



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 155 OF 2014

BENJO TRAVELLERS (K) LTD.....APPELLANT

VERSUS

**1. JUSTUS KAMENYA MWASYA (Suing as the Legal Representative
of the Estate of Kivelenge Kameja (Deceased).....1ST RESPONDENT**

2. BENJAMIN MAINA KAHORO.....2ND RESPONDENT

RULING

1. The application dated **23rd July, 2014** is for stay of proceedings in **CMCC NO. 209 of 2005** in **Kitui** pending the hearing and determination of the appeal.
2. The application is premised on grounds that the matter proceeded against the Appellant *exparte*; the advocate of the Appellant did not attend court due to unavoidable circumstances; unless stay is granted the court will proceed to finalize the matter without the Defendant's participation.
3. The application is supported by an application sworn by **Lucy Mwhaki Njuguna** the advocate representing the 1st Defendant who deponed that after an order was issued in **Misc. No. 1345 of 2005 (O.S.)** in the **High Court of Kenya at Nairobi** staying all civil cases against **United Insurance Company Limited**, the order dragged along all pending matters against the Insurance Company including **CMCC No. 209 of 2005** which is the subject of this appeal. It is therefore not true that the 1st Defendant has delayed the Kitui matter.
4. That when the matter came up twice on two (2) occasions where the 1st Defendant was not represented it was for valid reasons. The matter proceeded *exparte*. Submissions filed on behalf of the 1st Defendant were not considered by the court. The appeal is against a ruling of the court dismissing the Defendant's application.
5. The 1st Respondent filed a replying affidavit where he deposed that the application is incompetent and fatally defective and otherwise an abuse of the process of the court as the supporting affidavit has no relation to the present application and remain unsupported by any document therefore should be struck out. The Applicant's advocate was duly served.
6. That the matter was adjourned at the behest of the Applicant twice on account of illness and appointment of the advocate to judgeship. Upon hearing when parties were to file submissions the

Applicant filed the application to set aside proceedings. The Applicant has therefore been indolent and reluctant to proceed with the hearing.

7. Filed with the reply was a Notice of Preliminary Objection on the ground that no leave was sought and/or granted in **Civil Suit No. 209 of 2005 at Kitui Law Courts**, which appeal gives rise to the instant application.

8. The Applicant's counsel swore a supplementary affidavit where she deposed that failure to diarize the case on the **12th September, 2013** was through a honest mistake. On the **23rd January, 2014** she could not attend court as she was awaiting to be appointed as a Judge. On **27th March, 2014** she was indisposed. On **15th May, 2014** an advocate held her brief and subsequently filed submissions that were disregarded.

9. The application was canvassed by way of written submissions that I have duly considered.

10. Granting orders sought is discretionary. In the case of **Shah vs. Mbogo (1969) EA 166** it was stated thus:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

11. In the instant case, the Applicant instructed an advocate to represent it. The advocate failed to make an appearance for reasons stated. They were granted a last adjournment. When it emerged that counsel had been nominated for Judgeship, the Applicant was to seek alternative representation. This does not seem to have happened. Events that transpired thereafter culminated into the learned trial magistrate proceeding with the matter.

12. It is apparent that justice was being delayed, however, whether it was its advocate or the Defendant should be established. An appeal against the ruling of the Lower Court has been lodged. This was done without delay. It will be in the interest of justice to have the appeal determined prior to further orders being made.

In the premises I grant an order staying proceedings in **CMCC No. 209 of 2005 – Kitui**, pending hearing and determination of the appeal.

13. Costs of the application will be in the cause.

14. It is so ordered.

Dated at Kitui this 30TH day of NOVEMBER, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 17th day of December, 2015.

P. NYAMWEYA

JUDGE