



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 34 OF 2015**

**DODHIA MOTORS LIMITED.....APPELLANT**

**VERSUS**

**MBATHI MULE..... 1<sup>ST</sup> RESPONDENT**

**COSMAS MBALYA KILONZO.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the orders of I.M. Kahuya delivered on 2.3.2015 in CMCC No 1574 of 2010 at Machakos)*

**BETWEEN**

**MBATHI MULE.....PLAINTIFF**

**VERSUS**

**COSMAS MBALYA KILONZO.....1<sup>ST</sup> DEFENDANT**

**DODHIA MOTORS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant sought to move this court vide notice of motion brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1, Order 22 of the Civil Procedure Rules and all other enabling provisions of the law. The notice of motion is dated 11<sup>th</sup> January, 2019 and sought orders for consolidation of appeals 188 of 2015, 197 of 2014 and 19 of 2016. The application also sought stay of execution of Machakos CMCC 1572/10, 1569/10, 1568/10, 1566/10 and proceedings in 1573/10, 1570/10, 1565/10 and 1576/10 pending hearing and determination of the appeal as consolidated.

2. The application was based on the grounds that the primary suit emanated from a road traffic accident that occurred on 28.5.2010 involving Motor Vehicle Registration Number KAS 480C that is owned by the applicant as a registered owner and the 2<sup>nd</sup> respondent as a beneficial owner and that the plaintiffs were passengers in the suit vehicle and further that the issues for determination in all the appeals are liability between the registered and beneficial owner. The applicant stated that some of the suits have judgements and others are pending hearing hence it is pertinent that the issues raised in the appeal are determined before execution and or further proceedings. The application was supported by the affidavit of Elizabeth Isika that has not been commissioned. Annexed to the affidavit are copies of Memorandums of appeal in respect of Civil Appeal 188 of 2015, 197 of 2014 and 19 of 2016.

3. In reply to the application, learned Counsel Mutunga & Co Advocates filed grounds of opposition dated 25<sup>th</sup> March, 2019. Learned counsel argued that the application is frivolous, incompetent, vexatious and bad in law, incurably defective, an abuse of the court process, an afterthought and brought in bad faith, brought after inordinate delay, overtaken by events. In addition learned counsel sought to inform the court that the applicant has already settled this matter hence admitting the plaintiff's claim and all the other matters in the series.

4. The application was canvassed vide written submissions. Learned counsel for the applicant referred this court to the case of **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa (2000) eKLR**, where Justice Maraga( as he then was) observed that:

**The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-**

- 1. Some common question of law or fact arises in both or all of them; or**
- 2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or**
- 3. For some other reason it is desirable to make an order for consolidating them.”**

5. Learned counsel submitted that as per the affidavit in support the primary suit emanated from a road traffic accident that occurred on 28.5.2010 involving Motor Vehicle Registration Number KAS 480C that is owned by the applicant as a registered owner and the 2<sup>nd</sup> respondent as a beneficial owner and that the plaintiffs were passengers in the suit vehicle and that the reliefs sought in all the suits are general and special damages. Counsel also referred the court to the case of **Korean United Church of Kenya & 3 Others v Seng Ha Sang (2014) eKLR** where it was observed that “Consolidation of suits is done under the inherent powers of the court and for purposes of achieving the overriding objective of the Civil Procedure Act that is for expeditious and proportionate disposal of civil disputes. Therefore, the main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action”

6. On the issue of stay of proceedings pending appeal, counsel referred this court to the case of **Kenya Power & Lighting Ltd v Esther Wanjiru Wokabi (2014) eKLR** where it was observed that :

**“The court’s discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by the following three main principles;**

- a) Whether the applicant has established that he/she has a prima facie arguable case.**
- b) Whether the application was filed expeditiously and**
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”**

7. Learned counsel for the appellant M/s Mulwa Isika and Co. Advocates submitted that the appeal is arguable as per the annexures to the application and urged the court to allow the orders. On the issue of stay pending appeal, counsel relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the application has met the threshold for grant of the order of stay.

8. In response, learned counsel for the respondent submitted that the appellant settled the claim hence the application is overtaken by events. Counsel urged the court to dismiss the application.

