



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 620 OF 2014

INTRA AFRICA ASSURANCE COMPANY LTDAPPELLANT

VERSUS

KENNETH KIRIKA WATENE RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated 24th February 2020 by which KENNETH KIRIKA WATENE (the Defendant/Applicant) seeks for the following orders:-

“1. SPENT

2. THAT this Honourable Court be pleased to stay the proceedings in this suit pending hearing and determination of the appeal at the Court of Appeal, being an appeal against the Judgment delivered on 22nd November 2019 in ELC NO. 741 of 2011.

3. THAT the costs of this application be in the cause.”

(2) The application which was premised upon **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, and **Sections 3 and 3A** of the **Civil Procedure Act, Cap 21, Laws of Kenya**, and all other enabling provisions of the law, was supported by the affidavit of even date sworn by the Defendant/Applicant.

(3) **INTRA AFRICA ASSURANCE COMPANY LIMITED**, the Plaintiff/Respondent opposed the application through the Grounds of Opposition dated 3rd March 2020 which was premised upon the grounds that:-

“(a) The Plaintiff herein was not a party to the separate ELC Suit No. 741 of 2011 nor is it a party in the intended appeal. Equally, there is no pending appeal affecting the Plaintiff;

(b) It is not in the interest of justice for this court to exercise its discretion to order a stay of these proceedings. The chips will lie where they fall in the intended appeal, which appeal is in any event, without merit;

(c) The Plaintiff’s right to expeditious disposal of its case would be greatly prejudiced by a stay of these proceedings;

(d) The application is unmeritorious, misconceived and meant to clog the Plaintiff’s right to a fair, expeditious trial of this matter.”

(4) The application was canvassed by way of written submissions. The Defendant/Applicant filed his written submissions dated 12th May 2020, whilst the Plaintiff/Respondents filed written submissions dated 21st May 2020.

BACKGROUND

(5) The Plaintiff/Respondent instituted this suit vide a Plaint slated and filed on 4th April 2013. In the said suit the Plaintiff prayed for Judgment against the Defendant for:-

“(i) Kshs. 2,509,931/-

(ii) Interest and costs of the suit.”

(6) The current suit against the Defendant is based on a claim for a mortgage debt which the Plaintiff is claiming the alleged outstanding balance of that mortgage debt as well as the costs of the suit. Prior to this the Defendant/Applicant had filed before the **Environment and Land Court a Suit No. 741 of 2011 KENNETH KIRIKA WATENE –VS- PETER KIMANI KAIRU & 4 OTHERS** in which the receipt of an amount of **Kshs. 4,600,000/-** by the Plaintiff/Respondent on account of the same mortgage facility was in issue. In the ELC case the Court found that this amount of **Kshs. 4,600,000/-** was properly credited to the mortgage facility account. On **22nd November 2019**, **Hon. Lady Justice Kossy Bor** delivered her Judgment in the ELC matter dismissing the suit with costs to the Defendants.

(7) Being aggrieved by that decision of the ELC Court the Defendant/Applicant herein filed a Notice of Appeal dated **26th November 2019**. The Defendant/Applicant contends that in the circumstances it would be prejudicial for the Plaintiff/Respondent to proceed with the prosecution of this present suit while the appeal against the decision in **ELC No. 741 of 2011** remains pending. For this reason the Applicant prays that instant suit be stayed pending the determination of the said appeal. As stated earlier this application was opposed by the Plaintiff Respondents.

ANALYSIS AND DETERMINATION

(8) The Defendant/Applicant is seeking orders for stay of proceedings and the principles for grant of such a stay which is a discretionary order are well settled in law. In the case of **KENYA POWER & LIGHTING CO. LTD –VS- ESTHER WANJIRU WOKEBII [2014]eKLR**, the Court cited with approval the decision of **Hon. Justice Aaron Ringera** (Retired) in the case of **GLOBAL TOURS & TRAVELS LIMITED NAIROBI WINDING UP CAUSE No. 43 OF 2000** as follows:-

“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 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.” [own emphasis]

(9) The power to grant a stay of proceedings is a discretionary power and one may be granted premised upon the following principles:-

- (a) That the application for stay has been filed expeditiously;
- (b) That the applicant has established that he has an arguable case (appeal);
- (c) That it would be in the interest of justice to grant the stay.

(10) In this case the Judgment being appealed against was delivered on **22nd November 2019**. The Notice of Appeal against the said Judgment was filed on **26th November 2019** barely five (5) days after the Judgment was delivered. Accordingly I find that the appeal was filed expeditiously.

(11) The next question to be considered is whether the Applicant has an arguable appeal. It must be emphasized that an arguable appeal does not mean that the appeal will be successful. In the case of **EZEKIEL MULE MUSEMBI –VS- H. YOUNG & COMPANY E.A. LIMITED [2019]eKLR** the Court held as follows:-

“... 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 matters, it should bear in mind such factors as ... 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 appeal.” [own emphasis]

(12) Similarly in the case of **KENYA POWER & LIGHTING COMPANY LIMITED –VS- ESTHER WANJIRU WOKABI [supra]** the Court held:-

“... It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues ...”

(13) The Plaintiff/Respondent has in its Grounds of Opposition dated **3rd March 2020** asserted that it was not a party to **ELC Suit No. 741 of 2011** and that it is also **not** a party to the intended appeal. Whilst, it is true that the Plaintiff was not a named party to **ELC No. 741 of 2011** a perusal of the Judgment delivered in that matter on **22nd November 2019** reveals that the suit land had been charged to **Intra Africa Assurance Company Limited** (the Plaintiff/Respondent herein) and that a dispute arose between the Plaintiff and the Defendant regarding the level of the Defendants indebtedness to the Plaintiff (Intra Africa Assurance). As such I find that the Plaintiff herein was an intrinsic part of the dispute in **ELC No. 741 of 2011**. It is further apparent that one of the key questions in issue in **ELC No. 741 of 2011** (and therefore in the pending appeal) is the receipt of an amount of **Kshs. 4,600,000/-** by **Intra Africa Assurance** on account of a mortgage facility which facility is the subject matter of instant suit. It is therefore clear that the two suits are intrinsically linked. It is evident that the outcome of the pending appeal will have a direct bearing on the question of what amount if any is due on the mortgage facility which is the subject of the

instant suit.

(14) In the **EZEKIEL MULE MUSEMBI** case (supra) the Court held:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted.”

(15) For the above reasons I am satisfied that the Applicant has an arguable appeal. I am further persuaded that it would serve the interests of justice to stay the instant proceedings pending the determination of the Appeal in **ELC NO. 741 of 2011** so as to avoid conflicting decisions. Accordingly I am inclined to allow the present application. In conclusion I make the following orders:-

(i) The proceedings of the present suit be and are hereby stayed pending the hearing and determination of the appeal at the Court of Appeal against the Judgment delivered on **22nd November 2019** in **ELC No. 741 of 2011**;

SUBJECT TO

(ii) The Defendant/Applicant depositing in a joint interest earning account opened in the name of both counsel the sum of **Kshs. 2,000,000/- (Two million Shillings only)** within **thirty (30)** days of the date of this Judgment;

(iii) Failure to comply with condition (ii) above means that the stay granted will automatically lapse with no further reference to the Defendant/Applicant.

(iv) Costs of this application will be met by the Defendant/Applicant.

Dated in **Nairobi** this **11th** day of **December, 2020**.

MAUREEN A. ODERO

JUDGE