



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CIVIL DIVISION

CIVIL APPEAL NUMBER 2 OF 2018

BETWEEN

ABDIGAN OMAR MOHAMED.....1ST APPELLANT

MOHAMED IBRAHIM SANTUR.....2ND APPELLANT

ENOCK KIPTOO SAWE.....3RD APPELLANT

AND

RWJ (Minor suing through next friend and motherGAT....RESPONDENT

(Being an appeal against the ruling dated 24.8.2018 by Hon.V. O. Adet, SRM

in Kapenguria PMC Civil Case NO. 50 of 2012))

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Introduction

1. The application before me is the Notice of Motion dated 30th November 2018. The same is expressed to be brought under **sections 1A and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 rule 1 and Order 42 rule 6 of the Civil Procedure Rules, 2010** and all other enabling provisions of the law. By the said application, the applicant seeks an order of stay of proceedings herein pending the hearing and determination of the Appeal filed herein against the ruling delivered on 30th August 2018 by Hon. V. O. Adet, SRM, dismissing the applicant's application dated 24th August 2018. The applicants also pray for such other and/or further orders as the court may deem fit to grant.

2. The application is premised on six grounds that are set out on its face, the main ground being that the lower court suit was set for delivery of judgment on 6th December 2018; that should the matter proceed to delivery of judgment, the applicant's appeal herein risks being rendered nugatory and further that the applicants may end up being condemned unheard and pay a fraudulent claim. Finally, the applicants contend that the appeal raises triable issues which cannot be wished away.

3. The application is also supported by the affidavit sworn by KELVIN NGURE, the senior claims officer **Direct Line Assurance Company Limited**, which is the insurer of the applicants motor vehicle registration number KBH 285C in which he depones that Kapenguria PMCC No. 50 of 2012 is based on fraud. He also depones that the application dated 24.8.2018 by the applicants was intended, if same had been allowed, to give the applicants an opportunity to file their list of witnesses and documents to prove the fraud. The deponent also prays that allowing this application will not prejudice the respondent in such a way and to such an extent as would not be compensated with payment of costs.

Response to the Application

4. The application is opposed vide the respondents Replying Affidavit sworn on 8th December 2018. The deponent avers that the applicants

having had the opportunity to do what they wanted to do through their application dated 24th August 2018 gave the respondent the chance to proceed with the hearing of the case to its logical conclusion. The respondent also depones that the applicants did not show the trial court and have not shown this court why they did not file their list of witnesses and list of documents together with their statement of defence dated 25th October 2012 or soon thereafter or even sometime thereafter when proceedings are closed.

5. The respondent also deponed that the applicants, as defendants caused undue delay in the matter by failing to proceed with their defence for over two years and that in the circumstances the applicants have been extremely indolent. The respondent prays that the applicants' application be dismissed with costs.

Background

6. Briefly, the respondent herein filed suit against the applicants vide their fast track plaint dated 13th August 2012 and filed in court on 23rd August 2012. The respondent's claim arises out of an alleged road traffic accident which occurred on or about 30th May 2012 at around 6.00pm at Kamatira area along the Lodwar-Makutano road involving motor vehicle registration number KBH 285C, Nissan UD Bus and the respondent who was said to be fare-paying a passenger in the said motor vehicle. It was alleged the accident was caused by the negligence of the applicants as detailed at paragraph 8 of the plaint and that as a result of the said accident, the respondent suffered injuries as follows:-

- a) Blunt injuries to the neck with swelling.
- b) Cut wound on the anterior aspect
- c) Cut wound on the left side of face below eye about 2.0cm x 0.2cm
- d) Blunt injuries to the chest and back

7. The respondent prayed for both special and general damages, the latter being for pain suffering and loss of amenities. The respondent also prayed for interest on amounts granted by court and for such other relief as the Honourable court would deem just to grant.

8. The applicants filed their defence dated 18th October 2012 and filed in court on 25th October 2012. They denied the claim and at paragraph 7 thereof, they pleaded fraud and/or misrepresentations on the part of the respondent, alleging thereby that the respondent's claim was unlawful, improper and an abuse of the court process.

9. The case thereafter proceeded to hearing and when it reached defence stage, the applicants woke up and applied for leave of the court to file list of witnesses and documents. That is the application which gave rise to the ruling, the subject of this appeal, an issue that has been exhaustively deponed to in the respective affidavits. Everything in this matter is now on hold pending the outcome of the instant application as well as the appeal.

The Law

10. As earlier pointed out, the instant application is brought under the provisions of **sections 1A and 3A of the Civil Procedure Act as well as Order 51 rule and Order 42 rule 6 of the Civil Procedure Rules 2010**. **Section 1A of the Civil Procedure Act** has come to be known as the "**Oxygen Principle**" whose provisions are intended to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Prior to the enactment of **Section 1A**, the burden fell on the provisions of **section 3A of the Civil Procedure Act**, whose provisions donate inherent powers to the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

11. **Order 51 Rule 1 of the Civil Procedure Rules** sets out the procedure for filing of applications and for the manner in which those applications, once filed, shall be heard by the court. On the other hand, **Order 42 rule 6 of the Civil Procedure Rules** specifically makes provision for the issue in controversy in this case. An applicant who seeks an order of stay of execution must demonstrate to the court that:-

- a) substantial loss may result to the applicant unless the order sought is made and
- b) the application has been made without unreasonable delay; and
- c) such security at the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

12. The courts have stated on numerous occasions that all the three conditions under **order 42 rule 6(2) of the Civil Procedure Rule** must be fulfilled by an applicant seeking a stay order.