9. Having considered the pleadings and rival submissions, the issues to be determined are whether there was a valid affidavit in support of the application and whether the court should grant the orders sought namely stay of execution, stay of proceedings and consolidation of suits.

10. With regard to the 1<sup>st</sup> issue, the Oaths and Statutory Declarations Act, Order 19 Civil Procedure rules are to the effect that an affidavit ought to be commissioned by a commissioner for oaths. In the case of **Ismail Suleiman & 9 Others v Returning Officer Isiolo County, (2013) eKLR** Makau J., dismissed a petition where the supporting affidavits were not commissioned as required under Oaths & Statutory Declarations Act. In **Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others [2018] eKLR** it was held that affidavits which are not commissioned by a commissioner of Oaths appointed as provided by the Oaths and Statutory Declarations Act are not affidavits but mere statements. In this regard, the affidavit of Elizabeth Isika dated 11<sup>th</sup> January, 2019 that has not been commissioned is not an affidavit but a mere statement.

11. On the 2<sup>nd</sup> issue, counsel referred the court to Order 42 Rule 6 of the Civil Procedure Rules in support of the prayer for stay of execution pending the appeal. On record was an appeal that was lodged on 13<sup>th</sup> March, 2015 that sought to appeal against the ruling that was delivered on 2.3.2015. A copy of the said ruling had not been annexed to the application. However the record bears witness that the ruling is a refusal to set aside the interlocutory judgement that was entered in CMCC 1574 of 2010 selecting the suit in the trial court as a test suit on the grounds that the court was functus officio after a consent was entered to have the said suit as a test suit. The question is, can the court stay execution in respect of Machakos CMCC 1572/10, 1569/10, 1568/10, 1566/10 without having knowledge of the contents of the judgement in respect of the same? The answer is a resounding NO. The record bears witness that by consent CMCC 1574 was selected as a test suit to determine liability in respect of inter alia Machakos CMCC 1572/10, 1569/10, 1568/10, 1566/10 and there is nothing to show the court that judgement in respect of the said of Machakos CMCC 1572/10, 1569/10, 1568/10, 1566/10 was entered. In the words of Order 42 Rule 6 of the Civil Procedure Rules:

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

12. In the absence of a decree or order in respect of Machakos CMCC 1572/10, 1569/10, 1568/10, 1566/10, the court cannot make any stay of execution. Therefore the 1<sup>st</sup> limb of the jumbled up prayer 2 of the application fails.

13. With regard to stay of proceedings in 1573/10, 1570/10, 1565/10 and 1576/10 pending hearing and determination of the appeal as consolidated I would need to address the issue of consolidation of suits.

14. Order 11 rule 3 Civil Procedure Rules provides that during the pretrial conference the court may consider consolidation. Section 81 of the Civil Procedure Act places a duty on the rules committee to make rules that govern consolidation of suits and appeals and as it is no such rules have been made and thus I will refer to the East African Court of Appeal decision in the case of **STUMBERG & ANOTHER v POTGIETER (1970) EA 323** where KNELLER J observed at Page 326 that:

***“A broad principle has emerged from English decisions in relation to consolidation applications. It is this, where there are common question of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered”***

15. In the present appeal I have noted that the facts of the application arose from a refusal to set aside the interlocutory judgement that was entered in CMCC 1574 of 2010 selecting the suit in the trial court as a test suit on the grounds that the court was functus officio after a consent was entered to have the said suit as a test suit. Having found that the affidavit of the applicant is a mere statement, it would be foolhardy

to find that the court is seized with information of what the suits 1573/10, 1570/10, 1565/10 and 1576/10 are about. The court cannot tell the related questions of law to be decided in the said cases and in playing the devil's advocate, appeal against CMCC 1570 of 2010 relates to a ruling to disregard a defence whereas the appeals against CMCC 1573, 1565 and 1576 of 2010 related to a ruling that was delivered on 28<sup>th</sup> October, 2015 and as it is, the court is not able to see the common legal and factual issues that run through the said cases so as to establish whether consolidation is appropriate.

16. For those reasons, prayer 1 and the remainder of prayer 2 must fail. In the result the application dated 11.1.2019 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **20<sup>th</sup>** day of **November, 2019**.

**D. K. Kemei**

**Judge**