



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAKURU
CIVIL APPEAL 239 OF 2011

EMMAH WANGECHI NJOKI.....1ST APPELLANT

ZYSIUS PHILIP NDERI.....2ND APPELLANT

VERSUS

MIRIAM WANJA MUCHIRI.....RESPONDENT

RULING

The application dated 16/01/2012 is made pursuant to provisions of **Rule 2(3)** of the High Court (Practice and Procedure) **Rules, Section 10** of the **Judicature Act (Cap 8), Order 22 Rule 22, Order 42 Rule 4 and 6(1) and 2** of **Civil Procedure Rules 2010, Section 3** and **3A Civil Procedure Act**, seeking that:

1. This matter be consolidated with SPMCC No.92 of 2009, No.97, 110, 105, 106, 93, 101, 104, 91, 100, 103 102, 98, all of 2009 (Naivasha) for purposes of hearing.
2. The court do order a Stay of proceedings in this suit and the aforementioned suits pending hearing and determination of the appeal.

The grounds for seeking these prayers are that:

- (a) In all the suits filed in the lower court and listed here, the defendants are common in that they are the alleged legal and/or beneficial and/or insured owners of the motor vehicle registration No.KAY 223A and/or agents employees to the alleged owners of the aforementioned vehicles.
- (b) The issue at hand and facts in these suits are similar and the suit in which this appeal has been preferred i.e., Civil Suit No.107 of 2009 (Naivasha) was selected as a lead suit for purposes of defence hearing on all the matters aforementioned and proceeded for hearing on 14th December 2011.
- (c) The defendants had two witnesses who testified on that day and further sought their document marked DMF1 – to be admitted in evidence as they had failed to secure attendance of the maker under Section 35 of the Evidence Act.

(d) The defendant's application seeking leave to have the statutory document sworn by James Mwangi (who is said to have since left the country) allowed in evidence was denied.

(e) The appellants were dissatisfied with that decision and appealed.

The defence case closed as the defence had been granted a last adjournment and the matter was placed for mention on 8th February 2012 to confirm that submissions have been filed. When the applicants prayed for stay pending appeal, the trial court rejected their request and the applicants state that unless the proceedings in the other listed matters are stayed, the present appeal will be rendered nugatory.

The request for consolidation is so as to make it easier and faster disposal and save on the time and costs. Further, that the appeal has high chances of success and this application will not occasion any prejudice to the Respondent. It is also stated that the application has been made without unreasonable delay.

In an affidavit sworn by MARYANNE MWANGI, the Legal Manager at Directline Assurance Company, who are the insurers of motor vehicle registration KAY 223A, she deposes that the Company instructed the applicant's advocate to plead fraud in all the matters mentioned in this application, as they had obtained information from the Criminal Investigations Department (CID) Naivasha and Naivasha District Hospital, to the effect that the claims herein are fraudulent, as the plaintiffs are not listed in the necessary police records and hospital records – a letter in support of that and a statutory statement by James Mwangi are annexed. The rest of her affidavit simply reiterates what is stated in the grounds on the face of the application.

The application is opposed and in a replying affidavit sworn by MIRIAM WANJA MUCHIRI (the Respondent) she states that she was injured in a road traffic accident on 29th November 2008 and filed suit for compensation. She confirms that Naivasha SPMCC No.99 of 2009 was selected as a test case on liability and her matter awaiting judgment therein, then proceeded to assessment.

She points out that SPMCC No.99 of 2009 was fully heard, and when it got to defence hearing, the applicants failed to secure attendance of a witness and they prevailed upon the Respondent to give them a concession of 5% and judgment on liability was thus recorded. On 30th March 2010, the consent on liability at 5:95% was recorded in the present file and obviously applicable to all files in this series.

On 2nd June 2010, Respondent's case was partly heard on assessment of damages and before the next hearing, the applicant's insurer filed an application in Nairobi stopping all matters covered by Directline Assurance Co. Ltd., so the Respondent's case was paralysed for one year. Thereafter Respondent called her witnesses and closed her case on 8th June 2011.

Although the matter was proceeding only for assessment of damages, the applicants demanded that Respondent calls all the makers of her documents, which she faithfully did, although it was very expensive. The Applicant then applied for adjournment on 29th June 2011 to call their defence witness as they were not available on 8th June 2011.

