



REPUBLIC OF KENYA

High Court at Kisumu

Constitutional Application 51 of 2012

JULIUS MOKAYA ONGERA T/A NYAMIRA EXPRESS & 3 OTHERS.....APPLICANTS

VERSUS

HELLEN ADOYO KUKE & 18 OTHERS.....RESPONDENTS

J U D G M E N T

The originating notice of motion dated 25-10-2012 prays for the following reliefs:-

(a) This motion be certified as urgent and be heard ex-parte in the first instance.

(b) Pending the hearing of this motion inter-parties this honourable court may be pleased to order stay of proceedings and/or execution in the following cases;

1. Caren Awuor -VS- Black Hound Bus Services Ltd, CMCC No. 71/2011 – Tamu court.
2. Celestine Osimbo -VS- Kuehne & Nagel Ltd, CMCC No. 92/2010 – Tamu court
3. Shareen Awuor -VS- Black Hound Bus Services Ltd, CMCC No. 74/2011 – Tamu court.
4. Musa Abuli -VS- Black Hound Bus Services Ltd, CMCC No. 64/2011 – Tamu court.
5. Brenda Akinyi -VS- Black Hound Bus Services Ltd, CMCC No. 61/2011 – Tamu court.
6. Mary Adhiambo -VS- Acacia Ventures Ltd, CMCC No. 70/2011 – Oyugis court.
7. Milenta Anyango -VS- Acacia Ventures Ltd, CMCC No. 71/2011 – Oyugis court.
8. Linet Auma -VS- Acacia Ventures Ltd, CMCC No. 68/2011 – Oyugis court.
9. Millicent Anyango -VS- Modern Integrated Communication (K) Ltd & Others, CMCC No. 101/2011 – Nyando court.
10. Moses Ododa -VS- Modern Integrated Communication (K) Ltd & Others, CMCC No. 103/2011 – Nyando court.
11. Sharon Akoth -VS- Modern Integrated Communication (K) Ltd & Others, CMCC No. 109/2011 – Nyando court.
12. Richard Ochieng -VS- Modern Integrated Communication (K) Ltd & Others, CMCC No.

112/2011 – Nyando court.

13. Fredrick Magolo -VS- Modern Integrated Communication (K) Ltd & Others, CMCC No. 99/2011 – Nyando court.
14. Charles Odera -VS- Modern Integrated Communication (K) Ltd & Others, CMCC No. 97/2011 – Nyando court.
15. Simon Magolo Jeje -VS-CMCC No. 104/2011 – Nyando court.
16. Johnson Mutuasi -VS- Kuehne & Nagel Ltd, CMCC No. 62/2011 -Tamu court.
17. Dina Omulupi -VS- Kuenhe & Nagir Ltd, CMCC No. 99/2010
18. Ignatius Kaburu -VS- Kuehne & Nagil Ltd, CMCC No. 93/2010 - Tamu court.
19. Josephat Wanjala -VS- Kuehne & Nagil Ltd, CMCC No. 89/2010 -Tamu court.
20. Emelda Andeka -VS- Kuehne & Nagil Ltd, CMCC No. 86/2010 - Tamu court.
21. Linah Oyira -VS- Kuehne & Nagil Ltd, CMCC No. 87/2010 -Tamu court.
22. Benson O. Odhuno -VS- Modern Integrated Communication (K) Ltd & Others, SRMCC No. 93/2011 – Nyando court.
23. Shaline Awino -VS- Black Hound Bus Services Ltd, CMCC No. 66/2011 – Tamu court.
24. David Otieno -VS- Black Hound Bus Services Ltd, CMCC No. 69/2011 – Tamu court.
25. Grace Akoth -VS- Black Hound Bus Services Ltd, CMCC No. 64/2011 – Tamu court.
26. Wilfred Odhiambo -VS- Kuehne & Nagel Ltd, CMCC No. 76/2010 – Tamu court.
27. Josephine Ombuni -VS- Kuehne & Nagel Ltd, CMCC No. 100/2010 – Tamu court.
28. Lilian Onyango -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 113/2011 – Nyando court.
29. Linah Oyiera -VS- Kuehne & Nagel Ltd, CMCC No. 87/2010 – Tamu court.
30. Moses Were Ngoya -VS- Intercall Express Ltd, CMCC No. 171/2010 – Maseno court.
31. Evans Kaburu-VS- Kuehne & Nagel Ltd, CMCC No. 91/2010.
32. Phabian Alaka -VS- Kuehne & Nagel Ltd, CMCC No. 94/2010.
33. Lilian Achieng -VS- Kuehne & Nagel Ltd, CMCC No. 98/2010 – Tamu court.
34. Linah Kaburi -VS- Kuehne & Nagel Ltd, CMCC No. 79/2010 – Tamu court.
35. Henry Muhati -VS- Kuehne & Nagel Ltd, CMCC No. 101/2010 – Tamu court.
36. Benard Omondi Adeny -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 106/2011 – Nyando court.
37. Kennedy Oburu Odera -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No.

