



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 271 OF 2018 (CONSOLIDATED WITH CIVIL APPEAL NO. 297 OF 2018)

(Appeal from the Ruling and order of the Hon.D.O. Mbeja, Senior Principal Magistrate in Nairobi Civil Suit No. 7141 of 2016 delivered on 28th May, 2018)

THE KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT/APPELLANT

VERSUS

GIBSON MUNGAI KIMANI.....1ST RESPONDENT

HEBERT MASENGELI2ND RESPONDENT

EDWARD GITHAE WANJAU.....3RD RESPONDENT

AND

THE KENYA RAILWAYS CORPORATION.....1ST THIRD PARTY/4TH RESPONDENT

RIFT VALLEY RAILWAYS CORPORATION.....2ND THIRD PARTY/5TH RESPONDENT

THE ATTORNEY GENERAL.....3RD THIRD PARTY/6TH RESPONDENT

RULING

The Notice of motion dated 26th June, 2016 was taken out by the Appellant/applicant. It has been brought under Order 40 Rules 1, 2 and 4 of the Civil Procedures Rules and Section 3A of the Civil Procedure Act. The applicant has sought for orders to stay proceedings in Civil Suit No. 7141/2016 in the Magistrate’s Court and all consequential orders pending the hearing and determination of the applicant’s application to set aside the ruling herein.

It is premised on the grounds set out in the body of the same and it’s supported by the affidavit sworn by Ezekiel Munyua on the 26th June, 2018.

The applicant contends that vide a Third Party Notice dated 23rd March 2017, the Defendants instituted Third Party proceedings against among others, the Applicant herein, seeking indemnity and/or contribution in the event that they are found liable for the claims raised by the plaintiff in the plaint dated the 7th day of October, 2016 and filed on the 17th October, 2015.

The Applicant filed a Notice of Motion dated the 16th February, 2018 seeking an order that the suit filed against it be struck out with costs for reason that the suit against it is misconceived, statute time-barred by limitation of time and that it has been improperly enjoined with respect to the cause of action brought against it.

The court heard the application and dismissed it vide a ruling delivered on the 28th May 2018 and ordered the parties to fast track the suit for hearing. The applicant has appealed against the said ruling in terms of the Memorandum of Appeal filed on the 19th June 2018. The applicant avers that if the orders sought herein are not granted, it shall suffer substantial loss as the Respondent are likely to proceed with the suit in the Chief Magistrate’s Court whilst the applicant has raised pertinent points of law in the Appeal which has a likelihood of success.

The 2nd and 3rd Respondents have opposed the application vide grounds of opposition filed on 9th August 2018 in which they contend that the application is scandalous, frivolous and vexatious, the memorandum of appeal does not disclose any reasonable ground, the Respondents are entitled to the fruits of their judgment or any decision of the court at any stage of the proceedings, the applicant is guilty of laches that

any issue of liability as between the 2nd to the 6th Respondents and the applicant herein can still be determined even after the Respondent's claim has been heard and determined by the trial court and that the Respondents will be prejudiced if the orders sought are granted.

When the application came up for hearing on the 10th day of December, 2018, the court was informed that the 1st Respondent has never participated in the proceedings before the trial court while the third parties did not object to the application.

The court has considered the oral arguments made by the learned counsel in support and in opposition to the application before the court.

The main prayer sought in the application is for stay of proceedings pending the hearing and determination of Appeal against the ruling delivered on 28th May, 2015 by the trial court.

The legal consideration in an application for stay of proceedings have been enunciated in many judicial decisions. They are as follows;

a. The decision whether or not to grant a stay of proceedings is a matter of judicial discretion and if the court is to grant the same, on what terms.

b. In deciding whether to grant 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 and 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 the judicial time and whether the application has been brought expeditiously. See the case of Global Tours & Travels Limited.

The main consideration in my view is whether the applicant has an arguable appeal. The applicant has argued that the Appeal is based on points of law in that the Appeal Court shall determine whether the case against the Applicant is time barred and whether the road in question, from which the purported cause of action arose, is classified as an urban road under Section 10(1) of the Kenya Roads Act and thus not falling within the scope of the Appellant's jurisdiction. These two are the main issues in the Appeal and which the court cannot determine at this point as it would amount to determining the Appeal prematurely.

The court has perused the provisions of Kenya Roads Act and in particular Section 67 thereof and I form a considered opinion that the Appeal is arguable and it's only fair that a stay of proceedings be granted pending the hearing and determination of the Appeal. Costs of the application shall abide the outcome of the Appeal.

It is so ordered.

Dated, signed and delivered at NAIROBI this 14th day of February, 2019

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents