



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO.269 OF 2011
PHILOMENA MUTHEU NZYOKA
(suing as legal representative of the estate of the late
TIMOTHY KIEMA MUSANGO.....PLAINTIFF
VERSUS
TRANSPARES KENYA LIMITEDDEFENDANT

RULING

This ruling determines two applications. The first is an application dated 26th June 2015 by the plaintiff. The second application is dated 13th July 2015 by the defendant.

The parties' advocates agreed to have the two applications heard together and directions were given by this court to that effect on 15th July 2015. The parties' advocates canvassed the applications by way of oral submissions on 15th October 2015 and a ruling date set for today.

A brief background to the two applications is that this suit was heard interpartes by Honorable (the late) Joyce Khaminwa (as she then was) and both parties advocates filed written submissions. On 17th July 2012 the learned judge reserved the matter for delivery of judgment on 17th September 2012 but that the said judgment was not ready so it was rescheduled for 11th October 2012. Nothing is recorded for 11th October 2012. On 11th March 2013 the matter came up before Honourable Waweru J who set it for mention on 12th April 2013. The matter was further mentioned on 10th May 2013, 30th May 2013, 23rd September 2013.

On 5th May 2014 the matter shifted to Ougo J when the court was notified that the insurance Company had been placed under statutory management and a moratorium of 12 months given. The court then directed that the proceedings be typed and the matter be mentioned on 3rd June 2014 for directions. The defence then filed an application dated 20th May 2014 seeking stay of proceedings of the suit until HCC 88/2014 consolidated with HCC 38/2014 were heard and determined. The matter came up before me on 17th November 2014 and I directed that since parties had closed their cases and the matter was pending judgment, only an application for arresting the judgment could be made. I granted the defendant 14 days within which to file and serve that application. The defendant did not file the application until 13th July 2015 after the plaintiff had filed hers dated 26th June 2015 and

served upon the defendant.

The defendant's application seeks orders for enlargement of time within which to file an application for stay of delivery of judgment and that the applicants/defendant's application dated 23rd December 2014 filed on 24th December 2014 be deemed to be duly filed within time given by the court.

On the other hand, the plaintiff's application dated 26th June 2015 seeks orders that the court do proceed to pronounce judgment for the suit; the court do exonerate the plaintiff from existing moratorium proceedings between the defendant's insurer Concord Insurance Company Ltd especially in HCC 88/2013 consolidated with HCC 38/2014 or any other proceedings involving Concord Insurance Company Ltd with any other party; upon pronouncement of such judgment, the plaintiff be at liberty to execute any decree thereof directly against the defendant; that the court be pleased to issue any other order as it may deem fit.

I will commence with the defendant's application which seeks to stay judgment and asking for enlargement of time. On enlargement of time, the defendant relies on Order 50 Rule 6 of the Civil Procedure Rules and contends that due to an avoidable circumstances (sic) it could not file the application within 14 days as ordered on 17th November 2014 by the court and that it only managed to file the said application on 24th December 2014 after expiry of the said 14 days and that it is in the interest of justice that the court does extend the time to meet the ends of justice since the application has a high chances of success. In response thereto, the plaintiff opposed the application by the defendant dated 13th July 2015 and swore a replying affidavit on 27th July 2015 contending that the defendant's application is an abuse of the court process and that despite filing the application dated 23rd December 2014, out of the 14 days given on 17th November 2014, the defendant never bothered to secure any hearing date prompting the plaintiff to file her application dated 26th June 2015, which she served upon the defendant for hearing on 15th July 2015 and on the eve of the said hearing is when the defendant filed its application seeking for enlargement of time to enable it prosecute its application dated 23rd December 2014. That the court should therefore not exercise its discretion to aid a sleeping litigant whose intention is to frustrate the plaintiff and continue delaying the matter. Further, that the moratorium should not apply to her. The plaintiff also contended the affidavit sworn by the advocate for the defendant on 13th July 2015 is fatally defective, incompetent and bad in law and it does not disclose or demonstrate any genuine valid or lawful reason explaining why the defendant did not comply with the court order of 17th November 2014 and or why the application dated 23rd December 2014 was not regularized and prosecuted. That the affidavit by the defendant's advocate is disrespectful to the court and based on mere speculation.

The power to enlarge time is grounded in Order 50 Rule 6 of the Civil Procedure Rules which provides. From the said provision it is clear that the power to enlarge time is available to the court and is discretionary. That discretion, however, must be exercised judiciously and not capriciously, taking into account all circumstances of the case. In this case, the defendant was granted 14 days from 17th November 2014 within which to file an application if any for stay of delivery of judgment pending the hearing and determination of the HCC 88 of 2013 wherein the defendant's Insurers statutory manager had obtained stay of all proceedings affecting any of the claims against its insured. The defendant did file the application dated 23rd December, 2014 on 24th December 2014 way beyond the 14 days timeline given by the court. The application ought to have been lodged by 1st December 2014. That notwithstanding, the defendant upon filing of the said application never took any hearing date to facilitate its hearing and or seeking for enlargement of time. It waited until the plaintiff herein had vide an application dated 26th June 2015 sought to proceed with this suit and fixed a hearing date that on the eve of that date for the hearing of the plaintiff's application, the defendant filed its own application seeking to enlarge time within which the application dated 23rd December 2014 ought to have been filed; and therefore urging the court to find that the application dated 23rd December 2014 was filed within the stipulated time given by the court on 17th November 2014.

