



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 208 OF 2004**

**TIMOTHY RINTARI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MADISON INSURANCE CO. LTD....DEFENDANT/APPLICANT**

**R U L I N G**

1. The **Notice of Motion** application before the Court is dated **21st January 2015**. It is filed by the Defendant/Applicant pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, 2010, Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks to secure the following orders:-

1. ***That this application be certified as urgent and service thereof be dispensed with in the first instance.***
2. ***That proceedings in the above noted matter scheduled to resume on 22nd January 2015 be stayed pending the lodgment, hearing and determination of the Defendant's intended appeal against the decision of Hon. Justice Ogola dated and delivered on 18th October 2014.***
3. ***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 **Annette Kahama** dated **21st January 2015**.

3. The Defendant's case is that it is aggrieved by the ruling of Hon. Justice Ogola dated and delivered on 18<sup>th</sup> October 2014 denying them leave to produce and rely on certain crucial documents. The Defendant has filed a Notice of Appeal and has requested proceedings to enable it file and prosecute its appeal against the impugned decision at the Court of Appeal. The proceedings are yet to be availed to enable the Defendant prepare and lodge its intended appeal. The Defendant's intended Appeal is alleged to raise substantive and triable issues of law and of fact and stands a high chance of success, and the Defendant/Applicant will be grossly prejudiced, inconvenienced and will suffer substantial and irreparable loss unless the orders of stay sought herein are granted.

4. The application is opposed by the Plaintiff/Respondent vide the Plaintiff's Replying affidavit filed in court on 26th January 2015. The Plaintiff's case is that the said application is brought in bad faith and amounts to an abuse of the court process. The Plaintiff states that this is an old matter filed in the year 2004 and litigation thereof has not been without challenges, a large extent of which the Defendant/Applicant (hereinafter called the "Applicant") has contributed. To elaborate on this issue the

Plaintiff states that the Applicant has on several occasions sought adjournment so as to frustrate the expeditious and timely conclusion of the suit as follows:-

1. In 2004 the Applicant filed an application dated 28<sup>th</sup> May 2004 seeking stay of proceedings pending arbitration of this suit. The said application was eventually dismissed as the Plaintiff had before filing suit invited the Defendant to go for arbitration.
2. On 31<sup>st</sup> January 2006 the Applicant filed an application of even date seeking to be allowed to file a list of documents. The Court declined to certify the application as urgent.
3. When the matter came up for hearing on 15<sup>th</sup> February 2006, the Applicant prayed for adjournment on grounds that it was yet to file a list of documents.
4. On 18<sup>th</sup> October 2006 the Applicant sought yet another adjournment when the matter came up for hearing on the basis that it had not yet filed a list of documents. The matter was later listed for hearing on 12<sup>th</sup> June 2007 when the Respondent applied for leave to amend the plaint in this matter which application was allowed. It is worthy of note that on the said date the Applicant was not present in court.
5. On 25<sup>th</sup> November 2009, this suit was listed for hearing before Khaminwa J. (as she was then) when the Applicant prayed for yet another adjournment.
6. On 12<sup>th</sup> March 2012 the Applicant sought another adjournment and consequently the matter was adjourned and fixed for hearing on 10<sup>th</sup> May 2012.
7. On 21<sup>st</sup> November 2012 when the matter came up for hearing before this Court, the Applicant herein applied for adjournment on grounds that more documents were required in support of its case. As a result, the suit was stood over generally.
8. The matter was listed for hearing on 21<sup>st</sup> July 2014 and having prayed to adjourn the matter yet again, the court granted a final adjournment to the Applicant. The court further exercised its discretion and granted the very last adjournment to the Applicant when the matter came up for hearing on 31<sup>st</sup> July 2014.
9. On 25<sup>th</sup> September 2014 when this matter was to be heard further, the Applicant made an application to have a new list of documents and witness statement be admitted as duly filed. The Ruling on the said application was delivered on 18<sup>th</sup> October 2014 effectively allowing the Applicant's new witness to testify but disallowing the additional list of documents. The said Ruling is the subject of the Applicant's intended appeal.
10. The matter was fixed for further hearing on 22<sup>nd</sup> January 2015 whereupon the Respondent was ready to proceed. However the matter could not proceed given the present application. That the Respondent states that he fully appreciates that some delay has been occasioned in litigating this matter for reasons outside the parties' and the Court's control. However the Applicant has on various instances, where parties finally had opportunity to expedite conclusion of this long-drawn dispute, chosen to further delay hearing thus impeding a speedy trial of the same.

