



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**MISC. CIVIL CASE NO. 47 OF 2015**

**JOHN NKUNJA BATI T/A**

**COMBO DVD COACH ..... 1<sup>ST</sup> APPLICANT**

**NASIR MOHAMED NASIR ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**SALIM SAID MARO ..... 1<sup>ST</sup> RESPONDENT**

**BAKARI OMAR ..... 2<sup>ND</sup> RESPONDENT**

**ABDALLA KOMORA KHARUNI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

The application dated 3<sup>rd</sup> December 2015 seeks the following orders: -

**1. THAT** this honourable court be pleased to order a stay of proceedings in CMCC 191 of 2014, CMCC 196 of 2014 and CMCC 197 OF 2014 pending the hearing and determination of the appeal filed by the applicants herein.

**2. THAT** this honourable court do order that the ruling in CMCC 191 of 2014, CMCC 196 of 2014 and CMCC 197 of 2014 be set aside and the applicants be allowed to file their supplementary list of documents to include the bundle of documents erroneously left out in filing the initial List of Documents.

The application is supported by the affidavit of Erastus Mwaniki sworn on 3<sup>rd</sup> December 2015. The respondents filed a replying affidavit sworn by Salim Said Maro on 9<sup>th</sup> March 2016. Counsel for both parties agreed to determine the application by way of written submissions.

I have read the submissions filed by both counsels. The applicants contends that they were denied the opportunity to produce supplementary documents during the hearing of the case before the trial court. According to the applicants, the list of the documents to be produced had been filed in court but were not in the court file. Some of the documents had been erroneously left out in the initial bundle of documents.

The applicants made an oral application during the hearing of the case on 5<sup>th</sup> October 2015. The trial court delivered its ruling and dismissed the application. In essence therefore, the applicants were denied the opportunity to present before the court documents in support of their defence.

On his part, counsel for the respondents oppose the application. Counsel maintain that the case before the trial court is part heard. It came twice and was adjourned due to reasons not related to this application. The applicants will not be prejudiced if the case proceeds. According to the respondents, prayer four (4) of the application cannot be granted as it seeks to determine the appeal at this stage. The application has been brought through the wrong legal provisions and ought to be struck out. No substantial loss will be suffered by the applicants.

The main issue for my determination is whether the proceedings before the trial court should be stayed pending the hearing and determination of the appeal. Although counsel for the respondents maintain that the application has been brought under the wrong legal provisions, the application is also brought under Order 42 rule (6). That provision allows an application for stay of proceedings or orders. The background of the dispute is that the respondents were involved in a road traffic accident on 6<sup>th</sup> May 2014 involving motor vehicle registration number KBD 382P. The suit before the trial court is part heard. On 5<sup>th</sup> October 2015 the applicants made an oral application to file a supplementary list of documents. That request was declined via a ruling delivered on 2<sup>nd</sup> November 2015.

I have read the ruling of the trial court as well as the application and response thereto together with the rival submissions. The only issue being raised is that the proposed documents are crucial to the applicants' defence. The documents have been annexed. They consist of second medical reports, letters dated 3<sup>rd</sup> September 2014 and 24<sup>th</sup> October 2014. There are other medical documents annexed to the affidavit in support of the application. The totality of the applicants' contention is that the respondents or some of them were not involved in the accident and their medical records are untrue. The trial court was of the view that to allow the production of the documents is tantamount to a trial by ambush. The documents were not served upon the plaintiffs' counsel. The plaintiffs have already testified and will be prejudiced by the production of the documents.

Since the appeal is still pending, I need not dwell in details the merits or demerits of the appeal. The overriding objective is to have parties present their respective cases without any hindrances. This has to be done within prescribed time as well as within the legal procedures. According to the applicants, the documents are crucial to their defence. The application and the appeal are quite intertwined.

I do find that should the case proceed before the trial court without the issue of defendants' documents being determined, the applicants/defendants will be prejudiced. Their documents which form the basis of their defence shall be left out without having known the fate of their appeal. The best way forward is to have the proceedings stayed pending the determination of the appeal. It will be waste of judicial time to have the suit proceed for hearing only for the appeal to be allowed and throw the parties back to the trial court for another hearing.

In the end, I do find that the application dated 3<sup>rd</sup> December 2015 is merited and is hereby allowed in terms of prayer three (3) only. Prayer (4) is somewhat similar to prayer (b) of the memorandum of appeal. It cannot be granted as it is the main prayer in the appeal. The applicants to prepare and serve the record of appeal within sixty (60) days hereof. Costs shall follow the outcome of the appeal.

**Dated and delivered in Malindi this 26<sup>th</sup> day of July, 2016.**

**S.J. CHITEMBWE**

**JUDGE**