



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 610 OF 2007

NAILA QURESHI.....1ST PLAINTIFF/RESPONDENT

KAILESH JOBANPUTRA....2ND PLAINTIFF/RESPONDENT

-VERSUS-

DR. RAFIQUE PARKAR.....1ST DEFENDANT/APPLICANT

DR. NAJI SAID.....2ND DEFENDANT/APPLICANT

AGA KHAN HEALTH

SERVICE KENYA.....3RD DEFENDANT/APPLICANT

RULING

1. The 1st and 2nd defendants have filed the Notice of Motion dated 14th September, 2018 which Motion stands supported by the grounds set out on the body thereof and the facts deponed in the affidavit sworn by *Samir Inamdar*. The orders sought therein are as follows:

i) Spent.

ii) THAT there be a stay of proceedings in Civil Case No. 610 of 2007 pending the hearing and determination of the intended appeal against the ruling delivered by this court on 5th July, 2018.

iii) THAT the costs of the application be provided for.

2. In his supporting affidavit, Samir Inamdar who is the advocate representing the 1st and 2nd defendants, stated that the said defendants had previously filed an application seeking to have certain medical documents produced by the plaintiffs expunged from the court record on the basis that they are inadmissible since the makers thereof would not be called as witnesses and consequently, the defendants would not have an opportunity to cross-examine them on the same.

3. The deponent added that upon filing of written submissions by the respective parties on the aforesaid application, this court vide its ruling dated 5th July, 2018 dismissed the application and hence the intention to appeal against the ruling. The deponent averred that a notice of appeal has been filed in this regard.

4. *Zul Mohamed*, in his replying affidavit sworn on behalf of the 3rd defendant, largely concurred with the sentiments raised in the supporting affidavit save to add that it would be in the interest of justice to first have the Court of Appeal determine the issue; that unless the substantive order sought is granted, the appeal will be rendered nugatory and that the plaintiffs will not be prejudiced in the process.

5. The Motion stands opposed by way of Grounds of Opposition filed by the plaintiffs on 4th October, 2018. In essence, their arguments revolve around the fact that this is an old matter which is yet to be determined and the application will only delay the same further. That no prejudice will be suffered if the case proceeds with the documents already filed since the defendants will have an opportunity to appeal at the end. The plaintiffs further argued that there has been unreasonable delay in bringing the application since the delivery of the ruling and filing of the notice of appeal and in any case, the defendants have not demonstrated that they stand to suffer substantial loss should the matter proceed to hearing; carefully adding that the plaintiffs stand to suffer prejudice which far outweighs that of the defendants.

6. Parties presented their respective oral arguments in respect to the application. Mr. Inamdar for the 1st and 2nd defendants began by submitting that this court has the inherent jurisdiction to grant an order for stay of the proceedings, citing the case of *Harnam Singh &*

others v Mistri [1971] EA and adding that if a stay is not granted and the appeal turns out to be successful, the same will be rendered nugatory and the hearing will have to begin afresh. It was his further submission that the defendants will suffer prejudice by being dragged through the trial. That the principles applied in granting a stay of the proceedings were referenced in the case of *Re Global Tours* and according to the aforementioned case, substantial loss need not be proved.

7. The advocate for the 1st and 2nd defendants was careful to add that the delay in having the case heard and determined was caused mostly by the plaintiffs and cannot therefore be attributed to the defendants. He argued that the application has been brought without unreasonable delay and a request for the typed proceedings has been made. That it would be unjust to refuse to grant the order sought.

8. *Mr. Mohamed* for the 3rd defendant, in supporting the arguments made by *Mr. Inamdar*, submitted that there are compelling reasons for granting an order for a stay of the proceedings.

9. In his rebuttal arguments, *Mr. Oduor* for the plaintiffs while admitting that the granting of an order for stay of the proceedings is purely a discretionary matter, submitted that the defendants are simply seeking to delay the matter unreasonably. Counsel indicated that one of the doctors involved in preparing the disputed medical reports has since passed on and hence, even if the appeal were to succeed, the defendants would be unable to cross-examine him. That in any case, the remaining witness is unavailable to attend court for the purpose of giving evidence. *Mr. Oduor* restated that the plaintiffs stand to suffer a greater deal of prejudice since the case is over ten (10) years old and it remains unclear when exactly the appeal will be concluded. That at the same time, the 1st plaintiff continues to undergo recurrent treatment and is financially strained.

