



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 438 OF 2013

ELIJAH KAGONDU.....APPELLANT

VERSUS

ELIAS KIMANI GITAU.....1ST RESPONDENT

DAVID KURIA.....2ND RESPONDENT

KIAMBU INSTITUTE OF SCIENCE AND TECHNOLOGY...3RD RESPONDENT

(Being an appeal from the ruling of the Hon. Onchuru (Mrs) Ag. Chief Magistrate delivered on 7th July, 2013 in Kiambu CMCC No. 16 of 2008)

R U L I N G

1. Elijah Kagondtu, the Appellant herein, filed an application dated 12th August, 2011 before the subordinate court in which he sought for inter alia

a. Judgment on liability be entered against the 3rd Party at 20%.

b. The 3rd Party be ordered to pay Kshs.581,056/- being 20% of damages awarded to the Plaintiff together with costs and interest.

c. The 3rd Party to pay costs of the application.

2. The aforesaid motion was heard and dismissed by Hon. Onchuru, learned Ag Chief Magistrate vide a ruling he delivered on 17th July, 2013. Being aggrieved by the aforesaid decision, the Appellants preferred this appeal and put forward the following grounds: -

a. The learned trial magistrate failed to appreciate the nature of the Plaintiff's application dated 12th August, 2011 and thereby erred in law in dismissing the said application.

b. The learned trial magistrate misdirected himself and erred in law by failing to adopt the judgment on liability as apportioned in High Court Civil Appeal no. 719 of 2009, which was an appeal against judgment on the test suit.

c. The learned trial magistrate failed to appreciate the law on test suit and thereby erred in failing to adopt the finding of the test suit and subsequent appeal on liability.

d. The learned trial magistrate decision cannot be supported by the law and or facts.

3. Elias Kimani Gitau, the 1st Respondent herein has now taken out the motion dated 17th November, 2016 the subject matter of this ruling, in which he sought for the following orders: -

a. That the Honourable Court be pleased to strike out the Appellant's appeal as it was filed on 14th August, 2013 with full notice, knowledge and information that there was a subsisting High Court order given on 16th March, 2009 in NRB HCCC 168 of 2009 in the Matter of standard Assurance staying all proceedings in relation to all policy holders of Standard Assurance Co. Ltd including the Applicant/1st Respondent herein.

b. That this appeal be struck out with costs as it was filed without any leave sought from the lower court or the High Court while the dismissed application dated 14th August, 2011 which is the basis of this appeal was founded on Order 51 of the Civil Procedure Rules and contrary to provisions of Order 43 Rules 1, 2 and 3 of the Civil Procedure Rules.

c. That this appeal is incompetent as the dismissed application dated 12th August, 2011 was filed in Kiambu CMCC No. 16 of 2008 Elijah Kagonda Vs David Kuria & Kiambu Institute of Science and Technology after the final judgment was delivered, the suit was concluded and which was not appealed against or any application for review done. Hence the Lower court was funtus officio

d. That the Plaintiff be condemned to pay the costs of this suit.

4. The aforesaid motion is supported by the affidavit of the 1st Respondent. When served, the Appellant filed the replying affidavit of the Charles Njuguna to oppose the motion. The 1st Respondent also filed a supplementary affidavit he swore to respond to the facts deponed in the Replying affidavit.

5. I have considered the grounds stated on the face of the motion plus the facts deponed in the Affidavits filed in support and against the motion. It is the submission of the 1st Respondent that the Appellant was on 28th August 2011 duly served with a Notice of Preliminary Objection dated 23rd August, 2011 and a substituting court order issued on 16th March, 2009 vide Nairobi HCCC No. 168 of 2009 in the matter of **Standard Assurance** long before the Appellants filed this appeal.

6. It is the 1st Respondent's submission, therefore, that this appeal amounts to an abuse of the court process because it was filed while there was a subsisting court order staying proceedings filed against **Standard Assurance (K) Ltd** or its Policy Holders during the pendency of the moratorium given on 16th March, 2009.

7. The 1st Respondent further argued that the appeal should be struck out for it was filed without leave being sought pursuant to the provisions of Order 43 Rules 1, 2 and 3 of the Civil Procedure Rules.

8. The Appellant on the other hand is of the submission that the 1st Respondent had an opportunity to stay the proceedings before the subordinate and the appeals before this court but he opted to continue with the proceedings geared towards determining liability, therefore he is estopped from using the moratorium as a shield at this late stage of the proceedings.

9. It is also the Appellants submission that at the time of service of the said order, the period which the order applied had already lapsed, therefore, it was inconsequential without any proof that the moratorium had been extended.

10. The Appellant further argued that the said power is only limited to insulating the insurer and does not prevent third parties from suing the insured.

11. It is also the submission of the appellant that the application which was dismissed was premised on Order 25 Rule 5 of the Civil Procedure Rules which provision does not require leave of court prior to filing an appeal. The Appellant lamented that the application dated 17th November, 2016 is only meant to frustrate the Appellant from pursuing the fruits of his judgment against the Applicant.

12. After a careful consideration of the rival averments, it is now clear that the 1st Respondent has not denied the assertion that despite having knowledge of the existence of the court order staying proceedings issued on 16th March, 2009 he did not attempt to stop further proceedings in the matter.

13. He has not also denied the assertion that he participated in subsequent proceedings before the trial court to determine liability. With respect, I am persuaded by the Appellant's argument that the 1st Respondent is stopped from using the stay order as a shield at this late stage of the proceedings. He fully participated in the proceedings before the trial court which gave rise to this appeal.

14. On the basis of this singular ground, I decline to grant the orders sought in the motion and instead issue an order dismissing the motion with costs abiding the outcome of this appeal.

Dated, signed and delivered at Nairobi this 16th day of August, 2018.

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J K SERGON

JUDGE

In the presence of

..... **for the Appellant**

..... **for the Respondents**