5. The Plaintiff/Respondent states that the foregoing shows apparent bad faith by the Applicant in order to frustrate the Respondent's claim for justice and in further demonstration of this the Applicant waited for over three months before filing the present application which was filed a day before further hearing whose date had been fixed by consent in court.

6. That in view of the above, the Plaintiff submitted that granting stay of proceedings hereof would only prejudice the Respondent further by delaying hearing of this matter to conclusion. The Plaintiff/Respondent states that the Applicant's improper conduct as outlined above has on many occasions not only resulted in extreme irritation, harassment and annoyance of the Respondent on one hand but also constant interference with the administration of justice on the other. As a result the application can only be surmised as a gross abuse of the court process and the Respondent accordingly implores on this Court to exercise its discretion in curtailing continuance of the same.

7. Parties with the leave of the court filed written submission to the application which I have carefully considered. In my view, the issues for determination are as follows:-

- i. ***Is this application filed in bad faith and does it amount to an abuse of the court process.***
- ii. ***Whether finding on the above issue notwithstanding, does the application have merit.***

8. The Ruling on this matter cannot be made in isolation of the Ruling of this court delivered on 18th October 2014 pursuant to an application by the same Applicant for adjournment of the hearing of the suit so that it could file further documents and also call another witness. The court in that Ruling provided a chronology of events showing the lethargic manner in which the Defendant/Applicant has defended the suit. The court finally for the reasons stated therein dismissed the application for filing a further document but allowed the Defendant to call a Mr. Hezron Wambugu to be Defendant's witness as per his witness statement filed in court on 25th September 2014. The current application seeks the stay of proceedings in this matter pending the intended appeal against the said Ruling of 18th October 2014.

9. The Plaintiff's case as stated above puts in clear perspective the conduct of the Defendant in the hearing of this suit. It is not necessary to possess special wisdom to know that the Defendant in this matter aims to take every opportunity to delay the hearing and finalisation of this matter. The record and chronology of events clearly show that intention. Most of these delaying tactics took place before this particular court started hearing this matter. But the hearing before this court has been going on since the year 2012, and here is the chronology of events since this court took over the matter.

10. The hearing of the suit within has been going on for over the last two (2) years. The Plaintiff closed his case on 25th January 2012. The defence was to start its case on 12th March 2012 but on that day the Defendant's counsel Mr. Marete successfully sought an adjournment on the grounds that his witness a Dr. Rukwaro was out of the country. The defence case finally took off on 17th September 2012, and was adjourned to 18th October 2012. On that date the defence again successfully applied for adjournment on account of a witness bereavement. The hearing was adjourned to 21st November 2012. On that day, again, the defence sought adjournment on the grounds that they needed to obtain a letter from the National Security Intelligent Service (NSIS) which was important for their case. They also sought issuance of Witness Summons for the Director NSIS to come to court and give evidence. Both applications were allowed. On 31st January 2013 the P.W. 1 proceeded with his testimony in the matter. From then on the matter was not heard until 21st July 2014 when it was due for further hearing. On that date, the Defendant's witness was not in court and the defence counsel Mr. Muihuri successfully sought an adjournment, with the court noting that to be the last adjournment on behalf of the Defendant.

11. On 31st July 2014, the hearing proceeded with D.W. 1 closing his testimony. At this stage Mr. Muihuri for the Defendant applied for adjournment on the grounds that his witness from NSIS was not in court. Mr. Kinoti strenuously opposed this application, which the court nevertheless allowed despite the earlier orders against any further adjournment on the behalf of the Defendant. The matter was then listed for hearing on 25th July 2014.

