



Kenya Orient Insurance Company Limited v LOO (A minor suing through her mother and next friend BAS) (Civil Suit E115 of 2021) [2023] KEHC 18836 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E115 OF 2021
HK CHEMITEI, J
JUNE 15, 2023**

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED APPELLANT

AND

LOO RESPONDENT

A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND BAS

RULING

1. In the Notice of Motion dated July 8, 2022 the appellant/applicant pray for orders that there be stay of proceedings and/or further proceedings in Nakuru CMCC 731 of 2019 scheduled for defence hearing pending the hearing and determination of this appeal plus costs of the application.
2. The application is based on the grounds thereof and the affidavit by Erick Kimathi the appellant/applicant's branch manager sworn on the same date. He deposed that sometime in August 2019 the appellant/applicant received a claim from the respondent the plaintiff in the declaratory suit referenced as Nakuru CMCC 731 of 2019; Lewis Oduor Oluocha Vs Kenya Orient Insurance Company Limited in which the respondent sought payment of an award given in Nakuru Cmcc No 484 of 2014; Beatrice Akinyi Sawo Vs Mbuthia Patrick. The respondent herein contended that the appellant/applicant was the insurer of the defendant in the primary suit and was therefore under an obligation to settle the decretal amount. Further, that the learned trial magistrate erroneously and/or unprocedurally disregarded the appellant's/applicants objection to the production of evidence by the respondent (plaintiff in the declaratory suit) during evidence in-chief and proceeded to admit the same as evidence.
3. He deposed further that their advocates on record objected to the said production of the police abstract as evidence in chief by the respondent owing to the fact that the respondent was not the maker



- of the said document nor did the appellant/appellant herein participate in the making of the said document but despite their objection and prayer to have a police officer called to produce the same having been the maker, the court disregarded their objection and admitted the same into as evidence.
4. Mr. Kimathi went on to aver that the defendant in the primary suit was not an insured of the appellant/applicant nor the insurance policy number indicated in the police abstract tally with the appellant's/applicant's and that evidence can only be given by a witness from the appellant/applicant's company who at the moment had been unjustifiably locked out from giving evidence by the court without any sufficient reasons. That the foregoing ruling was the basis and object of this appeal herein which they believed raised serious legal issues that the honorable court need to investigate and determine and progressing with the primary suit before the determination of the issue will lead to a fallacious and prejudicial judgment which will render this appeal academic.
 5. It also his deposition that the respondent will suffer no prejudice as they will get an opportunity to cross-examine the intended defense witness. That the appellant/applicant was ready and willing to furnish such security as this honourable court may deem just and fit as a condition for the issuance of the orders sought. Further, that the instant application had been filed promptly without any inordinate delay and it was in the interest of justice that the appellant's/applicants deposition was allowed as prayed so that the appeal is determined by merit.
 6. The respondent responded to the application through her replying affidavit sworn on September 26, 2022. She averred that the application herein was bad in law, made in bad faith, inept, malicious, lacked merit, an afterthought and otherwise amount to an abuse of the court process. That she had instructed her advocates on record to file a suit seeking compensation for injuries her son Levis Oduor sustained as a result of a road traffic accident that occurred on 27 January 2014. Further, that the suit was indeed filed as Nakuru CMCC 454 of 2014 and the appellant/applicant's insured participated in the same to conclusion being represented by the firm of Sheth & Wathigo Advocates.
 7. The respondent averred further that after the judgment in the primary suit file was delivered, the appellant/applicant and together with their insured were notified of the delivery of judgment through their advocate but the appellant's/applicant's insured failed to satisfy the judgment necessitating her to instruct her advocates to institute the declaratory suit Nakuru CMCC No. 731 of 2019 as a mode of execution against the appellant/applicant.
 8. Further, that the police abstract produced in the said case was the same one produced by the police officer in the primary suit which formed the basis of the present case and all the contents of the police abstract were relied upon. Additionally, that the appellant/applicant sought to have its witness testify but could not testify having filed the witness statement on the same hearing date of October 6, 2021 which was out of time and without the leave of court.
 9. The respondent went on to aver that the court went ahead to expunge the witness statement from record having ascertained that it was filed out of time and without the leave of court but gave the appellant/applicant another chance to file its witness statement. The appellant/applicant instead of filing another witness statement of its insured to satisfy to the court the claim that it did not take up an insurance policy with the appellant/applicant as claimed in the expunged statement had filed an application seeking to stay proceedings. She stated that she will be grossly prejudiced if the appellant's/applicant's application was allowed and therefore the same ought to be dismissed with costs in her favour as it lacked merit.
 10. When the matter came up for hearing the court ordered parties to file written submissions which they have complied.



