



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 440 OF 2019

APA INSURANCE LIMITED APPELLANT

VERSUS

ROSE LINNET ACHIENGRESPONDENT

RULING

1. In the Notice of Motion dated 15th November 2019 filed in court on 18th November 2019, the appellant *APA Insurance Limited* (the applicant) seeks orders staying further proceedings in Nairobi CMCC No. 10282 of 2018 pending the hearing and determination of its appeal.
2. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn on 15th November 2019 by *Ms. Judith Onyango*, the applicant's Legal Manager.
3. The context in which the application was filed as can be discerned from the grounds supporting the motion and the supporting affidavit is that the respondent, suing through her mother and next friend *Ms. Rose Adhiambo* filed a declaratory suit in Nairobi CMCC No. 10282 of 2018 seeking to enforce a judgment delivered in her favour on 16th March 2015.
4. Upon being served with summons to enter appearance, the applicant entered appearance, filed a statement of defence and a preliminary objection challenging the competence of the declaratory suit on grounds that it was statute barred considering that the judgment sought to be enforced was delivered over twelve (12) years prior to the institution of the suit.
5. The preliminary objection was heard and in a ruling delivered on 12th July 2019, the learned trial magistrate dismissed it with costs and sustained the respondent's suit. The applicant was aggrieved by the trial court's ruling and lodged the instant appeal. The applicant subsequently filed an application for stay of proceedings in the lower court which was similarly dismissed. This is what prompted it to file the application now before this court.
6. It is the applicant's case that its appeal has overwhelming chances of success and that in the circumstances, the proceedings in the lower court should be stayed because if they are not, it will suffer prejudice and injustice as it will be forced to incur expenses in terms of time and legal fees defending a suit which was a non-starter in the first place; that if stay is not granted, the appeal will be rendered nugatory as the respondent will proceed to prosecute the suit in the lower court and possibly obtain judgment which may lead to settlement of the decretal sums by the applicant in a bid to prevent its assets from being attached in the execution process; that the respondent is impecunious and in the event that the appeal succeeds, she will be incapable of refunding any money paid in execution of any decree that may be issued in her favour.
7. The application is opposed. *Ms. Rose Adhiambo* swore a replying affidavit averring that the application was an abuse of the court process as it was only meant to derail the course of justice. She denied the applicant's claim that the suit was defective for being time barred contending that prior to its institution, she had obtained leave from the trial court to file suit out of time and that in any case, the applicant through its advocates had acknowledged being indebted to the respondent and had even made part payment in the primary suit. For the above reasons, she invited this court to dismiss the application with costs for lack of merit.
8. By consent of the parties, the application was canvassed through written submissions which both parties duly filed and which I have carefully considered alongside the application and the authorities cited.
9. I wish to start by pointing out that the relief of stay of proceedings is a discretionary remedy which is only granted to an applicant who has established sufficient cause by demonstrating that unless the stay sought is granted, he or she is likely to suffer grave prejudice or injustice or that the ends of justice require that the order sought is issued. The applicant is also required to establish that the application was filed timeously and in good faith.

10. I have noted that the parties in their rival submissions mostly concerned themselves with buttressing their respective positions regarding whether or not the respondent's suit was time barred and whether the leave granted to the respondent by the trial court to file suit out of time was legally sound and the procedure that should be used to challenge such leave which in my view are issues which cannot be dealt with by this court in the context of the application under consideration.

11. In my opinion, the only issue for my determination in this application is whether the applicant has demonstrated sufficient cause to warrant the exercise of the court's discretion in its favour by granting the orders sought.

12. In opposing the motion, the respondent asserted that the application was filed for the sole purpose of derailing hearing of the suit and the course of justice and that it amounted to an abuse of the court process.

This was however a general averment which was not substantiated by any facts or evidence. From the material placed before me, I find nothing to suggest that the application was filed in bad faith with the aim of obstructing the course of justice. The application was filed timeously about a week after the trial court dismissed the applicant's application for stay of proceedings. I am not satisfied that the respondent has laid out any basis on which I can find that the application amounts to an abuse of the court process or that it was filed in bad faith.

13. It is common ground that there is an existing suit pending hearing in the lower court. The validity of the suit was challenged by the applicant in the preliminary objection which was dismissed by the trial court. The ruling in which the preliminary objection was dismissed is the subject matter of the current appeal.

14. The applicant has argued that the appeal has overwhelming chances of success which claim is denied by the respondent but without making any finding, in the event that the appeal is successful, the respondent's suit will automatically collapse. However, in the event that the appeal is dismissed, the suit will be prosecuted to its logical conclusion.

15. In view of the foregoing, it is my considered view that the interests of justice will be better served if the orders sought are granted in order to prevent the continuation of proceedings in the lower court during the pendency of the appeal. Granting the orders will save precious judicial time as it will prevent a situation where the High Court and the lower court conducts parallel proceedings and it will also save the parties' time and costs in prosecuting or defending a suit which may eventually be declared incompetent in the event the appeal succeeds.

16. Since it is impossible to predetermine the outcome of the appeal, I think it will be in the interest of both parties to have the appeal determined one way or the other before prosecution of the suit in the lower court can proceed. If stay is not granted, nothing will stop the respondent from proceeding with the hearing of the suit which as stated earlier, may lead to unnecessary costs and duplication of effort which may run counter to the overriding objective of the *Civil Procedure Act*.

17. On the other hand, if stay is granted, the respondent is not likely to suffer any prejudice which cannot be compensated by way of costs.

18. Having taken everything into account, I am persuaded to find that the applicant has demonstrated sufficient cause to justify the grant of orders staying proceedings in the lower court as sought. I therefore find merit in the Notice of Motion dated 15th November 2019 and the same is hereby allowed in terms of prayer 3.

19. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kibiku for the applicant

No appearance for the respondent

Ms Carol: Court Assistant