The question is, why did the defendant not file that application within the 14 days? What are the reasons given for failure to file the application within time and or filing it on 23rd December 2014 and seeking leave of court to enlarge the time, within reasonable time instead, it waited until the plaintiff moved the court is when the defendant was awakened to file its application seeking to validate the application dated 23rd December 2014 7 months later. The defendant in the supporting affidavit deposes that due to an avoidable circumstances (sic). I presume it meant unavoidable circumstances. Those circumstances are not disclosed and neither was there any attempt in the oral submissions to explain the reason why there was delay in filing the application or for seeking enlargement of time. In my view, the defendant does not deserve the exercise of the discretion of this court in its favour. Unexplained delay which in my view is inordinate, taking into account the fact that it took the plaintiff to file and serve her application seeking to proceed with the matter herein for the defendant to wake up on the eve of the hearing to forestall or scuttle the plaintiff's application is unacceptable and can only be described as calculated to delay and defeat justice. Equity frowns at delay and the same equity which is the mother of justice and fairness only aids the vigilant and not the indolent. Furthermore, Article 159(2) (b) of the Constitution mandates the courts in exercising judicial authority to be guided by the principle that justice shall not be delayed. The deposition by the defendant that they experienced difficulties fixing a hearing date is fallacious. The order was for filing of an application. The act of taking of a hearing date involves both parties through invitation. There is no deposition that the registry refused to give a hearing date and for that matter I note that the application was not even filed under any certificate of urgency noting that this is a fairly old matter and which was heard and conclude with only judgment delivery pending.

Nonetheless, where there is delay, but which is explained, the court may nonetheless exercise its discretion in favour of the offending party. But as I have stated earlier, in this case the defendant does not attempt to give any reason for the delay in filing the application within 14 days, or even the failure to fix a hearing date for the application filed on 24th December 2014 and or the failure to seek for enlargement of time until after the plaintiff had moved the court about 7 months later. In my view, that conduct of the defendant is an overreach and only intended, I reiterate, to obstruct the course of justice. It is for those reasons that I proceed and dismiss the defendant's application dated 13th July 2015 with costs to the plaintiff. In the same vein, as the application dated 23rd November 2014 was filed out of the 14 days stipulated in the order of 17th November 2014 without leave of court, I hereby proceed and strike it out with costs to the plaintiff.

I now proceed to determine the plaintiff's application dated 26th June 2015 which urges this court to proceed and pronounce judgment in this suit wherein the court heard and concluded the matter only pending judgment; and that this court do exonerate the plaintiff from the existing moratorium proceedings between the defendant's insurer(Concord Insurance Company Ltd) especially in HCC 88 of 2013 consolidated with HCC 38/2014 or any other proceedings involving Concord Insurance Company Ltd with any other party. In opposition thereto, the defendant filed replying affidavit sworn by Irene W. Kariuki contending that their motor vehicle registration No. KAE 906 N/ZB 5543 which the deceased was driving at the time of his death following a road accident was insured by Concord Insurance Company Ltd which is under statutory management. She annexed copy of insurance policy together with the renewal. She also annexed copies of the moratorium and as extended and Gazette notice placing the said insurance company under statutory management and that it is fair and just that the suit herein be stayed pending determination of proceedings in HCC No. 88/2013 as consolidated with HCC 38 of 2014. The defendant also contended that the plaintiff's application is misplaced as this is not the right forum for this kind of application. That the applicant/plaintiff should have appealed against the orders in the right court.

Further, that unless the court stays judgment, it will lead the defendant to pay the services that the defendant company is already insured against. The plaintiff on the other hand maintained that she should be exonerated from being affected by the moratorium as she had been greatly prejudiced by the moratorium proceedings and that as at the time of hearing the application, there was no evidence that the moratorium had been extended from when it was last declared as extended up to August 2015 according to the public notification dated 6th February 2015 by the statutory manager(IWK 5).

To determine whether or not to grant the orders sought in the plaintiff's notice of motion, I must first examine the contents of the order on the moratorium issued on 6th February 2015 by Honourable Gikonyo J which is framed in the following manner:

“.....IT IS HEREBY ORDERED:

