



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CIVIL APPEAL NO. 6 OF 2012

JOSEPH MURAGE MERU.....APPELLANT

-VERSUS-

LUCY WANGUI CHEGE.....1ST RESPONDENT

STEPHEN KARIUKI KAHUMBI.....2ND RESPONDENT

Summary:

- 1. Under Order I Rule 18 of the old Civil Procedure Rules, only the defendant giving the third party notice would make an application for directions. This procedure is now provided for under Order 1 Rule 22 of the Civil Procedure Rules, 2010;*
- 2. Grant of stay under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 is a discretionary remedy; that discretion is only tampered with by Order 42 Rule 6(2) of the Rules which sets out the conditions the Applicant must comply with before the discretion can be exercised in his favour;*
- 3. Accordingly, the satisfaction of the conditions stipulated in Order 42 Rule 6(2) is not an automatic entitlement to the order of stay;*
- 4. Order XI of the old Civil Procedure Rules through which an application for consolidation of suits could be made has been deleted from the new Civil Procedure Rules, 2010; issues of consolidation of suits can still be properly canvassed in pre-trial directions and conferences under Order 11 of the new Civil Procedure Rules, 2010;*
- 5. Selection of a test suit can only be done through a formal application under Order 38 of the civil*

Procedure Rules, 2010. Previously the same application could be made under Order XXXVII of the old Civil Procedure Rules;

6. *Without sufficient material to demonstrate that the applicant has an arguable appeal which would be rendered nugatory if stay is not granted and for the court to exercise its discretion in favour of the applicant, a stay will not be granted under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010;*

7. *The Court is enjoined to reject an application for stay under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 if the applicant fails to comply with any of the conditions expressed in Rule 6(2) of that Order.*

Statute referred to:

1. *Civil Procedure Act, Chapter 21, Laws of Kenya*
 - i. *Sections 1A, 1B, 3A and 63(e)*
 - ii. *Order 1 Rule 22, Order 11, Order 42 Rules 6(1) &(2) and Order 38 of the Civil Procedure Rules, 2010*
 - iii. *Order I Rule 14, Order I Rule 18, Order XI Rules 1 & 2 and Order XXXVII of the old Civil Procedure Rules*

Cases referred to:

- i. *Nairobi High Court Civil Case No. 188 of 2008, Shailesh Rajani & Another versus Ponangapalli Venkata Romana & Another;*

- ii. *East African Foundry Works (K) Ltd versus Commercial Bank Ltd (2002) 1KLR 443;*

- iii. *Mombasa High Court Civil Appeal No. 112 of 2012, Ali Shuber Habsy alias Habshi Nassir versus Membeyu Bule alias Mebetu Bule;*

- iv. *Court of Appeal in Civil Application No. 223 of 2000(UR 99/2000) Wachira Waruru versus Francis Oyatsi.*

RULING

The Appellant has moved this Court vide a Notice of Motion dated 8th November, 2012 premised on **Order 42 Rule 6(1)** and **Order 51 Rule (1)** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21 Laws of Kenya** (hereinafter cited as "the Civil Procedure Act") and all the enabling provisions of the law seeking, *inter alia*, stay of execution of a decree arising out of a judgment in the Kandara Principal Magistrates' Court Civil Case No. 186 of 2009 and stay of proceedings in several suits itemised in prayer 5 of the Notice of Motion. The Motion, which was filed under Certificate of Urgency, is supported by an affidavit sworn on 8th November, 2012 by the Appellant's counsel, Dominic Njuguna Mbigi Esq.

Only the 2nd Respondent responded to and opposed the Appellant's Motion; he filed a Replying Affidavit sworn on 27th November, 2012. The 1st Respondent neither filed any reply nor appeared for the hearing of the Motion although her counsel was duly served. Both the Appellant's and the 2nd Respondent's counsel filed written submissions which they ably highlighted on 14th December, 2012 when the Motion came up for hearing *inter partes*.

Having considered the material on record and counsel's submissions it is apparent that on or about the 30th April, 2009, the Appellant's car, Registration Number KBA 202Y (Nissan Sunny) collided with Motor Vehicle Registration Number KBB 108L, a public service vehicle owned by the 2nd Respondent in this Appeal. The road traffic accident occurred along Thika-Kandara Road and as a result of the accident several passengers in the 2nd Respondent's vehicle, including the 1st Respondent herein are said to have been injured.