107/2011 – Nyando court.

38. Kennedy Otieno Ochieng -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 96/2011 – Nyando court.
39. Juliah Khanali -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 84/2010 – Tamu court.
40. Lucy Akinyi Obiero -VS- Black Hound Bus Services Ltd, CMCC No. 65/2011 – Tamu court.
41. Gabriel Omondi -VS- Black Hound Bus Services Ltd, CMCC No. 72/2011 – Tamu court.
42. George Oduor Magolo -VS- CMCC No. 103/2011 – Tamu court.
43. Brenda Achieng Otieno -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 111/2011 – Nyando court.
44. Caren Atieno Odera -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 98/2011 – Nyando court.
45. Faith Muthoni -VS- CMCC No. 73/2011 -Tamu court.
46. Pamela Aoko Nyalgwe -VS- CMCC No. 78/2011 -Tamu court.
47. John Ochola Aseto -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 108/2011 – Nyando court.
48. Isaack Alila Opondo -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 114/2011 – Nyando court.
49. Edwin Otieno Oduor -VS- Kuehne & Nagel Ltd, CMCC No. 75/2010 – Tamu court.
50. Austine Oduor -VS- Black Hound Bus Services Ltd, CMCC No. 70/2011 – Tamu court.
51. Wilfrida Sila Odhiambo -VS- Kuehne & Nagel Ltd, CMCC No. 85/2010 – Tamu court.
52. David Onyango -VS- Crown Bus Services Ltd, CMCC No. 179/2012 – Nyando court.
53. Thomas odero Ondiek -VS- Crown Bus Services Ltd & Another, CMCC No. 174/2012 – Nyando court.
54. Fredrick Otieno Olang'o -VS- CMCC No. 173/2012 – Nyando court.
55. William Otieno -VS- Julius Mokaya Ongera t/a Nyamira Express & Anor. CMCC No. 66/2011 – Migori.
56. Linet Auma O. -VS- Acacia Ventures Ltd SRMCC No. 68/2011 – Oyugis court.
57. Robert Namley Kaburu -VS- Kuehne & Nagel Ltd, CMCC No. 97/2010 -Tamu court.
58. Leah Shikuku -VS- Kuehne & Nagel Ltd, CMCC No. 82/2010 -Tamu court.
59. Patrick Otsimi -VS- Kuehne & Nagel Ltd, CMCC No. 96/2010 -Tamu court.
60. Christine Khabele Bakhoya -VS- Kuehne & Nagel Ltd, CMCC No. 95/2010 -Tamu court.

61. Tabitha Ofula Alwanga -VS- Kuehne & Nagel Ltd, CMCC No. 90/2010 -Tamu court.
62. Joyce Khasalili -VS- Kuehne & Nagel Ltd, SRMCC No. 75/2010 -Tamu court.
63. Lina Oyiera Kaburu -VS- Kuehne & Nagel Ltd, SRMCC -Tamu court.
64. Lina Oyiera Kaburu -VS- Kuehne & Nagel Ltd, CMCC No. 78/2010 -Tamu court.
65. Lina Oyiera Kaburu -VS- Kuehne & Nagel Ltd, CMCC No. 79/2010 -Tamu court.
66. Christopher Agutu Opondo -VS- Morden Integrated Communication (K) Ltd & Others, SRMCC No. 102/2011 – Tamu court.
67. Moses Were Ngoya -VS- Intercall Express Ltd & Others, SRMCC No. 171/2010 – Maseno court.

(c) This honourable court may be pleased to call for the record and/or proceedings in the following cases with a view to making appropriate orders:-

