the just, proportionate and affordable resolution of disputes before it. There cannot be a just determination of the between the parties if the appeal filed herein is rendered worthless because this court declined to stay the proceedings. It would be unjust to take further proceedings in the lower court when there is a pending appeal whose determination may in the end render such further proceedings taken in the lower court as having been improperly taken. Such a course would not facilitate the affordable resolution of the dispute and runs counter to the overriding objective. Further, resolution of the dispute cannot be proportionate if the proceedings continue in the lower court and this appeal is ultimately rendered useless despite the appellant being successful. In that event, the cost of resolving the dispute shall not have been proportionate to the dispute herein. And resolution of the dispute cannot be said to be affordable when parties incur costs in this appeal and the appeal is then rendered worthless because the lower case proceeded unhindered and was finally determined before conclusion of the appeal. And no prejudice shall be suffered by the Respondent other than perhaps having to wait a little longer. But that cannot outweigh the need to allow the Appellant exercise its right of appeal and the need to avoid the appeal being rendered nugatory.

12. Should the determination of the appeal be in favour of the Appellant, it was contended, all further proceedings taken in the lower court subsequent to the appeal would be deemed to have been improperly taken. But in the event that the lower court case shall have been concluded in favour of the Respondent, the appeal would just be academic and this courts judicial and administrative resources shall have been expended in vain. That would amount to inefficient disposal of the court's business and inefficient use of available judicial and administrative resources. It is therefore imperative that this court takes the path of caution and halts further proceedings. This submission was based on the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited [2010] eKLR**.

13. On behalf of the Respondent, it was noted that the appellant has never filed a defence in the suit before the lower court but has on the contrary filed applications to delay or hinder prosecution of the same both before the lower court and before the mediator as ordered in the ruling the appellant wishes to appeal. In support of her submissions the Respondent relied on the case of **Kenya Wildlife Service vs. James Mutembei [2019] eKLR**, ***Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*** *and* ***Halsbury's Law of England,* 4th Edition. Vol. 37** page 330 and 332.

14. According to the Respondent, this court is being asked to impinge on right of access to justice, right to be heard without delay and overall, right to fair trial by staying the proceedings before the lower court. To the Respondent, a perusal of the appellant's submissions clearly shows that the appellant wishes to have the suit before the lower court (Machakos CMCC No. 246 of 2019) stayed indefinitely pending the proposed arbitration. Bearing in mind that this suit was filed on 29th April, 2019 and to date the wheels of justice are yet to start rolling to have the same determined on merit any further stay will be avoidable delay.

15. Since "Justice delayed is justice denied", the Court was urged not to impinge the respondent's right of access to justice by allowing the applicant to further delay the expeditious conclusion of Machakos CMCC No.246 of 2019. In her view, staying proceedings in Machakos CMCC No. 246 of 2019 will not be in the interest of justice. Should this court exercise its discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court.

16. In the Respondent's opinion, the matter before the lower court has already been stayed and referred to mediation. It thus follows that the appellant's appeal lacks any prima facie merit as the stay of proceedings that was sort before the lower court has already been granted. This can further be confirmed by the fact that the matter before the lower court is not scheduled for any mention or hearing. It was the Respondent's case that the applicant's action of filing this application before this honourable has done more harm than good with regard to usage of the judicial time. If anything, the applicant has brought issues which have already been determined by the lower court to this court. The Respondent contended that the issues for determination that were solely before the lower court pursuant to the respondent filing Machakos CMCC NO.246 of 2019, are now pending determination before three judicial officers i.e. this honourable court, the lower court and lastly the mediator. It was submitted that litigation must come to an end which the applicant herein seems to be vehemently opposed to by placing similar issues before numerous judicial officers for determination. This not only amounts to wastage of valuable judicial time but also an abuse of the court process.

17. The Respondent contended that the applicant only filed the application before this honourable court after the respondent took steps to initiate the dispute resolution before the mediator. A perusal of the court record will show that the Applicant filed the memorandum of appeal on 13th November, 2019 and this application was filed on 19th November, 2019 a day after the applicant was notified by the respondent vide a letter dated 18th November, 0219 that the matter was being placed before the Deputy Registrar for mediation for purposes of appointing a mediator. It was further contended that both the Memorandum of appeal and this application were served upon the respondent on 22nd November, 2019, over a week after the memorandum of appeal was filed. To the Respondent, this just goes to show the applicant's intentions of delaying the determination of Machakos CMCC No. 246 of 2019.

18. As regards the costs, it was submitted that the applicant having not met any of the requisite conditions to warrant stay of proceeding, this application be dismissed. As the norm, costs follow the cause, the Court was urged to condemn the applicant to pay the costs of this application.