Accordingly, the 1st Respondent lodged a civil suit in the Magistrates' Court against the Appellant seeking from him both general and special damages; this is the Kandara Senior Resident Magistrates' Court Civil Case No. 186 of 2009 (although it is cited as Kandara Principal Magistrates' Court Civil case No. 186 of 2009 in the judgment). According to the judgment which was delivered on 24th September, 2012 the Appellant was held to have been solely liable for the traffic accident and was thereby ordered to pay the 1st Respondent general and special damages together with costs of the suit and interest thereof at court rates until payment in full.

While not denying the occurrence of the road traffic accident aforesaid, the Appellant was of the view that the 2nd Respondent's vehicle contributed to that accident. The Appellant had therefore, prior to the hearing and determination of the case, invoked the provisions of **Order 1 Rule 14, Order XI Rules 1 and 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** in an *ex parte* Chamber Summons dated 9th December, 2009 and sought from the court leave to include the 2nd Respondent and his driver as third parties in the suit against him.

Besides seeking leave to join the 2nd Respondent and his driver as third parties in the 1st Respondent's suit against the Appellant, the Appellant also sought, in the same application, an order for issue of third party notices against the 2nd Respondent and his driver and also an order for fixing time within which the proposed third parties would enter appearance after the relevant notices had been served upon them.

One further prayer that the Appellant sought in his application was that, for the purposes of his application, the Kandara Senior Resident Magistrates' Court Civil Case No. 186 of 2009 was to be consolidated with eight other cases lodged against the Appellant in the same Court by different plaintiffs who were, at the material time, passengers in the 2nd Respondent's vehicle and who like the 1st Respondent, are said to have suffered various degrees of injuries as a result of the road traffic accident. In view of the ramifications this prayer has on the Appellant's Motion before the court, it is important that it is quoted herein verbatim:

"LET ALL PARTIES CONCERNED attend the Honourable magistrate in Chambers on the 25th day of February 2010 at 9.00 O'clock in the forenoon or soon thereafter as counsel for the defendant/applicant may be heard in an application for ORDERS:-

1. That this file be consolidated with file numbers Kandara RMCC No. 191, Mercy Njoki Maina Vs. Joseph Murage Meru, RMCC No. 192 Michael Gathuka Kariuki Vs. Joseph Murage Chege, RMCC No. 193 Mary Wambui Njuguna & Another Vs. Joseph Murage Meru, RMCC No. 194 Eunice Njeri Njuguna (suing through her next friend Vs. Joseph Murage Meru, RMCC No. 195 Benson Koinange Maina Vs. Joseph Murage Meru, RMCC No. 196 Rahab Wathira Njuguna Vs. Joseph Murage Meru, RMCC No. 197 Eric Chege Kamau (minor suing through his next friend, Lucy Wangui Chege Vs. Joseph Murage Meru and RMCC No. 198 David Ndung'u Maina Vs. Joseph Murage Meru for purposes of this application ".(underlining mine).

Counsel for the Appellant deposed in his affidavit in support of the Motion, more particularly in paragraph 4 thereof, that the Appellant's application was allowed; Indeed a copy of the judgment exhibited to the affidavit and marked as "DNM5" shows, at page 3 thereof, that the Application was allowed on 25th February, 2010. The extent and the terms under which the application was allowed is not clear from the Motion as the order allowing the application was not annexed to the affidavit; however, in the absence of any evidence to the contrary, it can only be assumed that the application was allowed as prayed.

If the Chamber Summons was allowed in terms of the prayers sought, the Appellant's gripe with the learned magistrates' judgment is her interpretation of prayer 1 quoted above which in his view was erroneous.

According to the Appellant, all the cases cited in the prayer in issue were consolidated for purposes of determining liability between the plaintiffs (of whom the 1st Respondent is one), the Defendant (the Appellant) and the 3rd Party (the 2nd Respondent). The Appellant further states that the 1st Respondent's suit was selected as the test suit and it would therefore follow that the determination on liability in Kandara Senior Resident Magistrates Court Civil Case No. 186 of 2009 would apply to the rest of the cases consolidated with this case.

The Magistrates' court came to a contrary view. In her judgment, the learned magistrate had this to say on this issue of consolidation of cases;

"I have noted that this matter was consolidated with others on 25th of February 2010, for purposes of the application dated 9th December 2009 which was allowed by Miss Boke on 25th February 2010. Therefore the issue of consolidation lapsed upon the enjoining (sic) of the 3rd party and this matter proceeded on its own."

