



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. CIVIL APPLICATION NO. 19 OF 2018

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPLICANT

= VERSUS=

NYAGA MUGAMBI & MARTIN MUNYI NYAGA (suing as the Legal

Representatives of the Estate of ANNE KENDI NYAGA (Deceased)....1ST RESPONDENT

LENITY KAGENDO KAUMBUTHU & WILFRED MUGIKUU (suing as the Legal

Representatives of the Estate of JEDIEL KITHINJI (Deceased).....2ND RESPONDENT

SATURINA GATAKAA NKONGE & FEDIS WANJA NKONGE

(suing as the Legal Representatives of the Estate of

GLORIA MWENDE (Deceased).....3RD RESPONDENT

WILKINSON MWENDA ERASTUS & FRANKLINE

NDINGA KAMUNDI(suing as the Legal Representatives

of the Estate of LYDIA KINYA (Deceased).....4TH RESPONDENT

RULING

1. Directline Assurance Company Limited, the applicant herein vide a Notice of Motion dated 29th May 2018 has moved this court under **Order 42 Rule (1) and (6), Order 43 Rule 2 &3 and Order 22 Rule 22 (1)** of the **Civil Procedure Rules** in addition to **Sections 1A, 1B &3A** of the **Civil Procedure Rules** for the following orders namely:-

(i) That this application be certified urgent.

(ii) That this honourable court be pleased to stay further proceedings before the Chief Magistrate's Court at Chuka in Chuka CMCC No. 133 of 2015, 134/15,135/15 and 136/15 pending determination of this application.

(iii) That this honourable court be pleased to stay further proceedings before the Chief Magistrate's Court at Chuka in Chuka CMCC No. 134/15, to 136/15 pending the hearing and determination of the intended appeals.

(iv) That this honourable court be pleased to enlarge the time within which the applicant may apply for leave to appeal the directions issued on the 13th March in the above cited cases in the lower court.

(v) That the applicant be granted leave to appeal against the direction/orders issued on 13th March 2018 in Chuka CMCC Nos. 133/15 to 136/15.

(vi) That the honourable court be pleased to extend time to file appeals to this court against the directions issued on 13th March, 2018 in Chuka CMCC No.133/15 to 136/15.

(vii) Costs be provided for.

2. The grounds upon which this application has been brought are as follows:-

a) That the cited matters i.e. Chuka CMCC No. 134-136/15 were listed for pre-trial conference on the 5th February, 2018 and that aware of the process, the applicants preferred an application dated 2nd February, 2015 and sought directions over the same on 5th February, 2018 pursuant to the provisions of Order 11 Rule 3(2) (a) of the Civil Procedure Rules.

b) That however the trial court without properly considering the applications or the cited rules unilaterally directed that the main suit be heard on the 13th March 2018 and directed that the applicant do obtain a date in the registry for the applications dated 2nd February, 2015.

c) That the applicant was not able to obtain a date in the registry for its applications because the main suit had a hearing date and the registry staff declined to give a date on that ground.

d) That the applicant desirous of its applications being heard on priority filed certificate of urgency which was scheduled for 13th March, 2018.

e) That on 13th March 2018 the trial court without considering the merits of the applications proceeded for main hearing to the detriment of the applicant.

f) That the honourable court denied the applicant an adjournment to enable the advocate in conduct of the matter to attend to the hearing and instead proceeded with the advocate who was holding brief.

g) That the applicant has suffered great prejudice and has been arbitrary denied the right to be heard contrary to the provisions of Article 50 of the Constitution.

h) That the failure to deliver a ruling in respect to the said application has left the applicant in limbo without any recourse as there is no ruling to be appealed from.

i) That the trial court has been biased against the applicant and this has driven the applicant from the seat of justice.

j) That justice must not only be done but must be seen to be done and the applicant is apprehensive that justice may not be done unless this application is allowed.

k) That the applicant requires leave to appeal the failure of the trial court to accord it a fair hearing.

3. The application is supported by the affidavit of Pauline Waruhiu sworn on 29th May 2018 which affidavit has majorly reiterated the above grounds. Pauline Waruhiu swearing the affidavit on behalf of the applicant believes that they were denied the right to be heard when the trial court proceeded on hearing of the main suit without considering the interlocutory applications filed and on that basis she deposes that their intended appeal has high chances of success. She has further deposed that the appeal will be rendered nugatory and lead to irreparable harm unless stay of proceedings is ordered.

4. The applicant's learned counsel Mr. Kissinger urged this court to accord the applicant a chance to be heard by staying the proceedings and granting it leave to appeal and extending time for it to appeal against the directions given by the trial court. Mr. Kissinger faulted the trial court for disregarding the provisions of **Order 11 Rule 3(2) (a)** of the **Civil Procedure Rules** by ordering the case to proceed for trial notwithstanding the pendency of an interlocutory application.

5. The applicant's counsel further urged this court to allow the application since the Respondents have not contested facts presented in the affidavit in support of this application. They urged this court to find that the trial court proceeded in a way that left the applicant handicapped as there was no decision rendered on their applications to enable them prefer an appeal.