On 29/06/2011, the defendants called one witness and sought adjournment for 2 months to avail their witnesses and the matter was stood over to 31st August 2011 – on which date, the court was not sitting. On 14/09/2011 the parties appeared in court, and again, the defendant/applicant sought 3 months period within which to get their witnesses, - so the matter was adjourned to 14th December 2011.

This background is given so as to demonstrate to this court that, the applicant in a move to frustrate the Respondent's case tried to introduce a document in the proceedings, whose origin is in doubt and the court dismissed their move.

Respondent points out that the police officer who testified confirmed that all the litigants were involved and injured in the said accident and the records officer from Naivasha District Hospital gave evidence to

confirm that as well, as supported by records from the hospital.

Consequently, there is absolutely nothing to taint the claimant's case.

In any event the plaintiffs in Naivasha SPMCC No.97 of 2009, 101, 103, 105 and 106 do not appear in the statutory declaration sought to be introduced and it is not clear why they are included in this application.

The applicant's move is seen as an attempt to block the claim lodged herein and the applicant had gone fishing for names which did appear in the proceedings with the aim of mixing up the records and somehow try to secure the orders sought. At the hearing of the application, Miss Solovea who appeared for the applicants submitted basically a repeat of what is contained in the application and the supporting affidavit.

She argues that the Replying affidavit does not raise any issues regarding the application and all the issues raised can be addressed at the hearing.

Mr. Gekonga for Respondent opposes this application saying the same is maliciously filed and he does not understand what the prayer for consolidation is all about because there is already a test suit. It is his contention that the trial court properly rejected the attempt to introduce a statutory statement and the appeal is not an arguable one to warrant orders of stay.

What is more, the applicants have already paid some of the litigants and are only out to delay this matter as the appeal is based on matters which are not legally tenable.

Mr. Gekonga submits that the applicants are asking the court to stay proceedings while they go on a fishing expedition.

In this matter, a consent had been entered on liability and what was pending for determination was assessment of damages. While the proceedings were on going, the defendants/applicants apparently made a discovery of some fraudulent claims. The only way to prove this, they say, is by a statutory statement made by one James Mwangi who is said to have left the country. This statutory statement was rejected by the trial court and now forms the subject of this appeal. As to whether that is a position tenable in law is arguable and I think that merits the appeal.

However would the appeal be rendered nugatory if the test suit was heard and concluded? What about the fact that Respondent has specified particular claimants whose names are not in the list contained in the statutory statement, should their cases also be put on hold? Why? Would this be fair?

To my mind the appeal would not be rendered nugatory if the test suit and the other suits pending in the lower court proceed because of the following reasons:

a) Should the appeal succeed, the applicants will have at their disposal many avenues of redeeming the situation which includes:

(i) Applying to set aside the judgment.

(ii) Seeking stay of execution pending appeal.

b) It is alleged that the litigants in the various cases have committed fraud, so have they been arrested and charged with what is obviously a criminal offence? If that has been done, then this has not been disclosed to the court.

c) There are persons who have filed suit in the lower court and whose names do not appear in that purported "**list of shame**", namely:

- (1) NVS SPMCC No.97 of 2009 Alice Nduta Ndirangu
- (2) NVS SPMCC No.101 of 2009 Andrew Ndirangu Wahu
- (3) NVS SPMCC No.103 of 2009 Stephen Mugo Kanyi
- (4) NVS SPMCC No.105 of 2009 Margaret Njoki
- (5) NVS SPMCC No.106/09 Mary Wambui Ndirangu.

I note that applicants are loudly silent on this aspect, offering no explanation as to why their cases should also be placed on hold. Since SPMCC No.99 of 2009 is a test suit, then it must proceed to conclusion to give a release and life to the ones which do not appear on the list of shame. As a sign of good faith why not pick the ones mentioned and seek stay on those instead of including everyone? This lead me to infer malice on the part of applicant.

In any case, going by the approach employed by the applicants to delay this matter by seeking prolonged adjournments, I am not persuaded that this application is made in good faith and I decline to allow it.

The upshot is that the application is dismissed with costs to the Respondents.

Delivered and dated this 18th day of May, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**