Submissions

13. The parties filed and exchanged their very detailed written submissions together with relevant authorities. I have had the opportunity to read through the rival submissions which bring out the two schools of thought as to what may or may not constitute undue delay. All the authorities cited by parties make interesting reading and also point to the fact that each case must be considered on its own merit.

14. For purposes of this ruling an extract, an extract from the case of **Jason Ngumba Kagu versus Intra Africa Insurance Company Limited**

[2014] eKLR will suffice. In the said case, the learned judge stated the following concerning **order 42 rule 6(2) of the Civil Procedure Rule:-**

[9]The thresholds for granting a stay pending appeal are set out under order 42 rule 6 of the Civil Procedure Rules. The conditions therein simply act as legal guiding principles or considerations in the exercise of court's discretion-that is quite in line with the command of law that discretion should be exercised judicially and in accordance with defined legal principles. And to my knowledge, I do not think those considerations under order 42 rule 6 of the Civil Procedure Rules have been obliterated or in any way diminished by the introduction of the principle of overriding objective in sections 1A and 1B of the Civil Procedure Act as the applicant seems to argue. On the contrary; the correct position arising out of the decisions of the Court of Appeal and recently the Supreme Court is that the principle of overriding objective now enables the court to have a much wider approach in applying those thresholds set out by law in a manner that it will exercise discretion for the sake of substantive justice under the Constitution. And, that does not mean the conditions in Order 42 rule 6 of the Civil Procedure Rules are to be ignored or have been supplanted by other utopia or superior grounds. What it means and I have already stated this, is that courts should apply them within the constitutional desire to serve substantive justice by acting fairly and justly; in the circumstances of each case as opposed to strict application thereof without regard to the context and the demands of justice in the case. Such approach and development of the law is a constitutional matter which recognizes that the law has always kept growing to greater levels of refinement, as it expands to cover new situations exactly not foreseen before. See the case of Suleiman versus Amboseli Resort Limited (2004) eKLR 589 Ojwang Ag. J (as he then was and Justice Hoffman in Films Rover International [1986] 3 All ER 772, that I the test and approach I shall apply here. Let me start with the straight forward issue on whether this application has been brought without unreasonable delay."

Analysis:

a) Whether this application was made without undue delay

15. The ruling in this case was made on 30th August 2018 and the appeal against the said ruling filed on 13th September 2018, just about fourteen days. The instant application for stay was made on 12th September 2018. Was there unreasonable delay in this case? In my humble view, there was no unreasonable delay in bringing the present application. Most of the arguments put forward by the respondent are premised on the fact that the subject suit was filed in 2012 and that the applicants did not place before the lower court and also have not placed before this court the reasons for their failure to file the list of witnesses and list of documents simultaneously with the statement of defence. This reasoning in my humble view, is flawed, because it is importing extraneous reasons into **order 42 rule 6(2) of the Civil Procedure Rules**. Accordingly, I am satisfied that the application was brought without undue delay.

b) Will the applicants suffer substantial loss if order sought is not granted?

16. The applicants contend that if it eventually turns out that the respondent's claim was based on fraud and the same is allowed without their being properly heard they risk suffering a miscarriage of justice. Without attempting to get into the merits of the appeal, I am satisfied that the probable loss of the applicants is not remote; that it is real and that such loss cannot be compensated by way of costs, and more so, when it is not clear that the respondent has the capacity to refund monies that may eventually be granted and paid out by the applicants. And indeed if the order sought is not granted, the appellant's appeal shall be rendered nugatory.

c) Security

17. This a case in which there is no judgment, but there is no doubt that once proceedings are stayed, the respondent will be taken back in time as far as the hearing and determination of the case is concerned. There is also an appeal pending. This court cannot say at this stage whether or not the appeal will succeed but the applicants who have not acted with diligence at all times since filing of their defence on 25th October 2012 cannot just be left to walk away. The applicants have themselves undertaken to abide by whatever terms this court may impose as security for costs.

Conclusion

18. For the reasons hereinabove given, I now make the following orders:-

- 1) There shall be stay of proceedings in Kapenguria PMCC No. 50 of 2012 pending hearing and determination of the Appeal filed herein against the ruling delivered on 30th August 2018 by Hon. V. O. Adet (SRM) dismissing applicant's application dated 24th August 2018.**
- 2) The applicants shall compile, file and serve Record of Appeal within thirty (30) days from the date of this ruling.**
- 3) Within thirty (30) days of filing of Record of Appeal, the applicants shall comply with order 42 rule 11 of the Civil Procedure Rule**
- 4) Costs of this application shall abide the outcome of the Appeal.**

19. Orders accordingly.

Ruling delivered, dated and signed in open court at Kapenguria on this 9th day of April, 2019

RUTH N. SITATI

JUDGE

In the presence of:-

M/S Chebet holding for Kairu Mc Court for applicants

M/S Opondo for Gacathi for respondents

Mr. W. Juma – court assistant