



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL APPLICATION 521 OF 2010

FARMERS CHOICE COMPANY LTD.DEFENDANTS/APPELLANT

VERSUS

DORLEEN ANYANGO WASONGA and

**JOSEPH OHITO NJENGA (suing as the administrators Of the Estate of HARRISON WASONGA (Deceased)...
PLAINTIFFS/RESPONDENTS**

R U L I N G

Before me is a Notice of Motion dated 10th November, 2010. It was filed on behalf of the defendants **FARMERS CHOICE CO. LTD.** It was brought under Order 49 rule 4 and Order 50 Rule 1 of the Civil Procedure Rules as well as Sections 3 and 3A of the Civil Procedure Act (Cap 21). The prayers in the application are as follows:-

- 1. That this matter be certified as urgent and service thereof be dispensed with in the first instance.***
- 2. That this honourable court be pleased to grant stay of proceedings in Limuru Civil Case No. 39 of 2010, Dorleen Wasonga and another Versus Farmers Choice Company Ltd pending the hearing and determination of the defendant's appeal.***
- 3. That this honourable court be pleased to give any such other or further orders as it may deem fit.***
- 4. That the costs of this application be in the cause.***

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant was dissatisfied with the orders of the court dated 13th July, 2010 in Limuru Civil Case Number 39 of 2010. That they have filed an appeal and the appeal has high chances of success. That the defendant is likely to suffer substantial prejudice if stay is not granted. That should the orders sought not be granted, the appeal will be rendered nugatory.

The application was filed with a supporting affidavit sworn on the 10th November, 2010 by Dinah Ogulla described as the Manager Legal Department of the Defendant's Insurers who will be liable to satisfy the judgment. The said insurers have not been disclosed in the affidavit though documents filed indicate they are Jubilee Insurance Co. Ltd. It is deponed in the said affidavit, inter alia, that after the ruling of the Magistrate the advocates for the defendant filed a Memorandum of Appeal. That the assessment of

damages was initially set for 5th October, 2010 but that has now been re-fixed for 23rd November, 2010. That if the defendants are denied a chance to be heard that would result in great prejudice. The affidavit attaches several documents including a report issued to Jubilee Insurance Co. Limited.

The application is opposed and a replying affidavit sworn by one of the plaintiffs Dorleen Wasongo on 17th November, 2010 was filed. It was deponed in the said affidavit, inter alia, that the defendant had made an application in the Limuru Magistrate's Court to set aside interlocutory judgment entered on 31st March, 2010. The application was heard on merit and it was dismissed. The defendant appealed and filed an application dated 27th September, 2010 for stay of proceedings in the Magistrate's court. It was also dismissed on 26th November, 2010. It was deponed therefore, that the defendants were trying to obstruct proceedings in the subordinate court using Jubilee Insurance Co. Limited who are not a party to the proceedings in the subordinate court.

The defendants through their counsel filed written submissions to support the application. Several case authorities were cited. The plaintiff filed written submissions through their counsel also citing several legal authorities. The defendant's counsel filed reply to the plaintiff's submissions.

On the hearing dated only the counsel for the defendants, who are the appellants, appeared in court, though notice of hearing was served on Ms Mbaabu Advocates for the plaintiffs/respondents.

I have considered the application, submissions filed as well as the authorities cited to me. This is an application for stay of proceedings in the subordinate court pending determination of appeal. I have seen a Memorandum of Appeal filed by the defendants/appellants. It certainly raises triable issues. The court has wide discretion in granting the orders sought in order to ensure that justice is done to all parties. This case was determined by the learned Magistrate on a technicality that the defendants did not defend themselves in the lower court. That technicality is what is to be challenged through an appeal. The Overriding Objective principle incorporated in the Civil Procedure Act (Cap. 21) under Section 1A of the Act requires that courts administer substantive justice expeditiously. I do not agree that the defendant has been trying to obstruct the cause of justice. Whether or not the learned magistrate exercised the court's powers properly is a matter for determination in the appeal. The plaintiff can be compensated adequately in money terms, when the case is ultimately determined in her favour.

For my part, I find that the interests of justice would dictate the orders of stay requested should be granted, to await the determination of the appeal. However, in order to avoid a situation where the stay orders will remain in force indefinitely, I will give a time frame for the stay.

Consequently, I find merit in the application and grant stay as requested in prayer 2. Such stay will be for the period up to 30th June, 2012 or the hearing and determination of the appeal, which ever comes first, unless this order is varied by court. Costs of the application will be in the cause.

Dated and delivered at Nairobi this 21st day of September 2011.

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GEORGE DULU

JUDGE

In the Presence of

Non appearance for the plaintiff

Mr. Okemwa holding brief for Mr. Njenga for the defendant

C Muendo – court clerk