REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 574 OF 2005

NDUUVE KAVENE KIOKO................APPELLANT

VERSUS

SUKHDEN PARNESAR SINGH.........RESPONDENT

R U L I N G

On 5/8/05, the applicant/appellant moved to this court by way of a Notice of Motion, under Order 50 rule 1 of the Civil Procedure Rules and Sections 3A and 79G of the Civil Procedure Act, Cap. 21, Laws of Kenya, seeking the following orders:

1. ……..…Already spent

2.

3. That there be a stay of Proceedings in Milimani Chief Magistrate's Court Civil Suit No. 12918 of 2003, pending the hearing and determination of this application, interpartes.

4. Costs for this application

Supported by an Affidavit by B.W.K. Kamunge of even date, the application is on the grounds, inter alia that the hearing of the suit at the Subordinate Court was fixed for 20/2/05; on which date the applicant/appellant gave evidence and called one expert witness then applied for adjournment to trace her witness who was said to be on leave from his place of work, and a police officer to produce police abstract; the application for adjournment was disallowed by the lower court and the applicant/appellant had nothing to do but close her case after the Magistrate granted her leave to appeal against her ruling and order; the applicant/appellant has not been able to get the proceedings as all the visits to the court have been fruitless; the submissions on liability and quantum of damages in the said case is scheduled for 8/8/05; the applicant/appellant will have nothing to submit on having been unable to call two crucial witnesses; the delay in prosecuting the case in the High Court was among other things the missing of the court file and several letters written by the Chief Justice concerning the issue which were given to the lower court. The applicants stand to suffer irreparable loss if this stay application is not allowed; the applicant has an arguable appeal with high chances of success; the applicant/appellant is willing to abide with any conditions this court may deem fit in the circumstances.

The Respondent did not file a Replying Affidavit, vide the counsel's submissions on 16/9/05, because they did not intend to raise any factual matters, rather they said they would only raise

matters of law.

The parties submitted written submissions which I have carefully perused, together with the authorities cited and relied upon, especially by the applicant/appellant. I have, after considering the written submissions by the parties, reached the following findings and conclusions.

I begin with the two issues heavily relied upon by the Respondents. These issues are that: the suit had abated when the original Plaintiff died and no proper substitution had been made, and secondly that the suit has taken more than sixteen years since it was first filed.

With due respect to the Learned Counsel for the Respondents, the above two issues are not born out by the record in the file before me. The records show that the issue of the suit having abated was raised by the 3rd Respondent before Mr. El-Kindy, the Principal Magistrate where it was canvassed as a Preliminary Objection and at the end of which the lower court rejected the objection and ruled that the suit had not abated. The respondents did not appeal against the said ruling. In my humble view, that explains why that was not an issue when the suit came up for hearing on 20/7/05, and it is RES JUDICATA and cannot be raised at this stage, and in this Notice of Motion.

On the second issue of the case having taken too long, the Respondents seem to intentionally overlook two factual situations which contributed to the delay. These factors are that the file went missing for quite a while, and the death of the original Plaintiff/applicant/appellant. The contention by the Respondents seems to ignore the Second Respondent's Preliminary Objection on the very issue of abatement rejected by the court after the hearing of the same.

I am also satisfied that indeed the file went missing for quite a while. This is supported by the correspondence between the applicant and the office of the Chief Justice.

The two factors that in my view contributed to the delay in prosecuting the suit may not appear satisfactory to the Respondents . But if that was so, I am not convinced that the Respondents did themselves justice by not filing an application under Order 16 Rule 5 of the Civil Procedure Rules to have the suit dismissed for want of prosecution.

The record before me bears no record of such an application for dismissal of the suit or want of prosecution.

Accordingly, I reject that ground of opposition as well.

The two issues above on which I have ruled pave the way for addressing the core cause for this application for stay of the proceedings in the Subordinate Court. The applicants position is that whereas the court has discretion in granting or rejecting an application for adjournment, such discretion must be exercised judiciously. Granted that an appellate court, such as this should not interfere with such discretion by the lower court unless the discretion has been in correctly exercised, the question before me is whether the Subordinate Court exercised the discretion correctly, under the circumstances.

My finding and conclusion is in the negative. And this, as in all cases, must be viewed within the circumstances of the case.

In the present case, the applicant/appellant, on the hearing date, called two witnesses, including himself. The two crucial witnesses including the eye witness who witnessed the accident and therefore in a position to testify on the issue of negligence in the way the injury occurred, were not available in court that day. That is why and when the applicant applied for adjournment to facilitate the appearance and testimony in court by those witnesses.

I consider it very unfortunate that the Learned Magistrate declined to grant the adjournment but

went ahead to order that in the absence of any further witnesses/evidence, the parties should prepare and make their submissions to the court. I note that the Respondent/Defendants had stated their position that they were calling no witnesses or adducing any evidence, rather they would rely on matters of law. Clearly if you go on legal points, you do not need to call any witnesses or adduce any evidence – oral or by affidavit.

Without getting into the merits of the actual suit it is sufficient to state that in negligence cases, it is not possible to prove one's case without evidence. If one cannot, for whatever reasons, prove the particulars of the alleged negligence, the case is as good as lost.

Back to the issue of discretion, Law Reports and text books abound on the topic. I will not indulge in more than one authority, that is the case of *ABDULREMAN V. ALMAERY [1985] KLR 287* in which the Court of Appeal held that: "The refusal to grant an adjournment is within the discretion of the trial court and the appellate court cannot interfere with this discretion unless it has been incorrectly exercised. An adjournment ought to be granted as long as it is not unreasonable, no apparent miscarriage of justice is likely to arise and extra expense occasioned by the adjournment can be compensated by way of costs. An adjournment should be granted if refusal will cause the possibility of an injustice."

In line with the above judgment, and given the facts and circumstances in the case/application before me, I hold that the denial of adjournment by the Learned Magistrate was unreasonable and carries all the seeds of injustice. The exercise of the discretion was improperly applied.

In the result, I grant the stay order, and stay the proceedings in the Lower Court – Milimani Civil Suit No. 12918 of 2003, pending the hearing and determination of the intended Appeal herein.

Costs of this application to be borne by the Respondents.

It is so ordered.

DATED and delivered in Nairobi this 15th Day of July, 2008.

O.K. MUTUNGI

JUDGE