



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 3 OF 2019

JOSEPH GICHIA.....1ST APPELLANT

JOHNSON NGATIA.....2ND APPELLANT

VERSUS

JANE NJERI MAINA.....RESPONDENT

(Being an Appeal against the ruling by Principal Magistrate Hon.

F. Munyi delivered on 11th December, 2018 in NAKURU CMCC No. 1000 of 2007)

RULING

1. Before me is the Notice of Motion dated 19th September, 2019 brought under **Order 42 rule 6, Order 51 of the Civil Procedure Rules 210 and Sections 1A (1) (2) (3), 3A of the Civil Procedure Act and all enabling provisions of the law.**

2. It was brought under the Certificate of Urgency of Lynn Mwera Advocate dated 19th September, 2019.

3. It seeks orders;

1. Spent

2. Spent

3. THAT pending the hearing and determination of Civil Appeal No. 3 of 2019 there be an order of stay proceedings in Chief Magistrates Court Civil Suit No. 1000 of 2007.

4. THAT this application be heard inter-parties on such date as this Honourable Court may direct.

5. THAT this Honourable Court be pleased to issue any other Orders as it may deem just appropriate and expedient in the interest of justice.

6. THAT costs of this application be provided for.

4. It is supported by the affidavit of Isabela Nyambura, the Claims Director at Directline Assurance Company Limited sworn on the same date, and the further affidavit of Isabela Nyambura sworn on 11th October, 2019. The applicants also filed a Memorandum of Appeal on 11th November, 2019.

5. The application is opposed vide the Replying Affidavit of the respondent Jane Njeri Maria sworn on 7th October, 2019, and the further affidavit of Mark Ng'ang'a Githiru Advocate sworn on 11th October, 2019.

6. Parties chose to rely on their affidavits.

7. The gist of the application is that there exists a suit CMCC 100 of 2007 where the respondent is the plaintiff and the applicants are the

defendants. From the affidavits and annexures, the respondent was a passenger in motor vehicle registration number KAS 176R Toyota Matatu, which was involved in a road traffic accident of which she sustained injuries. She sued for damages. She closed her case on 13th May, 2014. That since then the defendant/applicant had been indulged in delaying the matter by not availing their witnesses, until 11th December, 2018 when the trial court had enough and ordered the defence case closed, fixing the matter for submissions and a date for judgment.

8. The applicants were aggrieved by that decision. Their application for stay pending an appeal before the trial court was dismissed, prompting this application.

9. For the applicant it is argued that their expert witness was in court at the time the case was ordered closed. That the trial court put a lot of emphasis on the issue of costs, awarded for the respondents, to be paid before the defence hearing, scheduled for 4th July, 2018, by which date the costs had not been paid.

10. On 11th December, 2018 when the matter came next for hearing the applicant contends they had paid the costs but they did not have the proof. That their witness was in court but the court overlooked the same and ordered the case closed.

11. This set of facts is disputed by the respondent and the counsel who contend that the costs have never been paid, and in any event the alleged payment into a National Bank Account could not have been **because** the firm of Githiru & Company Advocates does not have any account in National Bank. That the trial court had exercised its discretion in the interests of justice to bring to a close litigation that had been pending since 2007.

12. It is noteworthy that the applicant does not identify the alleged expert witness, whom the applicants claim was indeed in court when the defence was ordered closed.

13. I have gleaned from the affidavit of the respondent that it might be a doctor who conducted a second medical examination on the respondent, she explains that although the applicants had not indicated they would require a second medical examination, and although the court declined to allow it, they proceeded to file an application to compel her to attend the examination. She did so on 29th March, 2018 but by the time of the defence hearing the defence had not supplied her and her counsel with a copy of the second medical report, that there was no reasonable ground upon which the application could be allowed.

14. The issue is whether this application has any merit.

15. **Order 42 rule 6(1)** states:

“no appeal or second appeal shall operate as a stay of execution on proceedings under a decree or order appealed from.... and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such an appeal is preferred shall be at liberty, on application..... to consider such an application and to make such order thereon as it may seem just...”

16. The applicants seek stay of the proceedings in the lower court to enable them pursue an appeal against the ruling of the trial magistrate made on 11th December, 2018. In the appeal they seek to re-open their case to enable them call the expert witness on whom the defence wishes to rely.

17. The court is expected to exercise its discretion to make orders it may deem just in the circumstances.

18. The respondent is certain the witness they intend to call is the doctor who conducted the second medical examination. The applicants' claim he/she was in court, an act of good faith would have been to have that witness also swear an affidavit to confirm that he/she was in court on 11th December, 2018. The fact that no such evidence was tendered can only be an indication that the witness was not in court, and with that the applicants' central argument would collapse.

19. However, the right to an appeal is a constitutional right available to any litigant, in the system of courts that we have. Having made the said ruling it became subject to appeal by any aggrieved party. That right ought not to be in vain, the applicants have filed their Memorandum of Appeal.

20. Should the matter in the lower court be allowed to proceed to finality then their appeal to have the case re-opened to call a witness whose evidence they consider necessary in the case, will have been rendered nugatory. It will have been overtaken by the event of the judgment. Hence, it is only right that the applicants be granted this way to prosecute the appeal.

21. The application is allowed in terms of prayer 3:

THAT pending the hearing and determination of Civil Appeal No. 3 of 2019 there be an order of stay proceedings in Chief Magistrates Court Civil Suit No. 1000 of 2007.

22. Applicants to file their appeal and serve the Record of Appeal within forty five (30) days hereof, in default the stay to lapse.

23. The applicants to pay the costs of this application.

Dated, delivered and signed at Nakuru this 16th day of January, 2020.

Mumbua Matheka

Judge

In the presence of

..... Court Assistants

Applicant

Respondent