1. Caren Awuor -VS- Black Hound Bus Services Ltd, CMCC No. 71/2011 – Tamu court.
2. Celestine Osimbo -VS- Kuehne & Nagel Ltd, CMCC No. 92/2010 – Tamu court
3. Shareen Awuor -VS- Black Hound Bus Services Ltd, CMCC No. 74/2011 – Tamu court.
4. Musa Abuli -VS- Black Hound Bus Services Ltd, CMCC No. 64/2011 – Tamu court.
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20. Emelda Andeka -VS- Kuehne & Nagil Ltd, CMCC No. 86/2010 - Tamu court.
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26. Wilfred Odhiambo -VS- Kuehne & Nagel Ltd, CMCC No. 76/2010 – Tamu court.
27. Josephine Ombuni -VS- Kuehne & Nagel Ltd, CMCC No. 100/2010 – Tamu court.
28. Lilian Onyango -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 113/2011 – Nyando court.
29. Linah Oyiera -VS- Kuehne & Nagel Ltd, CMCC No. 87/2010 – Tamu court.
30. Moses Were Ngoya -VS- Intercall Express Ltd, CMCC No. 171/2010 – Maseno court.
31. Evans Kaburu-VS- Kuehne & Nagel Ltd, CMCC No. 91/2010.
32. Phabian Alaka -VS- Kuehne & Nagel Ltd, CMCC No. 94/2010.
33. Lilian Achieng -VS- Kuehne & Nagel Ltd, CMCC No. 98/2010 – Tamu court.
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36. Benard Omondi Adeny -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 106/2011 – Nyando court.
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51. Wilfrida Sila Odhiambo -VS- Kuehne & Nagel Ltd, CMCC No. 85/2010 – Tamu court.
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67. Moses Were Ngoya -VS- Intercall Express Ltd & Others, SRMCC No. 171/2010 – Maseno court.

(d) This honourable court may be pleased to exercise its supervisory jurisdiction over the subordinate courts in the cases quoted in prayer number (c) above.

(e) This honourable court may be pleased to strike out the following cases:-

1. Caren Awuor -VS- Black Hound Bus Services Ltd, CMCC No. 71/2011 – Tamu court.
2. Celestine Osimbo -VS- Kuehne & Nagel Ltd, CMCC No. 92/2010 – Tamu court
3. Shareen Awuor -VS- Black Hound Bus Services Ltd, CMCC No. 74/2011 – Tamu court.
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37. Kennedy Oburu Odera -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 107/2011 – Nyando court.
38. Kennedy Otieno Ochieng -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 96/2011 – Nyando court.
39. Juliah Khanali -VS- Morden Integrated Communication (K) Ltd & Others, CMCC No. 84/2010 – Tamu court.
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50. Austine Oduor -VS- Black Hound Bus Services Ltd, CMCC No. 70/2011 – Tamu court.
51. Wilfrida Sila Odhiambo -VS- Kuehne & Nagel Ltd, CMCC No. 85/2010 – Tamu court.
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55. William Otieno -VS- Julius Mokaya Ongera t/a Nyamira Express & Anor. CMCC No. 66/2011 – Migori.
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62. Joyce Khasalili -VS- Kuehne & Nagel Ltd, SRMCC No. 75/2010 -Tamu court.
63. Lina Oyiera Kaburu -VS- Kuehne & Nagel Ltd, SRMCC -Tamu court.
64. Lina Oyiera Kaburu -VS- Kuehne & Nagel Ltd, CMCC No. 78/2010 -Tamu court.
65. Lina Oyiera Kaburu -VS- Kuehne & Nagel Ltd, CMCC No. 79/2010 -Tamu court.
66. Christopher Agutu Opondo -VS- Morden Integrated Communication (K) Ltd & Others, SRMCC No. 102/2011 – Tamu court.
67. Moses Were Ngoya -VS- Intercall Express Ltd & Others, SRMCC No. 171/2010 – Maseno court.

(f) The costs of this motion together with the costs incurred by the applicants jointly and severally in defending the above quoted cases be borne by the first respondent Hellen Adoyo Kuke (practicing under the name and style of M/s Kuke & Co. Advocates).

At the ex-parte stage this court granted the applicants some interim orders.

The applicants case is fairly straight forward. The applicants are registered owners of motor vehicles **Reg. No. KAQ 696U, KBA 757G, KBN 718A, KAW 101G, KBH 293C and KBF 138N**. The said vehicles were each involved in a road traffic accident on various dates namely 6-4-2012, 7-6-2010, 6-3-2011, 23-3-2011 and 18-4-2011.

As a result of the said road traffic accidents one Hellen Adoyo Kuke an advocate practicing under the name and style of **Kuke & Co. Advocates (the 1st respondent herein)** filed several claims as attached to the sworn affidavit of one Julius Mokaya Ongera in support of the application.

The applicants contend that they became suspicious and contacted one Carey Nyawinda an officer in charge of Insurance Fraud Investigation Unit who upon investigation found that the verifying affidavits in all the filed suits were a forgery. He also found out that the alleged commissioner of oaths one P.L. Otieno Oyoo advocate did not commission the verifying affidavits.