6. The Respondent has opposed this application through an affidavit sworn by Don. Z. Ogweno learned counsel for the Respondents herein. In his view the application before court is not urgent and that the matters sought be stayed have already proceeded with full participation of the applicant's counsel, Mr. Mbugua who cross examined the plaintiffs during the hearing on 13th March, 2018.

7. The Respondents have deposed that the trial court rendered a decision on the applicant's application dated 2nd February, 2018 when it decided that the applications were not urgent and directed that the matters to proceed for full trial. In their view, the applicant did not suffer any prejudice because it sought to file further witness statements which was allowed and that the applicant will have its day in court during defence hearing slated for 19th June, 2018.

8. The Respondents have further deposed that the matters sought to be stayed were filed in 2015 and in their view it is not in the interest of justice to stay them given that the decrees which are the subject of those suits were issued between 2012 and 2013.

9. The Respondents have further faulted the applicant for making allegations of bias at this stage when the same was not addressed to the trial court for its recusal. They have further faulted the applicant for not annexing or exhibiting the order/directive which they want to appeal against and in their view failure to annex the order to this application is fatal given that this court is required to determine if the

applicant has high chances of success in the intended appeal.

10. Mr. Ogwen, learned counsel for the Respondents has further submitted that the main purpose of the applicant's applications dated 2nd February, 2018 were to stay the proceedings which in his view was to delay the proceedings and that the trial court exercised its discretion in order to facilitate expeditions disposal of the cases. He submitted that the provisions of **Order 11 Rule 3(2)** gives the trial court discretionary powers to give such direction that serves to expedite the disposal of cases and that the applications presented by the applicant only served to delay the hearing and in his view the trial magistrate was right to direct that the matters proceed for full trial.

11. This court did call for lower court files numbers Chuka CMCC No. 133-136 of 2015 both pursuant to my supervisory jurisdiction under Article 165(b) of the Constitution and for the purposes of this application and in particular to attain the demands of this court in accordance with the provisions of **Article 159(d) of the Constitution**.

12. To begin with the allegations of bias against the applicant by the trial court, I have perused through the record of proceedings contained in the active file No. Chuka CMCC No.133/15 (the files are consolidated) and I have not found any evidence of bias or record of the applicants or their counsel raising the issue of bias at that court. It is always proper for a litigant who feels that a court is biased towards him/her or his/her cause to 1st raise the issue before the same court and apply for the recusal of such court if there is basis for such. This court therefore finds that the claims for bias by the trial court in this case is unfounded.

13. I have considered the other issue raised by the applicant which is the grievance about its interlocutory applications dated 2nd February, 2018 being disregarded at pre-trial stage without being heard. I have again perused through the record of proceedings noted that indeed the applicant filed an application dated 2nd February, 2018 on 5th February, 2018. When the matters were placed before the trial court on 6th February, 2018, the court directed that the cases be listed for full trial on 13th March, 2018 and further directed the applicant to fix the applications for hearing in the registry. The applicant has deposed that it tried through counsel to fix the applications for hearing in vain and the record appears to lend credence to his claim that it was denied a chance to be heard because when they filed a certificate of urgency on 7th March 2018 to be heard on its applications dated 2nd February, 2018, the trial court gave the same directions that a date for the applications be fixed at the registry. The applicant, much as it tried to get a hearing date in the registry it could not get a date simply because the registry staff noted that the matters were listed for main hearing on 13th March, 2018 and expectedly thought that by fixing another date for hearing of the applications they would be contradicting the directive of the learned trial magistrate. That in my view is where the problem lies and the big question is whether the trial court properly directed itself when it gave directions that the matters be fixed for full trial when interlocutory applications filed were pending for determination.

14. In my considered view rendering a decision on the above question at this stage would be premature as that will be the issue in the intended appeal but it suffices to say that the applicant has raised legitimate concerns about its rights to be heard under **Article 50 (1) of the Constitution of Kenya 2010**. The right to access justice for any person or litigant under **Article 48** of the **Constitution** cannot be impeded by the exigencies of quick disposal of cases notwithstanding the objectives of Civil procedure to facilitate expeditions resolution of civil disputes.

In my considered view a right to be heard, however frivolous the issue may be, is a basic right and sacrosanct in the new constitutional dispensation in Kenya. It has to be respected and protected. As I have said it cannot be sacrificed at the altar of expediency. A court should hear whatever is placed before it and make a determination whether the same is merited or frivolous. Either way a decision has to be rendered.

In the premises I find merit in this application. The intended appeal raises important questions that go into the basic rights of the applicant and I find that sufficient reasons have been advanced to give it a chance to ventilate its grievances through the intended appeal. The applicant is granted 14 days from the date of this ruling to file its intended appeal. In the meantime I find that it is the interest of justice to order stay of proceedings in **Chuka Cause No.133/15, 134/15, 135/15 and 136/15** pending the determination of the intended appeal. I also direct that proceedings be typed urgently and be available to the applicant in order to facilitate just and expeditious disposal of the intended appeal and the suits pending in the trial court. Costs shall abide by the outcome of the intended appeal.

Dated, signed and delivered at Chuka this 18th day of June, 2018.

R.K. LIMO

JUDGE

18/6/2018

Ruling signed, dated and delivered in the presence of Kijaru holding brief for Ogwen for respondent and in the absence of appellant and their counsel.

R.K. LIMO

JUDGE

18/6/2018