Determination

19. I have considered the issues raised in this application.

20. It is not in doubt that this Court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the ***Civil Procedure Act***. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.**

21. It was therefore held in **Jadva Karsan vs. Harnam Singh Bhogal [1953] 20 (1) EACA 74** that:

> **"It is true that there is a wider power under section 97 [now 3A of the Civil Procedure Act] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process."**

22. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account. In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held that:

> **"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case, 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."**

23. In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent. In this case while there was a delay in making the application, I am unable to find that in the circumstances of this case the delay was inordinate.

24. In **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In **Niazons (Kenya) Ltd.**

vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J (as he then was) held that:

> **"Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay…should be granted."**

25. Similarly, the Court of Appeal in **Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664** held that:

> **"In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility."**

26. In this case, the suit before the trial court was premised on an arbitral/mediation clause in the policy document between the parties herein. While the Court referred the matter to arbitration, it stipulated timelines within that reference was to be made and in default, the matter would be referred to Court Annex mediation. Based on the contention that the policy, the document in which the arbitral clause was incorporated provided for a situation where the parties were unable to agree on the arbitrator, it is arguable whether the Court could in light of the said clause make the order it made. At this stage this Court is only empowered to make a finding as to whether or not the appeal is arguable without delving into the merits of the appeal itself, as the Applicant seems to have done and one arguable point is sufficient for the purposes of stay. Whether or not the grounds of appeal would be sustained is however a different matter.

27. It is however clear that if the appeal were to succeed and the mediation proceedings were to have been finalised, the time and resources expended in that process would have been wasted. As was held in by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. 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…Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**

28. This was the position adopted by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

> **"Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court."**

29. I therefore agree with the decision in **Monarch Insurance Co. Ltd vs. Wycliffe Onyango Odenda [2016] eKLR** where **Korir, J** held that:

> **"That what the Applicant seeks to do is achievable is not in dispute…In the case before me, the Applicant faces eminent judgment. It has filed its suit against the Respondent and issued notices to the affected parties. Its suit will be rendered nugatory if stay is not granted. In light of the facts of this case, I find that the application has merit. A slight delay will not prejudice the plaintiffs in the civil suits that the Applicant seeks to stay. They however need to be made parties to this suit. The Applicant is therefore directed to place in motion the necessary mechanisms for enjoining the plaintiffs in these proceedings. In light of what I have stated above, an order of stay is hereby issued staying the proceedings in Busia CMCC No. 405 of 2015 and Busia CMCC No. 179 of 2016 for a period of 60 days from today's date or further orders of the Court. The Applicant is directed to prepare this suit and list it for hearing on priority basis."**

30. Similarly, the applicant herein is in imminent danger of the mediation proceedings being determined before this appeal yet this appeal is directed towards the regularity of the said proceedings.

31. I associate myself with the decision of **Nyamu, J** (as he then was) in **Mark Omollo Agencies & 2 Others vs. Daniel Kioko Kaindi & Another [2004] eKLR**, in which he expressed himself as hereunder:

> **"Turning to the facts of the matter before me and the points for determination, the facts and points are unique in that it is actually not a stay of execution which is being sought and my finding is that what is being sought is a stay of proceedings and the monetary conditions set out in (a) and (b) above do not apply to applications for stay of proceedings. They only apply to applications for stay of execution. The applicant seeks a stay of hearing so that a major legal point he intends to pursue on appeal is determined. If the hearing were to proceed on the basis of the amended pleadings this would render the appeal nugatory. I consider that the applicant is correct in that if fresh causes of action were to be added and the matter proceeds to full hearing the intended appeal would certainly be rendered nugatory. The fact that he could still file an appeal against the ultimate judgment would not in the opinion of the court make any difference to the intended appeal being nugatory because the Court of Appeal Rules require the institution of an appeal against each order or decree and there is no clear provision for consolidation. In addition, proceeding with the hearing while an appeal is pending would constitute an abuse of the court process." (Emphasis ours)**

32. It is therefore my view that the proceedings in the said suit ought to be stayed for a specific period that would allow the applicant to prosecute this appeal.

33. Consequently, I allow this application and direct that there be a stay of proceedings in Machakos Chief Magistrate's Civil Case No. 246 of 2019 pending the determination of this appeal or further orders of this court. However, as was appreciated by **Platt, JSC** in **Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989:**

> **"Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency."**

34. I also agree with the decision in **Kenya Wildlife Service vs. James Mutembei [2019] eKLR** that:

> **"Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent."**

35. In the same vein ***Halsbury's Law of England,* 4th Edition. Vol. 37** page 330 and 332, states that:

> **"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue…This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."**

36. In order that the stay does not operate in perpetuity, I direct the appellant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

37. In light of the delay in filing the instant application, the costs of the application are awarded to the respondent in any event.

38. It is so ordered.

39. This ruling was delivered online vide Skype due to the prevailing restrictions occasioned by COVID19 pandemic.

Ruling read, signed and delivered in open court at Machakos this 17th day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngugi for the Appellant vide Skype

CA Geoffrey