



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 8 OF 2018**

**TATA AFRICA HOLDINGS (KENYA) LTD.....PLAINTIFF**

**VERSUS**

**ACE MOTORS LTD.....DEFENDANT**

**RULING**

The applicant filed an application on 14<sup>th</sup> may 2019 seeking the following orders;

a) That the court be pleased to stay further proceedings herein pending the hearing and determination of the Plaintiff's appeal being Kisumu Court of Appeal Civil Appeal No. 6 of 2019.

The appeal is against the ruling delivered on 22<sup>nd</sup> October 2018.

**APPLICANT'S CASE**

The applicant filed submissions on 25<sup>th</sup> June 2019. He relied on Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 37 page 330 and 332 on the threshold for stay of proceedings. It further submitted that had the court taken into consideration the contents of the replying affidavit filed by the applicant it would have reached a contrary decision. The object of appeal goes to the root of the merits of the suit therefore if the appeal is allowed, any further proceedings will be rendered useless.

It cited the case of Global Tours 7 Travels Limited, Nairobi. Winding Up Cause No. 43 of 2000 and submitted that the court has jurisdiction to grant the orders sought in the interest of justice. Further, the applicant has filed an appeal and has the natural and undoubted right to seek the intervention of the court of appeal. The appeal raises cogent issues which ought to be heard on merit.

**RESPONDENT'S CASE**

The respondent filed submissions on 17<sup>th</sup> September 2019. It submitted that for the applicant to succeed it must show that his appeal is arguable and that unless the court grants it an injunction or stay as the case may be the success of that appeal will be rendered nugatory.

It cited the case of *Wasika Walucho Ally v Modyn Credit Ltd (2016) eKLR* and submitted that the applicant has not raised any argument different or in departure to what was raised in opposition to the respondent's application that sought unconditional leave to defend the suit. The application is an abuse of the court process as the honourable court exercised its discretion in granting the respondent leave to defend the suit. The intended appeal raises no compelling arguments and reasonable grounds for the same to be allowed by the court.

The applicant also seeks to appeal against the courts' discretion. In line with the decision in *Parliamentary Commission v Martin Nyaga Wambora & others (2018) eKLR* and *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others*, the judge did not misdirect himself and he properly applied himself to the issues at hand.

The applicant has failed to demonstrate that if the appeal succeeds it will be rendered nugatory if the stay is not granted by this honourable court. The honourable judge exercised his unfettered jurisdiction when he granted the respondents leave to defend the suit. The suit was initially filed in Eldoret where judgment was entered against the applicant. A subsequent application by the defendant/respondent to set aside the judgment and leave to defend the same suit was filed in the same registry. The applicant then decided to file the appeal in Kisumu yet there is a court of appeal in Eldoret. The filing of the appeal in Kisumu is an abuse of the court process.

The application should be dismissed with costs.

**ISSUES FOR DETERMINATION**

a) Whether the court should stay proceedings pending determination of the appeal.

The appeal is preferred against a ruling setting aside an ex parte judgment wherein the court allowed the respondent leave to defend the suit.

*Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332*, states that:

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”**

**“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”**

**“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The application for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”**

In *Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eCLR* the court of appeal stated the principles to be applied in considering an application for stay of execution and the proceedings as follows: -

**“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”**

This requires the court to establish whether the appeal is arguable and that if stay is not granted the success of the appeal will be rendered nugatory.

The appeal herein is against a discretionary order that granted the respondent leave to defend the suit. In *Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eCLR* the Supreme Court stated;

**On appeal of this decision, the Court of Appeal (in *Mbogo and Another v Shah* [1968] EA 93 at 96) affirmed the decision of the High Court thus:**

***“We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”***

The appeal is premised on the averment that the claim is liquidated but the respondent disputes the same. This is an issue which both parties dispute and it is trite law that judgment can only be entered where there is a liquidated sum. Given that the same is in dispute, it is in the interest of justice that both parties be heard.

Further, given that the cause of action is in Eldoret and the application for leave to file the appeal was also filed in Eldoret, the applicant choice to file the appeal in Kisumu while there exists an appeal registry in Eldoret is suspect. The same has not been explained and defeats reason. It amounts to an abuse of the court process and manifests itself as a tactic to delay the matter from proceeding any further. *Section 15* of the *Civil Procedure Act* provides;

**Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—**

**(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain;**

**or**

**(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or**

**(c) the cause of action, wholly or in part, arises.**

On the foregoing considerations I do find that the application lacks merit as the applicant has failed to meet the threshold for granting stay of proceedings. It is dismissed with costs to the Respondent

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 21<sup>st</sup> day of November, 2019.**

In the presence of:-

Mr. Nyagakah for Plaintiff/Respondent (absent)

Mrs. Khayo holding brief for Mr. C.F. Otieno for defendant.

Ms Abigael - Court clerk