



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 460 OF 2018**

**DAVID NIYIBIZI.....APPELLANT/APPLICANT**

**-VERSUS-**

**ANTHONY WARUI WANJIRU.....1<sup>ST</sup> RESPONDENT**

**NATIONAL TRANSPORT & SAFETY AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant filed a Notice of Motion dated 1<sup>st</sup> October, 2018 and which Motion stands supported by the grounds set out on the face thereof coupled with the affidavit sworn by *Isaiah Mwaniki Mwangi*. The orders sought therein are as follows:

**i) Spent.**

**ii) Spent.**

**iii) THAT there be a stay of proceedings in CMCC NO. 6621 OF 2014 (*David Niyibizi v Anthony Warui Wanjiru & Another*) pending the hearing and determination of the appeal against the ruling delivered by Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) on 26<sup>th</sup> September, 2018.**

**iv) THAT the costs of the application be provided for.**

2. The abovementioned deponent, *Isaiah Mwaniki Mwangi*, is indicated as being the appellant's duly appointed attorney by way of a special power of attorney. He stated that he entered into a business deal with one Charles Maina Wanjiru, who is a brother to the 1<sup>st</sup> respondent. That the deal involved the sale of various motor vehicles wherein the deponent was the sales agent for Charles Maina. That upon selling the motor vehicle registration number KBX 823A (the subject motor vehicle) to the appellant and deducting his fees, the deponent forwarded the balance of the purchase price to Charles.

3. It was the deponent's further averment that the 1<sup>st</sup> respondent thereafter lodged a restriction on the subject motor vehicle with the 2<sup>nd</sup> respondent, claiming the original log book was missing and the vehicle had been stolen; that investigations were undertaken and it was subsequently confirmed that the motor vehicle had lawfully been acquired by the appellant. That in his counterclaim, the 1<sup>st</sup> respondent is claiming payment of the proceeds from the sale of the motor vehicle from the appellant. The deponent added that the appellant thereafter filed an application seeking to amend his plaint and which application was dismissed on 26<sup>th</sup> September, 2018 in the absence of the parties and/or their advocates. He avers that if the matter proceeds for hearing, the same will give rise to complications and lead to a miscarriage of justice, not to mention that the appellant will suffer substantial loss if judgment is entered in favour of the 1<sup>st</sup> respondent on the counterclaim. That the amendments sought are necessary in determining the real issues in controversy.

4. In response thereto, a replying affidavit of Anthony Warui Wanjiru was filed. Largely, the said deponent asserted that the trial magistrate was right in dismissing the appellants' application; that the application is frivolous, vexatious, lacks merit and is an abuse of the court process. The deponent added that the appeal is not arguable since the appellant does not have a cause of action against the said Charles Maina, adding that the appellant had firstly intended to call Charles as a witness and then later turned around to seek to enjoin him as a defendant.

5. The deponent went ahead to state that the suit is part-heard and during its hearing, the appellant did not allude to any complaint against Charles Maina; and that the appellant has been sluggish in prosecuting his case. In closing, the deponent averred that no substantial loss or prejudice will befall the appellant since he has no cause of action against Charles Maina and in any case, he would still have the opportunity

of appealing against the judgment in the end.

6. The parties made oral submissions. *Mr. Mahinda*, counsel for the appellant, began by arguing that should the suit proceed, the appellant will be denied the chance of enjoining Charles Maina as a defendant. The advocate added that Charles was not previously joined by virtue of an oversight on the part of the appellant's advocates on record and that when the current firm of advocates came on board, they deemed it necessary to make him a party since he is the nexus between the other parties.

7. *Mr. Mahinda* also submitted that the appellant has an arguable appeal and that the application, having been filed timeously, ought to be granted. He was careful to enhance the argument that if the suit were to proceed and eventually succeed, the appellant would be forced to file a separate suit against Charles Maina.

8. In his opposing arguments, *Mr. Ngugi* advocate for the 1<sup>st</sup> respondent, emphasized that the suit is part-heard; adding that an initial application was filed for joinder of Charles Maina as a party and not for amendment. That principles on joinder of parties differ from those on general amendments.

9. Counsel went ahead to contend that Charles Maina was not a party to the purported sale transaction and hence there is no privity of contract between the appellant and the said Charles. That Charles could only be made a witness to the suit. *Mr. Ngugi* did not hesitate to indicate that if the case proceeds, the appeal will not be rendered nugatory since no relief is sought against Charles and in any case, the outcome of the appeal will in no way affect the suit.

10. *Mr. Mahinda* thereafter countered the arguments made by *Mr. Ngugi* by emphasizing that there is a claim against Charles Maina and it would be in the interest of justice for him to be enjoined.

11. I have considered the grounds on which the Motion is premised together with the supporting affidavit; the replying affidavit in response thereto and rival submissions by the respective parties together with the authorities availed by the 1<sup>st</sup> respondent. Having done so, it is my mandate to determine whether or not a stay of the proceedings ought to be granted in this instance. However, I must elucidate that I am not obligated to go into the merits of the appeal at this stage and will therefore limit myself to the relevant issues emanating from the Motion. I also need to point out that Order 42, Rule 6 (2) of the Civil Procedure Rules referenced by the appellant in the heading of his Motion applies strictly to a stay of execution and is therefore irrelevant herein.