10. *Mr. Inamdar* responded to the above submissions by contending that the application was timeously filed and that the purported demise of the witness has not been deponed to in an affidavit and there is therefore no way to confirm the true position.

11. I have considered the grounds on which the Motion is premised together with the supporting affidavit, reply and grounds of opposition, not forgetting the rival submissions by the respective parties. Having done so, it is my mandate to determine whether or not a stay of the proceedings ought to be granted in this instance.

12. It is noteworthy that the intended appeal lies from the ruling delivered by this court on 5th July, 2018. I have perused the record and established that the 1st and 2nd defendants filed their notice of appeal within the timelines set out under *Rule 75* of the Court of Appeal Rules and have as well annexed a draft memorandum of appeal to their application.

13. I am also alive to the fact that the granting of a stay of proceedings is a purely discretionary matter. This was restated in *Re Global Tours & Travels Limited (Nairobi High Court Winding Up Cause No. 43 of 2000)* which authority has been cited severally and wherein the court held the following:

“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...”

14. Furthermore, the Court of Appeal in the case of *National Bank of Kenya Limited & another v Geoffrey Wahome Muotia [2016] eKLR* appreciated that:

“...the purpose of orders of stay of execution, and a stay of further proceedings, will be to maintain the status quo and to ensure that there is a proportionate resolution of the appeal.”

15. That said, the principles surrounding a stay of proceedings have been made reference to, in numerous authorities. Take for instance the Court of Appeal case of *UAP Provincial Insurance Company Limited v Michael John Becket, Civil Application No. 204 of 2004* relied upon by the court in *Michael Njai v Juan Torres & another [2015] eKLR*. I must add that the latter case was appealed against in part. That notwithstanding, the court in the earlier case reasoned that:

“In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise...”

16. Similarly, the authority of *Re Global Tours & Travels Limited* (supra) mentioned by Honourable Justice Mboghli Msagha in his analysis of *William Kamunge & 2 others v Muriuki Mbithi [2016] eKLR* stated that:

“...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”

17. I shall first address the question of whether the application has been brought expeditiously. I do recall that the ruling on which the intended appeal is premised was delivered on 5th July, 2018. The defendants in turn filed a Notice of Appeal on 16th July, 2018 and explained that they had applied for typed copies of the proceedings together with the relevant court order. I have perused the documents annexed to the application and verified that a letter to that effect was filed in court on 16th July, 2018. The Motion was thereafter filed on 17th September, 2018. Under the circumstances, I am satisfied that the Motion was filed expeditiously.

18. As concerns the second issue on whether or not the appeal is arguable, it is imperative for me to accentuate that the intended appeal need

only raise arguable issues irrespective of whether the same will eventually succeed or not. I have perused the annexed draft memorandum of appeal and observed that the grounds set out therein largely touch on the admissibility of the medical reports and opinions to be relied upon by the plaintiffs. To my mind, the said grounds are not frivolous; rather, they raise arguable issues. It is not for me to delve into the merits of the appeal as these will be sufficiently addressed in the appropriate forum.

19. The third principle relates to whether or not the appeal will be rendered nugatory. Having taken into consideration the positionS by the respective parties in this regard, I am of the reasonable view that the outcome of the appeal will automatically impact on the course of the suit since the appeal is tied to the challenged medical documents that form a substantial part of the plaintiffs' case. In the event that the parties proceed with the hearing while the appeal is in place, there will likely be a crisis once the appeal is determined, especially if the same is allowed. It would therefore be prudent to have the proceedings stayed until such time as the appeal is heard and determined.

20. This brings me to the fourth and final principle on expeditious disposal of cases. In close relation to my arguments made directly hereinabove, the courts and respective parties have a collective duty to ensure expediency in the disposal of cases. I have observed that this is an old matter and the plaintiffs have pointed out their desire to have the matter heard and concluded. Be that as it may, I am convinced that to allow the hearing to proceed simultaneously with the appeal would be to throw the participants into a ball of confusion particularly where the appeal succeeds in the end. The suit would likely begin from where it has reached and hence impede its intended expeditious disposal. It would therefore be practical to preserve the status quo of the parties in a bid to save on judicial time.

21. In view of the foregoing, I find merit in the Motion and allow prayer ii) of the same

Costs shall abide the outcome of the appeal.

Dated, signed and delivered at NAIROBI this 7th day of February, 2019

L. NJUGUNA

JUDGE

In the presence of:

..... for the Defendants/Applicants

..... for the Plaintiffs/Respondents