As a consequence of his findings the 1st Respondent was charged with two criminal offences namely Forgery contrary to section 399 of the penal code and Uttering a false document contrary to section 353 of the penal code.

The said criminal suit namely Kisumu CM. CRC No. 297 of 2012 is still on going.

Pursuant to the discovery of this fraud the applicants are thus invoking constitutional provisions that mandates this court to supervise the proceedings at the lower courts with a view of terminating the same as they are based on forgeries.

They further argued that they shall suffer substantial loss in the event that they are ordered to pay damages arising from the said suits.

One Samuel Kinyanjui the Legal Advisor with Direct Line Assurance Company which has insured the motor vehicles went on to aver in his supplementary affidavit sworn 11-1-2013 that though some of the matters had been settled, the same were done prior to the discovery of the fraud.

Mr. Kinyanjui went further to implicate police officers in the fraud and in particular that the police abstract produced was suspect.

Mr. Wamaasa counsel for the applicant supported the applicants case and argued that if they were to file separate application to strike out the suits the same would be very expensive on the part of the applicant.

The 1st respondent filed a replying affidavit dated 22-11-2012 where she acknowledged the fact that she is acting for and on behalf of the co-respondents. She argued that the applicants are not insurers of the motor vehicles but owners.

The 1st respondent did not deny that she had been charged in the criminal case No. 297 of 2012 but that until she is convicted she remains innocent and not guilty as suggested by the applicants.

The issues to determine herein is whether in light of the alleged forged verifying affidavits the entire suits in the lower court ought to be terminated.

What is not in dispute is that the accidents earlier on alluded above actually occurred. As a result of the said accidents several persons were injured who presumably are the respondents herein.

The only argument by the applicant which is their pillar in this application is that the verifying affidavits are all suspect. Several of them were handwritten or not clearly legible. Above all one P.L.O Oyoo Advocate the alleged commissioner of oaths has denied that they were commissioned before him.

The denial of commissioning the verifying affidavit by Mr. Oyoo caused the 1st respondent to be charged. The applicant have argued strongly that the charge against the 1st respondent is prima facie evidence of her guilt.

They further went ahead to attach the charge sheet which shows that the alleged client denied that her mother instructed the 1st respondent.

Rule 7 of the Oaths And Statutory Declaration Rules chapter 15 Laws of Kenya states:-

“A commissioner for oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same and that such person is outwardly in a fit state to understand what he is doing”.

Essentially, Mr. Oloo is the person who administered the oath and he is yet to testify in court in regard to this although he has made his statement to the police.

The veracity or otherwise of the statement by Mr. Oloo shall be tested in the criminal case. From the attached criminal proceedings by the 1st respondent it would appear that the said advocate is yet to testify.

It is not equally disputed that the criminal case is still ongoing. No determination is yet to be reached against the 1st respondent. What is the net effect if the application herein was to be allowed as prayed by the applicants? Firstly, it would mean that this court by extension and by implication would have determined fraud on the part of the 1st respondent and by extension again determine the criminal trial.

I do agree with the applicants that there is a prima facie evidence of fraud on the part of the 1st respondent when looking at the attached verifying affidavits as well as the statement to the police by Mr. Oloo.

However, Article 50 (2) (a) of the Constitution insulates the 1st respondent from any guilt until determined by the courts. The said portion of the constitution states that one is presumed innocent until the contrary is proved.

If this court was to agree with the applicants therefore it would have condemned the 1st respondent unheard and fortify the Criminal case.

From the criminal proceedings the said Mr. Oyoo is yet to testify and the 1st respondent as well. Their evidence ought to be tested by cross examination and otherwise.

I also note that Mr. Oyoo's statement is not on oath and at this juncture it is very difficult to ascertain its veracity or otherwise.

Having stated so I am alive to the pleadings attached to Mr. Ongera's affidavit as well as that of Mr. Kinyanjui. Serious issues need to be interrogated and it would appear on the face of it that the deponents of those verifying affidavits need to be interrogate. The deponents are most likely the other respondents herein.

For the interest of justice therefore, I shall allow the application on the following terms:-

(a) **That all the suits and proceedings as per paragraph,**

Numbers 1-67 in the notice of motion are hereby and stayed pending the hearing and determination of criminal case No. Kisumu CMCR 297of 2012.

(b) The applicants be at liberty to apply after the determination of the above criminal case.

(c) Each party shall bear their respective costs.

Dated, signed and delivered at Kisumu this 26th day of March, 2013.

H.K. CHEMITEI

JUDGE

In the presence of:

.....for the applicants

.....for the respondents

HKC/va