The learned magistrate went further and stated thus;

"All the advocates during the hearing and also in their submissions dealt with the current plaintiff and none other, none of the advocates addressed the issue of the transferred matters or any consolidation. The presumption is that every matter proceeded individually after the third party was enjoined (sic). In the circumstances I can only assess the damages of the plaintiff in this case."

The Appellant does not agree with the learned magistrate's findings. As noted hereinbefore, he has said that all the cases were consolidated and the Kandara Senior Resident Magistrates Court Civil Case No. 186 of 2009 was selected as a test suit. According to the Appellant, if the Judgment and decree are allowed to stand, the Appellant will suffer substantial loss and costs in that he has to defend the 11 cases against him severally and hence the need for stay of execution of that judgment and the appurtenant decree.

In response to the twin issues of consolidation and test suit, the 2nd Respondent addressed his own application which he had filed in the Magistrates' Court under **Order 1 Rule 18** of the **Civil Procedure Rules** seeking third party directions as to the conduct of the case after he had responded to the third party notice served upon him by duly entering appearance and filing defence. Among the directions sought in that application were that the issues of liability and quantum of damages between the 1st Respondent (Plaintiff) and the Appellant (Defendant) be tried together with the issue of liability between the Appellant and the 2nd Respondent (Third party). Those directions were also to apply to all other suits that are said to have been consolidated with the Kandara Senior Resident Magistrates' Court Civil Case No. 186 of 2009.

Order 1 Rule 18 of the old **Civil Procedure Rules** (and currently **Order 1 Rule 22** of the **Civil Procedure Rules, 2010**) under which this application was made provides that it is only the Defendant giving the third party notice who may make such an application to court by means of summons in chambers and not the third party. This point seems not to have been taken in the magistrates' court and so nothing turned on it; I am on my part not inclined to make any pronouncements on this issue at this stage of the proceedings. Whether the third party rather than the defendant was right in seeking for directions both the Appellant and the 2nd Respondent are agreed that the 2nd Respondent's Application was allowed. Unfortunately for this Court, the order allowing the application seems not to have been extracted as none has been exhibited on any of the parties' affidavits. The extent and the terms under which the application was allowed are matters which, in the circumstances, are left to conjecture.

The 2nd Respondent's position is that though the Kandara Senior Resident Magistrates' Court Civil Case No. 186 of 2009 was a test suit on liability, failure to treat it as such in the learned magistrate's judgment is an error apparent on the face of the record which the 2nd Respondent has sought to rectify by way of an application for review dated 26th November 2012; that application was filed in court on 27th November, 2012 and as at the time of hearing the Motion before court, the 2nd Respondent's application in the Magistrates' court was pending for determination.

My understanding of the direction taken by the 2nd Respondent in this matter is that the issues of liability and the Kandara Senior Resident Magistrates' Court Civil Case No. 186 of 2009 being selected as a test suit on liability were determined in the application for directions he initiated in court after he had entered appearance and filed defence pursuant to the third party notice issued and served upon him at the instance of the Appellant. Those issues were not determined, as the Appellant seems to suggest, in the Appellant's application for issue of third party notices. Be that as it may, both parties seem to agree that at one point various suits were consolidated and one of them was selected as a test suit and to the extent that the learned magistrate did not take this aspect of the proceedings into account in her judgment, they are both aggrieved. The difference between them arises in the approach each one of them has taken to address their grievances; while the 2nd Respondent has chosen to treat the omission by the learned magistrate as an error apparent on the face of record which can be rectified by an application for review of the judgment, the Appellant has taken the path of appealing against the entire judgment citing this error as one of his grounds of appeal. More relevant to the Appellant's Motion, the 2nd Respondent is of the view that the error cannot be a basis for halting execution process or keeping on hold the rest of the cases because in any event, each of the plaintiffs in those cases that are said to have been consolidated must testify and prove the nature and extent of damages suffered or losses incurred.

My task at this stage, in an application such as this, is not to determine the merits of the Appeal. While I appreciate and indeed I am indebted to the learned counsel's able submissions and the material respectively presented in support of and against the Motion, I am afraid that many of the issues that have been canvassed in the Motion can only be conclusively determined in the main Appeal. It follows that in analysing the material placed before me and the learned counsel's submissions, I can only go as far as is necessary to determine the Motion before Court and avoid, as much possible, making any conclusive remarks on the prospects of the Appeal. To this extent, only one question calls for an answer: does the Appellant's Notice of Motion meet the benchmark for grant of a stay of execution of the judgment and decree of the Magistrates' Court pending the hearing and determination of the Appeal?

