



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

HIGH COURT CIVIL APPEAL NO.E020 OF 2021

INVESCO ASSURANCE CO. LIMITED.....APPELLANT

VERSUS

CLEOPHAS SHIMANYULA.....1ST RESPONDENT

WESTERN CROSS EXPRESS LIMITED.....2ND RESPONDENT

SHIMCOM COMPANY LIMITED.....3RD RESPONDENT

RULING

1. The Application coming for consideration in this ruling is dated 22/6/2021 seeking the following orders:-

(i) SPENT

(ii) That stay of proceedings be issued in Kericho CMCC. No.232, 239, 241, 231, 234, 230, 238, 228, 227, 2 40, 235, 229, 242, 233, and 236, All of 2019 – VARIOUS PLAINTIFFS -VS- SHIMCOM COMPANY LIMITED, pending the hearing and determination of this application.

(iii) That leave be granted to the Applicant to file a Memorandum of appeal out of time.

(iv) That the costs of this application be provided.

2. The Application is based on the grounds on the face of it and supported by the Supporting Affidavit of **PAUL GICHUHI** in which it is deposed that the Judgment in Kericho CMCC No.1 of 2019 was delivered on 11/6/2021 and parties were supplied with copies on 23/6/2021 and that the said Judgment impacts the above stated cases.

3. Further that the Plaintiff is dissatisfied with the said Judgment and wishes to appeal against the same and further that this application has been brought without delay.

4. The Respondents opposed the Application and filed a Replying Affidavit sworn by **CLEOPHAS SHIMANYULA** dated 14/7/2021 in which it is deposed that the matters sought to be stayed are not between the parties in this case and further the suit resulting in this appeal sought the following prayers among other prayers:-

(i) THAT the Court be pleased to give a declaration that at the material date of the alleged accident on 10/10/2018, the Motor Vehicle Reg. No. KBX 092 J was inter alia in an un-road worthy state and was in breach of the various traffic rules.

(ii) THAT the Court be pleased to issue a declaration that fundamental provisions of Insurance Policy No.075/0804/1/042608/2016/TQ were breached thereby automatically discharging the Plaintiff from liability.

(iii) THAT the Court be pleased to compel the Defendants jointly and severally to satisfy all claims arising out of the alleged accident involving Motor Vehicle Reg. No. KBX 092J.

5. It is further deposed in the Reply Affidavit that the application is seeking stay of proceedings and yet it is brought under Order 42 Rule 6 of the Civil Procedure Rules which deals with stay pending appeal and further that the Applicant is not a party to the suits he is seeking to stay.

6. The parties filed written submissions in the Application which I have duly considered. The Applicant filed submissions dated 17/9/2021 in which it is stated that the Applicant is seeking stay in several matters directly affected by the Judgment in **CMCC. No. 1 of 2019** and further that if stay is not granted, the substratum of the intended appeal shall have been defeated and the appeal will be rendered nugatory and further, the Applicant will suffer irreparable loss.

7. The Applicant further submitted that Judgment has been obtained in one of the cases (Civil Suit No.354 of 2019) and if stay is not granted the Respondent will proceed to file a declaratory suit which will render the intended appeal nugatory.

8. The Respondents filed written submissions dated 19/8/2021 in which they stated that the Application as presented is ill-advised as the matters sought to be stayed are not between the parties in the intended appeal and further that the stay order was not sought in the Trial Court.

9. It was also submitted by the Respondents that the Application is seeking stay of proceedings and brought under Order 42 Rule 6 (2) which provides for stay pending appeal.

10. The Respondents further submitted that the right to appeal ought to be balanced against the Respondents' right to enjoy the fruit of their judgment and further that the Applicant has not demonstrated how the intended appeal will be rendered nugatory if the stay is not granted.

11. Further, that the Application amounts to abuse of the Court Process and further that the same is unnecessary as it was filed within the 30 days period allowing for filing of appeals.

12. The issues for determination in this Application are as follows: -

(i) Whether the Applicant is entitled to stay of proceedings in the cases listed in the Application.

(ii) Whether the application is an abuse of the Court Process.

(iii) Who pays the costs of the application?

13. On the issue as to whether the Applicant is entitled to stay of proceedings in the cases listed in prayer (2), I find that the said parties have not been enjoined as parties in the current suit and granting stay of proceedings would be tantamount to condemning the said parties unheard.

14. In *Kenya Wildlife Service versus James Mutembei (2019) eKLR*, the court expressed itself as follows: ***“Stay of proceeding should not be confused with stay of execution pending appeal. 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.”***

15. The High Court in *Daniel Walter Rasungu versus Johana Nyakwoyo Buti & 2 others (2008) eKLR*, stated as follows: ***“... stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interest of justice depending on the facts of each case. Of course, the discretion has to be exercised judicially and not whimsically..... IN THE MATTER OF GLOBAL TOURS & TRAVEL LTD (supra), the court held that: “In deciding whether to order a stay [of proceedings] the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”***

16. On the issue as to whether this Application amounts to an abuse of the Court process, I find that the Applicant is seeking leave to file the Memorandum of Appeal out of time yet the impugned Judgment was delivered on 11/6/2021 and the Application herein was filed on 23/6/2021 before the expiry of the 30 days period which was to expire on 11/7/2021. The prayer for leave to file the Memorandum of appeal out of time is not necessary in the circumstances.

17. I find that it is not in the interest of Justice to stall the hearing of the suits referred to in this application since such an action would interfere with the rights of parties who may have no notice of **CMCC. No.1 of 2019**.

18. The Application dated 22/6/2021 is premature and the same may be raised in a declaratory suit which the Plaintiffs in the suits referred to may file seeking to enforce the Judgment in **CMCC No.1 of 2019**.

19. The Application dated 22/6/2021 lacks in merit and the same is dismissed with no orders as to costs.

Delivered, dated and signed at Kericho this 5th day of November, 2021.

A. N. ONGERI

JUDGE