



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: MRIMA, J.]

CIVIL APPEAL NO. 136 OF 2018

KENNEDY OTIENO APIYO.....APPELLANT

VERSUS

ELIZABETH ACHIENDA ANDHIRA

GEORGE OPIYO ABUORO.....RESPONDENTS

(Being an appeal arising from the judgment and decree by Hon. R.K. Langat, Senior Resident Magistrate in Rongo Principal Magistrate's Civil Case No. 40 of 2015 delivered on 29/06/2017)

RULING

1. The Notice of Motion under consideration in this ruling is evenly dated and filed on 28/03/2019. The application was filed by **Monarch Insurance Co. Ltd** (hereinafter referred to as '**the Applicant**') and sought the following orders: -

(1) The Application herein be certified urgent and same be heard ex-parte in the first instance.

(2) Pending the hearing of the Application herein, the Honourable Court be pleased to grant interim orders of stay of execution of the decree in the primary suit vide Rongo 40/2014 and the declaratory suit vide Rongo 227/2018

(3) The Honourable Court be pleased to grant an order of stay of execution of the decree in the primary suit vide Rongo 40/2014 and the declaratory suit vide Rongo 227/2018 pending the hearing and determination of MIGORI HCCA NO. 136/2018.

(4) Costs of this Application do abide the Appeal.

(5) Such other and/or further orders as this Honourable court may deem just and expedient be granted.

2. The application is premised on the grounds on its body and is supported by the Affidavit of one **Obed Ireri** sworn on 28/03/2019.

3. The application was strenuously opposed by the Respondents *vide* a Replying Affidavit by **Elizabeth Achieng Andhira** sworn and evenly filed on 23/04/2019.

4. The application was heard by way of written submissions where both Counsels duly complied. One of the issues raised by the Respondent was the Applicant's *locus standi* to institute and sustain the application. I note that the issue ought to have been raised by way of a preliminary objection. I will nevertheless deal with the issue.

5. The brief background to the application is that the Respondents filed *Rongo Principal Magistrate's Court Civil Case No. 40 of 2015* (hereinafter referred to as '**the suit**') against **Kennedy Otieno Apiyo**. The Respondents sued as the Legal Administrators of the estate of **Maurice Oyugi Nyabwoyo** who was involved in a road traffic accident on 16/11/2013 and subsequently passed on. They claimed for damages under the **Fatal Accidents Act** and the **Law Reform Act**.

6. The suit was heard and judgment in favour of the Respondents rendered on 29/06/2017. On 09/10/2018 this Court granted leave to Kennedy Otieno Apiyo to lodge an appeal against the said judgment. *Civil Appeal No. 136 of 2018* was filed on 12/10/2018. The application under consideration was filed on 28/03/2019.

7. From the record it appears that upon entry of the judgment in the suit the Respondents filed a different suit in *Rongo Principal Magistrate's Court Civil Case No. 227 of 2018* (hereinafter referred to as '**the declaratory suit**'). The declaratory suit was against the Applicant herein as the insurer of the motor vehicle which was involved in the accident subject of the suit. The declaratory suit was also determined in favour of the Respondents herein. The Applicant then filed a Notice of Motion in the declaratory suit and sought for a stay of execution of the judgement in the suit. The application was dismissed on 13/03/2019 and on 28/03/2019 the Applicant filed the application herein.

8. The Respondents' objection to the application was that the appeal before this Court is against the suit whereas the application was filed by the Applicant who was never a party in the suit. The objection is merited. The Applicant is not a party in this appeal and is yet to be so enjoined. It hence lacks the *locus standi* to file and prosecute the application.

9. Whereas an appeal is pending only parties to it or any other party properly enjoined can file and sustain proceedings in the appeal. The objection transcends those which can be regarded as technical objections as it goes to the root of the matter. The Applicant is a bystander whose invitation in the appeal has not been sought. It lacks the right to institute any proceedings in the appeal.

10. The application cannot therefore stand and is hereby struck out with costs against the Applicant, Monarch Insurance Co. Ltd. The costs are assessed at Kenya Shillings Twenty Thousands Only (Kshs. 20,000/=).

11. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of October 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Wesonga Counsel instructed by the firm of Messrs. Mose, Mose & Milimo Advocates for the Applicant.

Miss Kusa Counsel instructed by the firm of Messrs. Khan & Associates Advocates for the Respondents.

Evelyne Nyauke – Court Assistant