Ordinarily, the grant of stay under **Order 42 Rule 6(1)** of the Civil Procedure Rules is a discretionary remedy; this discretion is only tampered with by **Order 42 Rule 6(2)** of the same Rules which stipulates when that discretion will not be exercised in favour of the Applicant. That order sets out the circumstances when the grant of stay of execution will be declined notwithstanding the latitude given to court to exercise its discretion under **Rule 6(1)**. In other words the exercise of discretion under **Rule (1)** is subject to **Rule 6(2)** which provides as follows:

"No order for stay of execution shall be made under sub rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant."

The Rule is more or less self-explanatory. In a nutshell, this Rule is to the effect that, over and above the discretion which the court enjoys to grant or refuse stay, it must be certain before it grants any stay that firstly, the Appellant has satisfied the court that he will suffer substantial loss if the order for stay is not made, secondly, he has demonstrated that his application has been made without unreasonable delay and thirdly, he has given security for satisfaction or performance of the decree in the event his appeal fails.

In my view, contrary to what the Applicant has submitted through his counsel's written submissions, the satisfaction of these conditions does not automatically entitle the Applicant to an order for stay of execution. They are less of conditions for granting an order for stay of execution under **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** and more of grounds for refusal of such an order, where the applicant falls short of any of the requirements stipulated in **Rule 6(2)** of those Rules. This means, the court may very well decline to grant an order for stay even after satisfaction of these requirements or conditions as long as its discretion is exercised judiciously and not whimsically. If it was to be argued that an Applicant is automatically entitled to the stay of execution upon satisfaction of the conditions in **Rule 6 (2) of Order 42** of the Rules then discretion with which the court is clothed in **Rule 6(1)** would thereby be rendered superfluous. For these reasons, I am not persuaded to follow the decision of **Nairobi High Court Civil Case No. 188 of 2008, Shailesh Rajani & Another versus Ponangapalli Venkata Romana & Another** cited by the Applicant in support of his application.

The Appellant filed his Appeal on 22nd October, 2012 after judgment had been delivered on 24th September, 2012; to my mind this is not unreasonable delay. As for security for the performance of the decree against him the Appellant has offered to deposit half of the decretal sum in a parties' joint interest earning bank account and is ready to comply with any other conditions that the court may deem fit to order.

As to the question of substantial loss, the Appellant's counsel has sworn in paragraph 11 of the affidavit that if a stay is not granted the Appellant would suffer substantial loss mainly because "**he will incur huge costs in prosecuting the 11 pending suits as the Plaintiffs are currently in the process of fixing each of the said matters for hearing.**" In the same affidavit counsel has sworn that the decree holder is a person whose means of livelihood are unknown. I must point out here that it would have been prudent if the Appellant himself had sworn on these matters rather than his counsel, if not for anything else, to insulate the counsel from being cross-examined on issues that are likely to be disputed by the parties themselves. See the decision of **Ringera, J** (as he then was) in **East African Foundry Works (K) Ltd Versus Commercial Bank Ltd (2002) 1KLR 443.**

The suits whose prosecution is alleged to likely cause substantial loss to the Appellant are said to have

been consolidated and subsequently one of them selected as the test suit. This brings me back to the application upon which a consolidation order is supposed to have been made; a prayer in the application which I have quoted verbatim hereinbefore was made in an application for issue of third party notices against the 2nd Respondent and his driver. It has been noted that no order was extracted or none was exhibited in these proceedings to enlighten the court on the extent and the terms under which the order of consolidation of the suits and selection of test suit was made. If the prayer was granted as couched in the application, it will be necessary to interrogate why the applicant sought the consolidation of suits **“for purposes of this application”**. If the purpose of that application was for issue of third party notices which indeed is always the purpose of any application made under **Order 1 Rule 14** of the **Civil Procedure Rules**, I doubt at this stage, that the learned magistrate may be faulted in her interpretation of that prayer. It follows that if that is the case, the alleged fault would be too weak a foundation for the contention that the Appellant will suffer substantial loss as a result of the perceived erroneous interpretation of that prayer.

