



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 140 OF 2003**

KENINDIA ASSURANCE CO. LIMITED. APPELLANT

- V E R S U S -

MARY KAINGONGI SAMUELRESPONDENT/PLAINTIFF

AND

ANGELA STOIBERGRESPONDENT/DEFENDANT

R U L I N G

By Notice of Motion brought under Order 41 rule 4 of Civil Procedure Code and Section 3A of the Civil Procedure Act the applicant described as interested party seeks orders for stay of proceedings in SRMCC. No. 1226/2000 pending determination of appeal filed by the interested party in the said suit.

The grounds are that a limited stay granted in the lower court expired on 3rd October, 2003 because the advocate appearing for interested party failed to reach court in time. Application to reinstate that expired order was filed, the application was adjourned but the stay was not reinstated. It is submitted that suit is a nullity and should not be allowed to proceed before the appeal is determined. A copy of Memorandum of Appeal is exhibited. In that appeal it is complained that the original plaint was not accompanied by a verified affidavit of the plaintiff and did not contain an averment that there were no other proceedings pending between the parties as is mandatory requirement under Order VII rule 1 of Civil Procedure Code. That a verifying affidavit was filed on 13.9.2000 when infact the plaint was filed in June 2000. The learned magistrate is said to have misdirected himself by holding that-

“the prayer for striking o ut a suit if granted will amount to quashing my judgment. It will be like sitting on appeal against my judgment”

and therefore did not correctly interpret the law.

Perusal of the plaint in the lower court shows that the cause of the action arose out of an accident and that the interested party is not listed as a party in the plaint and no claim is made against the interested party.

The plaintiff has filed a replying affidavit in which it is asserted that the applicant has not filed defence in the lower court but seeks to delay the suit. The grounds of opposition state that there is a similar application pending in the lower court and that this application is delayed.

Submission show that if the stay is granted the proceedings in the lower court shall proceed and the appeal shall be rendered nugatory. Counsel for the plaintiff confirms that in the lower court there is no judgment yet and that the interested party’s liability has not arisen since their insured is personally sued in

the lower court and no substantial loss will be suffered if the order is not granted.

I have perused the material presented to court. The lower court file is not produced. From what can be gathered here the applicant is the insurer of the defendant. And if the judgment was to be entered against the defendant the interested party would be forced to pay decretal amount to the plaintiff. Mr. Mulwa submits that no judgment exists yet and therefore liability of interest party has not arisen. The interested party submits that he has been granted leave to join in the suit in the lower court so he has opportunity to defend the suit.

From what I can see the applicant is convinced that the suit is a nullity for failure to comply with Civil Procedure Code rules Order 7 rule 1 (e) and rule 1 (2). Regarding Rule 1(2) the court has discretion either on its own motion or on application to order a plaint to be struck out for non compliance.

I have perused the authorities submitted by applicant. The judgment of- Ringera J. in **Global Tours & Travels Ltd W.U. Cause no. 43/2000 and that of Onyango Otieno J Niazsons (Kenya) Ltd –vs- Chania Road and Bridge Corporation (K) Ltd.**

HCC. No. 126/1999 favour a stay to be granted so as not to render an appeal nugatory. On the other hand the Court of Appeal in Civil Appeal No. 345/00 Gawo & Others – vs- Nairobi City Council the court was of the view that-

“the rule is so clear as to leave no room for other interpretation”.

This was in connection with rule 7.1(2). Order 41 rule 4 Civil Procedure Code requires that sufficient cause be shown to warrant granting stay. From the authorities mentioned above it is clear that sufficient cause is shown when it is clear an appeal may be rendered nugatory.

On the issue of substantial loss and furnishing of security Hon. Ringera J. as he then was said-

“On a plain reading of the rule the requirements are) applicable only to applications for stay of execution only”.

The submission by counsel for plaintiff in regard to the issues are therefore not relevant.

On the whole I find that it is in the interest of justice that the proceedings in the lower court be stayed. The Civil Procedure Rules involved are recent additions to the rule of procedure and it is my view that the applicant have an arguable appeal. I therefore allow the application. The delay in filing the application is reasonably explained in the supporting affidavit in support which shows that even the plaintiff Counsel contributed to the delay. To avoid undue delay in the proceedings it is hereby ordered that the proposed appeal shall be prosecuted within the next 45 days excluding the period of Christmas vacation failing which the stay shall lapse. Costs shall be in the cause.

Dated this 12th day of November, 2004.

J. KHAMINWA

JUDGE

Ruling read in presence of Mr. Mwendwa and Mrs. Okata.

J. KHAMINWA

JUDGE