12. On 25th July 2014, the Defendant again sought adjournment this time round, claiming that they had just the same morning filed their supplementary bundle of documents for which they were seeking leave to be admitted out of time, and considered duly filed. This is the application in which the defence was seeking orders that the Defendant's list and bundle of documents dated 23rd September 2014 and filed in court on 25th September 2014 without the leave of the court be admitted as duly filed. This was the application the subject matter of the Ruling of this court on 18th October 2014, which is partly being appealed.

13. It appears that the Defendant/Applicant did not learn from the observations of this court in the Ruling dated 18th October 2014. Else, how come again that the present application was filed on 21st January 2015 just a day to the day schedule for the further hearing of the suit? The said Ruling was delivered on 18th October 2014, and was delivered in the presence of both counsel. On the same day the court granted the suit a hearing date being 22nd January 2015. Why was it necessary for the Defendant, to wait for over 90 days to file this application if the intention was not to further cause the delay in the hearing of the matter? If that was their intention, as I have found it was, then the Defendant actually succeeded, for on that day, the matter was adjourned so that this application could be considered. In my view, the Defendant's behaviour in consideration of the history of this matter, amounts to acting in bad faith and in

abuse of the process of this court. This application has been filed *inter-a-lia* under Sections 1A, 1B and 3A of the Civil Procedure Act. Those Sections do not support a party, whose intent is to derail justice. Those Sections actually promote the objectives of fairness, adequate and prudent use of judicial time, ensuring that justice is served without undue delay. Consider those Sections as stated here under:-

***“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objectives specified in subsection (1).***

***(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

***1B. (1) For the purpose of furthering the overriding objectives specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—***

***(a) the just determination of the proceedings;***

***(b) the efficient disposal of the business of the Court;***

***(c) the efficient use of the available judicial and administrative resources;***

***(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***

***(e) the use of suitable technology.***

***3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

14. I am satisfied that the current application by the Defendant does not intend to achieve justice for either the Defendant or the Plaintiff. It is meant to perpetuate the perception that court's matters do not proceed to conclusion, and a party can actually hold another at ransom by bringing one application after another whose sole intent is to forestall justice. This court will see such a party from a far, and has seen the Defendant as such in this application. It is my finding that the application before the court is not merited, is filed in bad faith, is vexatious and is an abuse of the process of this court, is in violation of the principles and objectives of the Civil Procedure Act as expounded under Sections 1A, 1B and 3A of the Act, and is meant to perpetuate the perception that nothing moves in the corridors of justice or that the wheel of justice rotates so slowly to secure reverse justice for the deserving litigants.

15. In answer to the second issue which I raised, it is my view that the intended appeal can proceed in the Court of Appeal without the wheel of justice in this court being stopped or delayed. The Applicant will still be able to raise any grievances on appeal even if this suit is heard and determined without any stay being granted. There will be no prejudice to be suffered by the Applicant if the stay is not allowed.

16. In the decision of **Chesilyot Enterprises Ltd. – Vs - Cooperative Bank (K) Ltd [2008] e KLR**, a text from *Halsbury's Laws of England*, 4th Edition Vol. 37 page 330 and 332 is quoted as follows:-

***“the stay of proceedings is a serious, grave and fundamental interruption in the right***

*that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."*

17. In the case of **Kids Alive Kenya Registered Trustees – Vs – Wendy Boyard & 8 Others [2008] e KLR**, the matter had previously proceeded to the extent of the Respondent closing his case. The intended appeal was found not to be rendered nugatory if stay was not granted. Finally under Order 42 Rule 6 of the Civil Procedure Rules, 2010 under which this application is filed, it is clearly stated that:-

*"6 (1) No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the court appealed from my order."*

18. Pursuant to the foregoing paragraphs of this Ruling the order that best commends itself to this court is to dismiss the Defendant's application dated 21st January 2015 with costs to the Plaintiff/Respondent.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Ngunju holding brief for Kinoti for the Plaintiff/Respondent

Mr. Muihuri for the Defendant/Applicant

Teresia – Court Clerk