



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 141 OF 2009

DAMISHA BUILDING CONTRACTORSAPPLICANT

VERSUS

AUTO SPRINGS MANUFACTURESRESPONDENT

RULING OF THE COURT

Introduction

1. The Notice of Motion application before the court is dated and filed herein on **14th June, 2016** by the plaintiff. The applicant prays for the following orders;
 - a. That the court be pleased to order a hearing of the suit on a priority basis.
 - b. That the court do immediately take the evidence of the Director of the Applicant- Mishael Makori, Hesborne Ochieng – care of Mapesa & Associates and Eclipse Consultants under **Order 18 rule 9(1) of the Civil Procedure Rules, 2010.**
 - c. That the court be pleased to summon, fix and give Notice of the day for examination of the said witness.
 - d. Any other relief that the court deems fit in the interest of justice.
 - e. Costs of the application.
2. The application is premised on the grounds set out herein and is supported by an undated affidavit of **Mishael Makori** filed herein on **14th June, 2016.**

The application

3. The applicant's case is that this matter has been pending in court for more than fifteen (15) years. The applicant's director who has sworn the affidavit is alleged to be elderly and sickly hence the need for the matter to be heard on priority. Further it is alleged that the witnesses of the plaintiff may disappear due to the length the matter is taking in court. The applicant states that the interlocutory appeal pending before the Court of Appeal has taken many years and no efforts have been made by the respondent to pursue the same.

The Response

4. The respondent opposes the application vide a Notice of Preliminary Objection filed herein on **15th July, 2016** and a Replying Affidavit by **Salil Patel** sworn on **6th July, 2016**. The main gist of the opposition is that the proceedings in this suit were stayed by an order of this court on 3rd April, 2014 pending appeal being **Civil Appeal No. 150 of 2014 – Auto Spring Manufactures Limited vs. Damisha Building Contractors Limited** which was filed on **16th June, 2014** at Nairobi. That being the case the respondent's case is that the present application is an attempt by the plaintiff to vary the orders issued on 3rd April, 2014, and that this court cannot sit on Appeal of a ruling made by a judge of concurrent jurisdiction. It is submitted by the respondent that the application is an abuse of the process of this court and should be dismissed.

The Determination

5. I will not write a long ruling on this matter. The only issue for the determination of the Preliminary Objection is whether or not there is a valid order of this court staying proceedings herein pending the said appeal.

6. The court record shows that on 3rd April, 2014 Lady Justice L.N. Mutende issued an order staying proceedings in this matter pending the hearing and determination of the said appeal which was to be filed within ninety (90) days from that date. The said appeal was filed in Nairobi as Civil Appeal No. 150 of 2014. The respondent has submitted that it has not caused the delay of the said appeal. Indeed there is correspondence between the respondent and the Court's Registry with a view to listing the matter for hearing.

7. This court can understand the anguish of the plaintiff/applicant given that the appeal is on an interlocutory issue and appears to delay the suit herein. However, there is an order of court staying proceedings and this court cannot disregard that order. Instead of making this application before this court, this application ought to have been made in the Court of Appeal with a view to persuading the court to hasten the hearing of the said appeal so that the matter in the High Court can proceed. The applicant or its advocate knows this.

8. For the applicant to make this application, knowing very well that the court lacks the requisite jurisdiction to entertain the application is a perfect example of an abuse of the process of court.

9. For the foregoing reasons, the Preliminary Objection herein is upheld and the application before the court stands dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Ngolya holding brief for Lagat for applicant

No appearance for the respondent

Court Assistant – Mr. Munyao