12. That said, I am alive to the fact that whether or not to grant a stay of proceedings is purely at the court's discretion and which discretion is aimed solely at meeting the ends of justice. This was well captured in *Re Global Tours & Travels Limited (Nairobi High Court Winding Up Cause No. 43 of 2000)* wherein the court held as follows:

***“As I understand the law, whether or not to grant a stay of execution or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...”***

13. The principles surrounding a stay of proceedings have been articulated in numerous authorities including those filed by the 1<sup>st</sup> respondent. Take for instance the Court of Appeal reasoning in the case of *UAP Provincial Insurance Company Limited v Michael John Becket, Civil Application No. 204 of 2004* referenced by the court in *Michael Njai v Juan Torres & another [2015] eKLR* in this way:

***“In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise...”***

14. Similarly, the High Court in its analysis of *William Kamunge & 2 others v Muriuki Mbithi [2016] eKLR* indicated that:

***“...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”***

15. In view of the above, I will begin by addressing the first issue, that is, whether the application has been filed expeditiously. It has been established that the impugned ruling was delivered by the trial court on 26<sup>th</sup> September, 2018. The appellant thereafter filed the Motion on 1<sup>st</sup> October, 2018 followed by a memorandum of appeal on 2<sup>nd</sup> October, 2018. I am therefore satisfied that the application has been filed in good time.

16. The 1<sup>st</sup> respondent contended that the application is frivolous, vexatious and an abuse of the court process in the sense that the appellant/applicant has filed one application after another with the aim of delaying the progress of the suit, and so doing, has acted mischievously. I have perused the record and established that a number of applications have been filed by the appellant/applicant seeking a variety of orders. In the meantime, the progress of the suit has been hampered. To my mind, this is evidence of an abuse if not a misuse of the court process by the appellant/applicant, whom it would seem has been majorly indecisive for one reason or another.

17. This brings me to the second issue of whether or not the appellant has an arguable appeal, otherwise referred to as an appeal with prima facie merits. I have taken time to peruse the filed memorandum of appeal, whose grounds are derived from the ruling of 26<sup>th</sup> September, 2018. I am well aware that an arguable appeal is not necessarily one which must succeed; rather, it is one which raises arguable issues. This was well noted in the above-cited *William Kamunge* case (supra).

18. While it is not for me to address the merits of the appeal, I am required to determine whether the same is arguable on the face of it. In doing so, I must state that I have perused the documentation annexed to both the application and reply. I have taken particular interest in the motor vehicle sale agreement between the appellant/applicant and Motorscope, which business is said to belong to the abovementioned Isaiah Mwaniki Mwangi. There is no mention of either Charles Maina Wanjiru or the 1<sup>st</sup> respondent therein. Similarly, there is nothing to point towards the fact that Isaiah was acting as the agent of the 1<sup>st</sup> respondent.

19. Further to the above, I have looked at the Certificate of Registration annexed to the Motion and confirmed that the 1<sup>st</sup> respondent is the registered owner of the subject motor vehicle. Having determined so, I am at odds as to the manner in which the appellant/applicant purchased the said motor vehicle from Isaiah without doing a background check to ascertain the true ownership of the same. From where I stand, it is obvious the appellant/applicant did not exercise due diligence prior to proceeding with the sale transaction.

20. From the above, it would be accurate to conclude that no good title passed to the appellant/applicant and thus, he is not a bona fide purchaser for value. As relates to Charles Maina, I am unable to find the nexus between him and the appellant/applicant or Isaiah. In fact, it was indicated that the necessary payments arising from the controversial transaction were made to Isaiah and not to Charles. While it is possible that Charles had a role to play in the turn of events, there is no evidence to point me in that direction. In view of the foregoing, I find that the appellant/applicant has not demonstrated a prima facie arguable case to warrant a stay of the proceedings.

21. The third principle relates to whether or not the appeal will be rendered nugatory. To my mind, the appellant/applicant has not satisfied me that the appeal will be rendered a futile exercise unless the order for stay of the proceedings is granted. I have already determined that he had no good title to the subject motor vehicle to begin with. If at all he is desirous of pursuing a claim against the said Charles, I believe this can be done separately. It would cause a great inconvenience to have the proceedings before the lower court held in abeyance.

22. I now turn to the fourth principle on expeditious disposal of cases *vis-a-vis* proper utilization of judicial time. My findings on this principle are closely tied to those made hereinabove, save to add that both the courts and parties have a collective duty to ensure expediency in the disposal of cases. While I am in appreciation of the fact that there is a memorandum of appeal in place, I also acknowledge that this is a fairly old matter which has been dragged mostly by the appellant/applicant through his consecutive applications. It would go against the proper use of judicial time to stay the suit on this basis.

23. In the end, I find no merit in the application and the same is dismissed with costs to the Respondents.

Dated, signed and delivered at **NAIROBI** this **21<sup>st</sup>** day of **February, 2019**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent