



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 51 OF 2016

LUCY NJERI MWANGI.....APPELLANT

VERSUS

JOHN IRUNGU MURIGI.....RESPONDENT

[Appeal from the order of A. Ogonda, Resident Magistrate in

Kigumo PMCC No. 91 of 2014 delivered on 26th August 2016]

JUDGMENT

1. This *interlocutory appeal* turns on two key issues: Firstly, whether the learned magistrate exercised her *discretion* judiciously in refusing to *extend time* to hear an application to enjoin a third party. Secondly, whether she erred by declining to grant *leave* to issue the third party notice.
2. The appellant filed a chamber summons in the lower court dated 22nd March 2016. She sought to *extend time* to file the application; and, for *leave* to issue the third party notice to one *Martin Mwangi Mbaa*. On 26th August 2016, the learned magistrate *dismissed* the summons with costs.
3. The appellant has raised *five* grounds of appeal. Firstly, that the lower court erred by insisting on proof of a supporting report from *Wisemen Limited*; secondly, that the replying affidavit by the respondent should not have been considered because these were meant to be *ex-parte* proceedings; thirdly, that the court paid too much heed to procedural technicalities; fourthly, that the learned trial magistrate was biased; and lastly, that submissions by the appellant were completely disregarded.
4. At the hearing of the appeal, the appellant relied entirely on submissions filed on 11th June 2019.
5. The appeal is contested by the respondent. The respondent relied on submissions filed on 7th May 2019.
6. The retort is that the appellant was not candid in the lower court; that there was undue *laches*; and, that having been served with the application, the respondent was entitled to reply. However, the respondent contended that the court was not influenced by the reply and properly exercised its discretion.
7. This is an *interlocutory appeal*. It would be *prejudicial* to comment about the merits of the suit. That will be the true province of the trial court. See *Lifico Trust Registered v Patel* [1985] KLR 538.
8. The genesis of this matter is a *road traffic accident* in which the plaintiff (now the respondent) alleged that he was injured. He blamed the drivers or owners of *two* vehicles involved in the collision: KBU 354D; and, KAQ 752R. Those facts are pleaded in the plaint dated 8th July 2014.
9. The appellant lodged a *statement of defence* on 18th September 2014 denying negligence. In paragraph 5 of the pleading, she blamed the driver of a *matatu* motor vehicle KAQ 7752R for *contributory negligence*.
10. I thus concur with the learned trial magistrate that as early as 18th September 2014, the appellant knew about the *third party* vehicle. Furthermore, the appellant attached to her ill-fated application a police abstract dated 24th April 2015 which gave further particulars of the third party vehicle. It is not lost on me that the document has a stamp of *Wisemen*.
11. But I have also seen an earlier version of the abstract dated 24th July 2013 filed *together* with the *plaint*. At paragraph 1 (a) of the form,

the details of the *owner* of the third party vehicle are given as *Martin Mwangi Mbao*. That is the same person to whom the appellant proposed to issue a third party notice. But assuming that the appellant was still in doubt, a simple *official search* would have settled the matter.

12. The appellant's application for leave to issue the notice was not lodged until 15th May 2015; over *one year and three months* since the suit. The application, under Order 1 Rule 15 of the **Civil Procedure Rules** should have been made *ex parte 14 days* after close of pleadings.

13. I thus readily find that there was *undue delay*. Was the delay well explained? Unfortunately not. The respondent blamed the delay on two fronts: Firstly, that it was awaiting an investigation report from *Wisemen Limited* to establish *ownership* of the vehicle. As observed by the lower court, the report by *Wisemen* was not before it; and, from what I stated earlier, the information on the *owner* of the third party vehicle was in the police abstract filed with the plaint.

14. The second explanation was that there was a pending *test suit*. That submission is awkward because there is no logical connection between the *outcome* of the test suit and the right of the appellant to issue a third party notice.

15. I readily find that the delay by the appellant was *prolonged*; and, was not well explained. It was accordingly *inexcusable*. See ***Ivita v Kyumbu*** [1984] KLR 441. Allowing the application by the appellant to issue a belated third party notice would have re-opened the pleadings and occasioned further delays. That flew in the face of the *overriding objective* of the court.

16. I have reached the conclusion that the learned trial magistrate properly exercised her *discretion* in disallowing the first limb of the application to *extend time*; and, in declining the second limb for service of the intended third party notice.

17. My finding on that point is *sufficient* to dispose of the interlocutory appeal.

18. It follows as a corollary that this interlocutory appeal lacks merit. It is hereby *dismissed*. I grant the *respondent* costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of June 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Njiraini holding brief for Mr. Njoroge for the appellant instructed by Eboso & Company Advocates.

Mr. Gitonga holding brief for Mr. Mr. Mbuthia for the respondent instructed by J. N. Mbuthia & Company Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.