As at the time the various suits are said to have been consolidated and a test suit selected, issues of consolidation and selection of test suits had their foundation in **Order XI** and **Order XXXVII** respectively of the old **Civil Procedure Rules**. Under **Order XI** of those Rules an application for consolidation of suits could be made in chambers or orally in court where two or more suits were pending in the same court in which the same or similar questions of law or fact were involved; the court could make an order for consolidation of such suits on such an application by any of the parties or on its own motion or at its discretion and upon such terms as it deemed meet and just. There does not appear to be a similar provision in the Civil Procedure Rules, 2010 presumably because matters to do with consolidation of suits can now still be managed or canvassed through pre-trial directions and conferences in **Order 11** of those Rules.

Order XXXVII of the old Civil Procedure Rules dealt with selection of a test suit; where two or more persons had instituted suits against the same defendant and such persons could have been joined as co-plaintiffs in one suit, the court could make an order directing that one of the suits be tried as a test case and stay all steps in other cases until the selected case has been determined or has failed to try the issues. This order could only be made upon the application of any of the parties. **Order XXXVII** has been retained and renamed in the new Civil Procedure Rules, 2010 as **Order 38**.

Unlike the application for consolidation which could be made orally in court, an application for a test case could and can only be made by way a motion under **Order XXXVII** of the old Rules or under **Order 38** of the new Rules. Counsel have submitted the suits were consolidated, which I agree is the ideal position in the circumstances, as long as parties had complied with the requirements under **Order XI** of the old **Civil Procedure Rules**.

Although it is clear that the Applicant combined the Application for leave to issue third party notices with the application for consolidation, it is not so clear whether an application for test case was made. While the application for consolidation could even be made orally in court, the selection of a test suit does not afford such latitude; the court has to be moved through a formal application. Such an application does not seem to have been filed even though parties are at consensus that a test suit was, nevertheless, selected.

I am not convinced that a substantial loss will result as alleged by the Appellant and, even if it did, I am unable to make out how such a loss can be traced to consolidation of the suits or selection of any of them

as a test suit; at least this not clear from the material before me. In any event, assuming that the suits were duly consolidated and one of them selected as the test suit, only the issue of liability will apply and bind the rest of the suits - that issue will not have to be regurgitated. The extent of injuries alleged to have been sustained, the losses and damages that are claimed to have been incurred are as varied as the number of the claimants; unless their claims are settled out of court, each one of them will have to prove his or her claim. In that event, the Appellant will inevitably be called upon to defend his defences in each of those claims and if costs are awarded they will be awarded in each of those claims either for or against the Appellant depending on the outcome of those suits.

The Applicant has also submitted that his appeal is not frivolous and is arguable; he fears that if his application is not allowed the appeal will be rendered nugatory. Amongst his grounds of appeal is the contention that he should not have been held 100% liable for the traffic accident; that may very well be the case but the Appellant has not demonstrated in his application why liability should have been apportioned. His other grounds of appeal seem to revolve around the same issues of consolidation of suits and selection of the test suit. He has relied on the decision of **Mombasa High Court Civil Appeal No. 112 of 2012, Ali Shuber Habsy alias Habshi Nassir versus Membeyu Bule alias Mebetu Bule (Mwongo, J)** to support his contentions. For purposes of determining the application before me, I need not add anything more than what I have said on the issues of consolidation and selection of the test suit; all I can say is I do not have sufficient material to convince me that the appeal is not frivolous and is arguable. I am less convinced that the said appeal would be rendered nugatory. In this regard the decision of the **Court of Appeal in Civil Application No. 223 of 2000(UR 99/2000) Wachira Waruru versus Francis Oyatsi**, which the Applicant has sought to rely upon, would be of little assistance to him. In that case, the Court of Appeal found that the Applicant had an arguable appeal before they ultimately ruled that stay was necessary so as not to render the arguable appeal nugatory.

Inevitably, I have come to the conclusion that in the absence of sufficient material, I am unable to exercise my discretion in favour of the Applicant and even if I was to be persuaded to exercise my discretion in favour of the Applicant, I would be stopped in my tracks by the Appellant's failure to meet in their entirety the conditions stipulated in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. Accordingly, I dismiss the Applicant's Notice of Motion dated 8th November, 2012. The costs of the Application will abide the outcome of the Appeal. It is so ordered.

Dated and delivered in open court at Murang'a on the 18th day of January 2013

Ngaah Jairus

JUDGE