



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.138 OF 2018**

**GENERAL INSURANCE COMPANY LIMITED.....APPELLANT**

**-VERSUS-**

**PETER MWANGI MURAGE.....RESPONDENT**

***(An Appeal from the Ruling of Hon. Omido, delivered on the***

***10<sup>th</sup> day of August, 2018 in Nakuru Chief Magistrate's Court Civil Suit No. 1013 of 2013)***

**RULING**

1. This is a ruling on the application dated 2<sup>nd</sup> October 2018. It seeks to stay proceedings in Nakuru CMCC No.1013 of 2013 pending herein and determination of appeal herein.
2. Grounds on the face of the application are that, the appellant has arguable appeal with high chances of success, which may be rendered nugatory if the trial courts proceedings, are not stayed.
3. Further that the applicant/appellant stand to suffer irreparable loss and damage if this application is not allowed.
4. In response, the respondent filed replying affidavit dated 25<sup>th</sup> October 2018. He averred that the application herein is incompetent as the decision appealed against has not been annexed to enable court decipher the contents and reasoning behind it.
5. Respondent further submitted that the applicant has not demonstrated sufficient reason to warrant grant of stay of proceedings pending appeal neither was the application brought expeditiously the ruling having been delivered on 10<sup>th</sup> August 2018 and application filed 55 days after.
6. Respondent averred that the suit has been pending in the lower court for 5 years and stay would delay the matter further contrary to Article 159 of the constitution's requirement to dispense justice to all irrespective of status.
7. Further that owing to scarcity and optimum utilization of judicial time, the balance tilt in favour of having the suit heard on merit in the lower court as opposed to staying proceedings and that proceedings in the lower court shall not prejudice the appellant as it would have time to cross examine the respondent.
8. Respondent averred that the appeal has remote chances of success as the appellant never tendered submissions in the application before the magistrate's court; and superior court would lack jurisdiction to entertain appeal on matters not raised in the lower court. He sought dismissal of the application.
9. In their oral submissions, counsels herein restated grounds of appeal and averments in the affidavits filed. Counsel for applicant explained reason for filing application is that it was delivered in their absence. In a rejoinder counsel for the respondent submitted that the applicant has not explained delay of 55 days and failed to disclose that the Civil Suit No.1013 of 2013 has been pending for 5 years and that in the earlier suit 1472 of 2003 they have been urged to file responses but they have not. Counsel further submitted that applicant has not filed affidavit to demonstrate that the respondent would not be able to refund decretal amount.

**ANALYSIS AND DETERMINATION**

10. On perusal of the appeal, I note that the appellant is aggrieved by the trial magistrate's failure to strike out the plaintiff's suit. Appellant argued that the trial magistrate failed to find that the appellant had obtained a declaration to the effect that the appellant is not liable to indemnify the defendant in Civil Suit No.1427 of 2003. That trial magistrate was bound by the judgment of Nairobi HCCA NO.299 of 2004;

that he failed to consider appellants evidence in form of annexures and relied on typographical error to dismiss the appellant's application.

11. I have considered arguments by parties herein. The ruling that the appellant seeks to appeal against has not however been attached to enable me peruse and consider. I have however noted grounds raised for dissatisfaction from the memorandum of appeal filed.

12. The applicant is aggrieved that the magistrate never considered annexures to the application. I cannot tell the reasoning of the magistrate, as I have not had opportunity to peruse the ruling; neither has judgment in Nairobi HCCA NO.299 of 2004 been annexed to this application; I cannot therefore make any comment on the same.

13. The annexures, which the appellant/applicant allege the trial magistrate never considered, must be part of the documents filed by the appellant/applicant in support of defence case in the lower court. The court will therefore have an opportunity to look at the documents and make a determination after the same being subjected to cross-examination.

14. I do not foresee any prejudice that appellant is likely to suffer as they are participating in the lower court trial. I decline to allow stay of proceedings in Nakuru CMCC No.1013 of 2013

**FINAL ORDERS**

1. Application dated 2<sup>nd</sup> October, 2018 is dismissed
2. Costs of this application to the respondent

**Ruling Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of May, 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/ Jared Court Assistant

Mr. Aim holding brief for Chengecha Counsel for Appellant

N/A Counsel for Respondent