



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 9 of 2012

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IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 9 OF 2012

FREDRICK OTIENO.....APPELLANT

VERSUS

PAMELA AWINO.....RESPONDENT

RULING

By an application described as a Notice of Motion dated 22<sup>nd</sup> October 2012 and filed on 16<sup>th</sup> October 2012, the Applicant sought orders -

- (1) *that there be a stay of all other similar suits pending the hearing and determination of the application,*
- (2) *that there be a stay of all other proceedings against the Appellant/Applicant pending the hearing and determination of Nairobi High Court Civil Appeal No. 9 of 2012,*
- (3) *that costs of the application be provided.*

The application was based upon the grounds on the face thereof and the Supporting Affidavit of Anthony Mutisya Musyoka, an Advocate of the High Court of Kenya. It was however opposed through the Replying Affidavit of the Respondent, Pamela Awino Ouma sworn and filed on 16<sup>th</sup> November 2012. The Application is premised upon the provisions of Order 38 rule 1 of the Civil Procedure Rules, 2010 and the court's inherent power to do justice under Sections 3A and 63(e) of the Civil Procedure Act, (Cap. 21, Laws of Kenya).

Rule 38(1) aforesaid provides -

*“38(1) where two or more persons have instituted suits against the same Defendant and such persons under rule of Order 1 could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing, that one of the suit be tried as a test case, and staying all steps in the other suit until the selected suit shall have been determined, or shall have failed to be a real trial of issues.*

**(2) ... (provides for staying of similar suits upon the application by the Defendant)”.**

My understanding of both these rules of Order 38, (*former Order 37*) of the Civil Procedure Rules is what it says. If there are several suits by different plaintiffs raising the same or similar claims against, either the plaintiffs or the Defendants, either of them may apply to the court for determination of one suit as a test suit, and the results therein may *mutatis mutandis* be applied in respect of other plaintiffs/defendants who may have filed suit or other claimants who may not have filed suit or Defendants not sued. In most cases, the test case is usually to determine liability of the Defendant.

This is exactly the position in this application. One test case, Nakuru CMCC No. 1277 of 2009 was filed and judgment thereon was delivered on 28th November 2011. Once liability for the accident is determined, there then would follow assessment of damages in respect of the claims by other plaintiffs. That was the case in Nakuru CMCC No. 1278 of 2009, CMCC No. 1284 of 2009, CMCC No. 1285 of 2009 and CMCC No. 1286 of 2009.

The Respondent deponed that the Applicants took part in the assessment of damages in respect of these other cases on various days, 2/4/2012, 23/04/2012, 09/07/2012 and 29/10/2012, when the assessment proceeded with the full participation of the Appellant.

The Applicant's case is that it has filed an appeal which it believes has good chances of success, and that it would be prejudiced if it were now required to put up moneys unpaid for the various claims.

On their part, the Respondents contend that having agreed on the test case, and also the assessment in the other cases, the Applicant is estopped from seeking a stay of those proceedings.

As already stated, once a test case is selected, the other suits are stayed pending the determination of the test case. The legal principle is that once the test case is determined, and the Defendant is found liable, liability is then applied across the board in respect of those other cases.

It is of course the right of the Applicant to appeal against the outcome or judgment of the test case. The question is, does he have a similar and automatic right to stay proceedings in respect of the other cases of which the test case was just one? He has, in any opinion, but not under either Order 38 of the Civil Procedure Rules, 2010, nor under Sections 3A and 63(e) of the Civil Procedure Act. The right to stay proceedings can only be invoked under Order 42, rule 6(1) of the Civil Procedure, on the one ground that it would be **just to make such order**.

I found no direct authority on the application of rule 6(1) of Order 42. However, considering the former rule 5 of the Court of Appeal Rules that court in the case of **KENYA SHELL LIMITED VS. KIBIRU & ANOTHER** [1986] KLR 410, held *inter alia* that -

**“(1) .....**

**(2) in considering a stay the court in doing so must address its collective mind to the question of whether to refuse it would render an appeal nugatory,**

**(3) in applications for stay the court should balance two parallel propositions, first a litigant, if successful should not be deprived of the fruits of a judgment, in his favour without just cause, and secondly that execution would render the proposed appeal nugatory.”**

In this case neither the successful plaintiff in the test case is, nor the other plaintiffs are, seeking execution. The concern is that of the other cases whose assessment is based upon the findings in the test case.

Addressing my mind to these situations, the claimants in other suits have in my opinion by agreeing to the outcome of the test case established a vested interest and right in the ultimate findings in that case which equally apply to their cases. The plaintiffs in the matters forming part of the series in the claims,

would no doubt be grossly prejudiced if the claims in their suits were not now assessed by allowing the Application herein.

On the corollary, the Applicant will not be prejudiced in any way since the monies to be paid (*under the test case*) and assessed in other cases, would not be paid to the plaintiffs, but rather deposited in a secure account awaiting the outcome of the appeal.

Having come to the above conclusion, it is clear to me that the application herein is an afterthought, and is brought in bad faith to deprive both plaintiffs in the test case, the fruits of the judgment, and the other plaintiffs the benefits of that judgment which was rendered on the basis that as a test case its findings would apply to other cases forming part of a series of claims arising from the same or similar facts as envisaged under Order 38, and rule 1 of Order 1 of the Civil Procedure Rules, 2010.

For those reasons, I find no merit in the application dated 22<sup>nd</sup> October 2012 and filed on 26<sup>th</sup> October 2012, and dismiss the same with costs to the Respondents.

It is so ordered.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of May, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**