



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

oCIVIL APPEAL NO. 113 OF 2012

FIRST ASSURANCE COMPANY LIMITED APPELLANT

VERSUS

MARGARET WANJIRU NJOROGE (*suing as a legal representative*

of the estate of **MESHACK NJOROGE KABUTI (DECEASED).....RESPONDENT**

(Being an appeal from the Ruling of the Chief Magistrate's Court at

Machakos by Hon. M.W. Murage (CM) in

Civil Case No. 1452 of 2010 dated 18th July, 2012)

RULING OF THE COURT

1. The Notice of Motion application before the court is dated **23rd July, 2013** filed by the appellant under **Order 42** and **Order 51** of the **Civil Procedure Rules**. The application seeks the following orders;

- a. That this application be certified as urgent and the same be heard ex-parte in the first instance.*
- b. That there be a stay of further proceedings in Machakos Chief Magistrates Civil Case No. 1452 of 2010 pending the hearing and determination of this application inter-partes.*
- c. That there be stay of proceedings in Machakos Chief Magistrates Civil Case No. 1452 of 2010 pending hearing and determination of the appeal herein.*
- d. That costs of this application be provided for.*

2. The application is premised on the grounds set out therein and is supported by affidavit of **George Mahugu** sworn on **23rd July, 2013**.

3. The appellant/applicant's case is that the appellant filed an application in the lower court Civil Suit No. CMCC 1452 of 2010 seeking to strike out the Plaintiff/Respondent's suit against the Defendant/Appellant on **18th May, 2011**. The court delivered its Ruling on **18th day of July, 2012** when the Defendant/Appellant's application dated **16th May, 2011** was dismissed. The net effect of the said ruling allowed the matter to proceed to full hearing. However, the applicant has appealed against the said ruling vide Machakos Civil Appeal No. 266 of 2012 on **24th July, 2012** and thereafter filed an urgent

application seeking stay of further proceedings in the lower court Case No. 1452 of 2010 pending the hearing and determination of his appeal. The court delivered its ruling on **9th July, 2013** when the defendant/applicant's application dated **13th November, 2012** seeking to stay further proceedings in the lower court case aforesaid pending the hearing and determination of Machakos Civil Appeal No. 266 of 2012 was dismissed. The applicant now fears that the matter could proceed for hearing whereas there is an appeal pending. Having been denied stay of further proceedings in the lower court, the appellant now seeks stay in the High Court and thus this application. The applicant's case is that it has a good arguable appeal with very high chances of success as can be gleaned from the Memorandum of Appeal on record. The said appeal shall be rendered nugatory if the lower court Case No. CMCC 1452 of 2010 is allowed to proceed for hearing as this appeal is seeking to strike out the entire lower court case for being fatally defective and an abuse of the court's process.

4. The respondent oppose the application vide a Replying Affidavit sworn on **1st august, 2013** by **S.M.Makau**. The respondent's case is that the application is frivolous and is without merit and is an abuse of the process of court since it is meant to delay the finalization of this matter.

5. With the leave of court parties filed submissions which I have considered.

6. The appeal herein was provoked by a ruling on **18th July, 2012** in Machakos CMCC No. 1452 of 2010. The ruling was pursuant to an application where the appellant was challenging whether a declaratory suit would be as a material damage claim contrary to the provisions of **Cap 405**. Further, the leave granted to the respondent to file the suit out of time was being challenged. The appellant is aggrieved with the orders given on **18th July, 2012** where in the court's jurisdiction to entertain a declaratory suit as a material damage claim was being challenged, which challenge was thrown out; with the result that the court would proceed as intended.

7. Section 3A of the **Civil Procedure Act** gives the court wide powers to stay proceedings when the ends of justice require or to prevent an abuse of the court process. However, under **Order 42**, for this application to succeed, the applicant must fulfill certain conditions. The first condition is that the applicant must demonstrate the intended Appeal is arguable and not frivolous.

8. The appellant has not demonstrated that the Appeal herein emanates from a ruling of a similar application in the lower court. Where the trial court opined that the applicant herein had not demonstrated to the court it has an arguable appeal and nothing has changed. Secondly, the applicant must demonstrate that the Intended Appeal, if successful would be rendered nugatory. The applicant's application dated **13th November, 2016** and which sought to dismiss the plaintiff's case, and was dismissed, is the subject of this Appeal. If this application is not allowed it will not render the Appeal nugatory since the lower case matter is yet to commence. Thirdly, the applicant must demonstrate substantial loss. This has not been demonstrated as the deponent of the supporting affidavit is not the appellant/applicant so cannot suffer any loss. Further no judgment and/or decree is in place so there is no risk of any execution against the appellant. Lastly, the appellant/applicant must demonstrate no prejudice will be occasioned to the respondent if the application is allowed. The applicant submitted that the respondent will be greatly prejudiced. The cause of action arose way back on **24th July, 2004** and judgment delivered in the primary suit on **26th February, 2010**. After the judgment was entered, the appellant/applicant who is the insurer of the defendant in the primary suit failed to satisfy the judgment and thus the respondent filed the declaratory suit which the appellants are seeking to dismiss.

9. It is further the position of this court that the matter in the lower court has not started in earliest, and that in any event, the issues raised in the applications leading to the appeal can still be canvassed in the main suit, and indeed the judgment in the main suit can still be appealed. So, as it were there are still several avenues for the appellant to address its concerns. This appeal is only serving the purpose of delaying the finalization of the matter in the lower court. The appeal has no merit and is dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

No appearance for the parties or counsel.

Court Assistant – Mr. Munyao