Appellant's/Applicant's Submissions

11. The appellant/applicant in its submissions identified four issues for determination. On the first issue, whether the appellant was entitled to the orders sought it placed reliance on Order 42 rule 6 sub-rule 1 of the *Civil Procedure Rules*, 2010, *Halsbury's Law of England*, 4th Edition. Vol 37, the cases of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 as cited in *Edward Muchiri Ituma v Beatrice Wangigi & 9 others* [2019] eKLR, *Kenya Wildlife Service v James Mutembei* [2019] eKLR, *Christopher Ndolo Mutuku & another v Stanbic Bank Ltd* [2015] eKLR and *Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wakebii* Civil Appeal No. 326 of 2013 [2014] eKLR.
12. On the second issue, whether the appellant had established that it had a prima facie arguable case, it was submitted that failure by the trial court to appreciate that documents as primary evidence should be produced by the maker was clear violation of the rules of evidence and more specifically the *Evidence Act*. That appellant/applicant would be condemned unheard and made to compensate a party yet it was not the defendant's (in the primary suit) insurer.
13. Further, that should the declaratory suit be allowed to proceed and the appellant/applicant be compelled to pay the respondent the decretal sum awarded in the primary suit it shall suffer great loss and prejudice.
14. The court's attention was drawn to section 35(1) of the *Evidence Act*, the cases of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR and *Silverstein v Chesoni* [2002] 1KLR 867.
15. On the third issue, whether issue, whether the application was filed expeditiously, it was submitted for the appellant/applicant that its application had been brought without unreasonable delay and therefore the court be inclined to grant the orders sought.
16. On the last issue, whether the appellant/applicant had established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought, it was submitted that in application for stay proceedings the court was required to exercise judicial discretion in the interest of justice. That it was the appellant's/applicant's belief that justice must not be sacrificed on the altar of strict adherence to procedure and pleads to have its intended witness testify in court. The court was urged to allow appellant's/applicant's application with costs in its favour. Additionally, the court's attention was drawn to Article 159 (2) (d) of *the Constitution*, the cases of *Harman Singh & others v Mistri* 1971 E.A 122, *Christopher Ndolo Mutuku & another v CFC Stanbic Bank Ltd* [2015] eKLR and *Edward Muchiri Ituma v Beatrice Wangigi & 9 others* [2019]eKLR.

Respondent's Submissions

17. The respondent in her submissions identified two issues for determination by this court. On the first issue, whether the applicant was entitled to the orders sought in the application, the respondent placed reliance on the case of *Millicent Wamatha Njogu v Pauline Nyambura Waweru* [2022] eKLR which cited the case of *Global Tours & Tours Travel Limited (supra)*.
18. On the last issue, whether the appellant/applicant had established a prima facie case, it was submitted for the respondent that the appellant/applicant had not attached to its application the intended appeal for the court to determine whether the same was arguable and had any chances of success. That the appellant/applicant had also not put forth sufficient reasons to warrant the granting of stay of proceedings order and therefore granting the orders sought in the said application would prejudice her



as there would be a delay in disposition of the matter which was against the interest of justice. She urged the court to dismiss the application as it lacked merit with costs in her favour.

Analysis and Determination

19. I have considered the application which is the subject of this ruling and the submissions made on behalf of the parties herein. In my view the only issue for determination is whether this Court should grant stay of proceedings in Nakuru Cmcc No. 731 of 2019 pending hearing and determination of the appeal herein.
20. The court in *Kenya Wildlife Service v James Mutembei* [2019] eKLR cited with approval the case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 where Ringera, J (as he then was) held that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case.....and whether the application has been brought expeditiously.”
21. In the case of *Kenya Wildlife Service (supra)* the court held that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”
22. In the instant case, the applicant herein has filed this appeal where it intends to challenge the production of an abstract as evidence by the respondent who is the plaintiff in a declaratory suit during evidence in-chief which the trial magistrate admitted into evidence. The appellant/applicant contend that the respondent ought not to have produced the said document as she was not the maker of the same and that it also did not participate in the making of the same. Additionally, that it was the appellant's/applicant's contention that the trial magistrate erroneously and/or procedurally disregarded its objection to have the said abstract be produced by a police officer who was the maker of it. That the said act was a violation of the provisions of the *Evidence Act*.
23. The respondent on her part in opposing the application argued that the police abstract produced in the said case Nakuru CMCC No. 731 of 2019 was the same one produced by the police officer in the primary suit file which formed the basis of this present case and all the contents of the police abstract were relied upon. Additionally, that the appellant/applicant sought to have its witness testify but could not testify having filed the witness statement on the same hearing date of October 6, 2021 which was out of time and without the leave of court.
24. It appears to me that the contentious police abstract was the one which was produced in the primary suit. The respondent's averments in the replying affidavit say as much. The applicant did not rebut. If that is the case, then the proper place to have disputed its production was perhaps at the primary suit.
25. All that the applicant ought to have done was to simply comply with the window of opportunity granted by the trial court in which it allowed it to file fresh statements or evidence. To stop the proceedings at this level is not efficacious in my view.



26. In any case and as clearly stated by the respondent what prejudice was the applicant likely to suffer if it complied with the directives by the trial court.? None at all. Staying the proceedings will further delay the claim.

27. For now, this court does not see the application herein meritorious and the same is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE

