



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL CASE NUMBER 3 OF 2019

JOSEPH GICHIA.....1ST APPELLANT

JOHNSON NGATIA.....2ND APPELLANT

VERSUS

JANE NJERI MAINA.....RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 18/5/2020 brought under Order 42 rule 1, 2 & rule 6, Order 51 rule 1, Order 50 rule 1, 3 & rule 5 of the Civil Procedure Rules, 2010, Sections 3, 3A & 79G of the Civil Procedure Act, Article 159 (2) (d) of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

2. It seeks orders:-

- a. THAT this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.*
- b. THAT pending the hearing and determination of this application there be an order of stay proceedings in Chief Magistrates Court Civil Suit No 1000 of 2007.*
- c. THAT pending the hearing and determination of Civil Appeal No 3 of 2019 there be an order of stay proceedings in Chief Magistrates Court Civil Suit No 1000 of 2007.*
- d. THAT this Honourable Court be pleased to grant the Applicant/Appellant leave to file a Record of Appeal out of the time stipulated by the Honourable court as per the ruling delivered on 16/01/2020.*
- e. THAT such other additional, suitable and or alternative orders be made as are just and expedient all circumstances of the case and this Application considered.*
- f. THAT costs of this Application be provided for.*

3. The grounds for the application are set out as follows: -

- a. THAT on 11/12/2018 the trial court delivered a ruling closing the defence case without allowing the appellant's expert witness to testify when he was present in court.*
- b. THAT the appellants/Applicants herein having been dissatisfied with the said ruling, have filed an Appeal at the High Court of Kenya at Nakuru being Civil Appeal No 3 of 2019.*
- c. THAT the appellants filed an application for stay pending appeal dated 21/01/2019 at the trial court and on the said trial court dismissed the said application.*
- d. THAT the appellants further filed an application dated 19/09/2019 seeking the stay of proceedings of Chief magistrates Court Civil Suit No 1000 of 2007 where this Honourable Court allowed the application on condition that the Appellants do file the Record of Appeal within 30 days from the date of delivery of ruling that is on 16/01/2020.*

e. THAT upon delivery of the ruling, the Appellants promptly moved the court requesting for typed proceedings and copy of ruling to enable them prepare the Record of Appeal.

f. THAT the Appellants have written several correspondences to the Executive Officer requesting for the typed proceedings but the same have not been availed.

g. THAT should the suit proceed in the lower court then this application and the appeal will be rendered nugatory.

4. The application is further supported by the affidavit of Isabela Nyambura sworn on 18/5/2020. She depones that she is a Claims Director at Directline Assurance company Limited who are the insurers of Motor vehicle registration number KAS 176R Toyota Matatu and at whose instance the claims were being defended and she was conversant with the issues relating to the suits and she was authorized and competent to make the affidavit by dint of their rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured's name.

5. Annexed to the affidavit are:

ü **The memorandum of appeal**

ü **The ruling of this court giving the parties 30 days to file right of appeal**

ü **Letters to court seeking typed proceedings.**

6. The application is opposed vide the Replying Affidavit of Mark Ng'ang'a Githiru Advocate sworn on 6/7/2020. He depones inter alia that :-

a. From the onset, it is worth noting that the application for stay of proceedings in the Lower Court matter being NKU CMCC NO 1000 OF 2007 and supporting affidavit therein is a duplicate of the Appellant's application and supporting affidavit on record therein dated 19/9/2019 which was determined vide ruling dated 16/1/2020. Thus clearly, the application herein is a gross abuse of the Court's process.

b. The Appellant's said application dated 19/9/2019 for stay of proceedings in the Lower Court's matter was determined vide ruling dated 16/1/2020 in the following terms;

i. Appellants are granted the order of stay of proceedings in NKU CMCC NO 1000 OF 2007 pending hearing and determination of this Appeal.

ii. Appellants to file and serve Record of Appeal within 30 days from the date herein.

iii. Failure to comply with (b) above, the stay lapses.

iv. Appellants to pay costs of this application

c. THAT instead of complying with the court's directive as ordered on 16/1/2020, the Appellant failed and/or ignored to comply with the court's orders above and in gross abuse of this Court's process filed this application to further stay proceedings in NKU CMCC NO 1000 OF 2007 after receiving the Respondent's mention notice dated 9/3/2020.

d. THAT it is indeed worth noting that the instant application emanates from the lower court matter being NKU CMCC NO 1000 OF 2007 which has been in court for over 13 years and the plaintiff therein closed their case way back on 13/5/2014.

e. THAT since the Appellant/Applicant having failed to comply with the court's said directive, the Respondent herein moved Court and requested the registry to fix the matter for a mention before the Honourable Judge for directions vide their letter to Court dated 20/2/2020.

f. THAT it is very clear the Appellant herein went to sleep and never prepared and/or filed their record of appeal as directed by Court and was only awoken by the Respondent's mention notice dated 9/3/2020.

g. THAT further, no draft of any record of appeal has been attached to the Appellant's application herein hence clearly the application herein has been brought in bad faith to further delay the conclusion of this matter.

7. Parties agreed to rely on their affidavits.

8. I have carefully considered the Notice of Motion, the affidavits and annexures. The applicant's position is that it was failed by the court as seen through the letters written to the Executive Officer seeking the proceedings from the CMCC No 1000 of 2007. The respondents' position is that the applicants went to sleep and were woken from the slumber by the notice to have the matter fixed for mention before the trial court.

9. I have perused my ruling of 16/1/2020. The Notice of Motion therein sought the exact same orders as sought herein, with the additional prayer for leave to file the Record of Appeal out of time. It is evident that no such Record of Appeal has been annexed. Other than the letters annexed to the application no explanation has been given as to why all this time the applicant has not filed anything. I am wont to agree with counsel for the respondent that they slept on their rights.

There is not demonstration of any sense of urgency taking into consideration the period of time that the applicant was given to file the Record of Appeal.

10. From the affidavits placed before me, I find no reason to persuade me to grant the orders sought.

11. Is this application an abuse of the court process? The applicant filed a similar application, obtained orders, did not comply and brought an application seeking the same orders? Surely that is an abuse of the court process and waste of judicial time. Having been granted time and that time having lapsed, the applicant would not be heard to bring the same application seeking the same orders.

12. The application is struck out with costs to the respondent.

Delivered, Dated and Signed at Nakuru this 16th October 2020.

Mumbua T. Matheka,

Judge.

In the presence of: VIA ZOOM

Edna CA

For Applicant N/A

For Respondent Ms. Muthoni for Respondent