- 1. That application be and is hereby certified urgent.*
- 2. That the tenure of the statutory manager of Concord Insurance Company Ltd, as well as the moratorium be and is hereby extended for a further 6 (six) months from the 6th February 2015.*
- 3. That the matter shall be mentioned on 8th April 2015 for further directions and to ascertain progress made in the enforcement of the recommendation by the statutory manager.*
- 4. That there be a stay of all proceedings subsisting against Concord Insurance Company Ltd (under statutory management) during the currency of moratorium declared by the statutory manager on 6th February 2013 and as further extended by the statutory manager, for a further period of six months from the 6th February 2015, be and is hereby granted.*
- 5. That there be a stay of all taxation proceedings currently pending and ongoing Concord Insurance Company Ltd (under statutory management) and its policy holders and for which the company or its policy holders may become liable during currency of the moratorium declared by the statutory manager on 6th February 2013 and as further extended, for a further period of six months from the six months from the 6th February 2015 be and is hereby granted.*
- 6. That all proceedings of whatever nature or form against Concord Insurance Company Ltd (under statutory management) be and is hereby barred during the currency of the moratorium declared by the statutory manager.*
- 7. That no statutory notices, demands or claims of whatever nature or form shall be effective against Concord Insurance Company Ltd (under statutory management) or its property during the currency of the moratorium.*
- 8. That the running time for the purposes of any law of limitation in respect of any notice, demand or claim by policy holders or creditors of Concord Insurance Company Ltd (under statutory management) be and is hereby suspended and shall remain suspended during the currency of the moratorium declared by the statutory manager.*
- 9. That all current, existing and or pending suit in the High Court, subordinate courts and any other judicial or quasi judicial tribunal against Concord Insurance Company Ltd (under statutory management) and its policy holders be and is hereby stayed for as long as the moratorium declared by the statutory manager exists.*
- 10. That the applicant, being the statutory manager be given leave to publicize the court's orders by publishing them in the Kenya Gazette and two local daily newspaper of national circulation.*

Issued at Nairobi this 6th day of February 2015.

Deputy Registrar

High Court of Kenya at Nairobi

Milimani Commercial & Admiralty Division.”

From the above order, and more specifically, Order No. 9, it is clear that the High Court in the said matters as consolidated, did stay all current, existing and or pending suits against not only the Concord Insurance Company under statutory management, but also its policy holders, for as long as the moratorium declared by the statutory manager exists.

That being the case, it would not be necessary for the defendant herein to seek any other orders of stay in this matter since orders in the HCC 88/2013 were issued by the High Court Judge of concurrent jurisdiction with this court. It would, in my view, be sufficient for the defendant to avail to this court evidence of such stay order in the form of a certified order or even applying to

have the subject file brought before me for perusal and secondly, evidence that the said orders are current. In other words, that there exists a current moratorium declared by the statutory manager.

And for the plaintiff who has a pending suit against the policy holder, the correct forum for challenging such order is to file an appropriate application in the said suit wherein the application or stay orders were made staying all suits pending against the policy holders, and not to file an application in this suit seeking exoneration from application of the moratorium. To seek orders in this suit is tantamount to appealing against or reviewing orders made by the learned judge in HCC 88/2013 through this suit which is not permissible. The plaintiff can still apply in HCC 88/2013 to challenge the order No. 9 thereof or any part thereof by way of review and provide reasons and that court (judge) would have the competence to consider the said application. I have perused a similar order made in the said HCC HCC 88/2013 and I have seen an application made by an affected party Stephen Muriuki Maina & Majaliwa Mengo Fredrick (interested parties) and Honourable Gikonyo J did make a finding on 12th May 2014 exonerating that affected party from the applicability of the moratorium, after considering the spirit and import of Section 67 (c) (10) of the Insurance Act.

I would , therefore, for the reasons that this court cannot review orders made by another judge in another matter, decline to grant the orders sought.

I would also go further to establish whether as at the time of urging this application, there was any current moratorium declared against the Concord Insurance Company Ltd. As stated earlier, the stay of proceedings or action in any matter affecting the Insurance Company or its policy holders would only be valid if there was a moratorium (current). In this case, the defendant did not annex any current moratorium. However, this court took the liberty to peruse HCC 383/2015 (OS) which was at arm's length, in order to avoid a situation where it would make orders in vain and my perusal of the said court file revealed that on 6th August 2015 Hon Ogola J did make an order that:

1. The period of statutory management of Concord Insurance Company Ltd which had been placed under statutory management be and is hereby extended for 45 days.
2. That the matter will be heard on 21st September 2015 for a consideration of the application in merits.

In that application wherein the above orders were made, the court had been urged to extend the stay of the moratorium issued on 6th February 2013 for another 6 months from 6th August 2015, which are the same orders as those made in HCC 88/2013 on 6th February, 2015. There is no reason why the same party should open different files seeking for the same orders but that is for another day.

There is no other evidence showing that there are orders staying these proceedings or that a moratorium as extended in HCC 383/2015 for 45 days on 6th August 2015 was extended for any other period after the expiry of the 45 days. That being the case, this court does not find any reason why it cannot proceed to write and deliver a judgment pending in this suit and any aggrieved party thereof shall have the liberty to either appeal or seek for stay of execution of the judgment or decree pending other proceedings as the case may be, having regard to the provisions of Section 67(c) (o) of the Insurance Act.

In the end, I find that there is no order staying these proceedings from being concluded and I accordingly order that the court shall proceed to write and deliver a judgment in this matter which was heard by Honourable Justice Joyce Khaminwa (RIP) to conclusion.

The registry to give parties a date for mention in the new term before a judge for purposes of fixing a date for judgment.

I make no orders as to costs of the plaintiff's application.

Dated, signed and delivered d in open court at Nairobi this 23rd day of November 2015.

R.E. ABURILI

JUDGE