REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL NO 103 OF 2018

KIOKO PETER.....APPELANT

VERSUS

KISAKWA NDOLO KINGOKO.....RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated the 16th day of August, 2018 in which **KIOKO PETER** (the applicant) seeks an order of stay of proceedings in **MACHAKOS C.M.C.C No. 59 of 2016** pending the hearing and determination of an appeal filed against the ruling on refusal of adjournment delivered by the Senior Resident Magistrate Honourable Shikanda on the 9th day of August, 2018.

2. The applicant also prays that the order of the Lower court be set aside and that he be awarded costs of the application.

3. The application was filed under ***Order 51 rule 1*** and ***Order 42 rule 6*** of the ***Civil Procedure Rules***. It is premised on the grounds stated on the body of the motion and is supported by an affidavit sworn by the appellant on 16th August, 2018.

4. The respondent **KISAKWA NDOLO KINGOKO** sued the applicant in civil case No 59 of 2016 in the Chief Magistrate's Court at Machakos seeking among other reliefs general damages for injuries as a result of an accident alleged to have been caused as a result of negligence.

5. After the suit was filed, summons were issued and served on the defendant (the applicant) who did file a defence and consequently, the matter was scheduled for hearing. On the date for defence hearing that had been previously adjourned, the defendant and /or his witness was unable to proceed and sought an adjournment and the same was denied. The learned trial magistrate proceeded thereafter to order that the defendant close his case and then directed that in the absence of the applicant's evidence the plaintiff file submissions. The applicant moved the lower court orally seeking leave to appeal against the orders and the same was granted.

6. Aggrieved by that decision, the applicant filed a memorandum of appeal dated 16th August, 2018 challenging the learned magistrate's refusal of adjournment. In the appeal, the applicant prayed that the ruling and order of the Honourable Magistrate dated 9th August, 2018 be set aside.

7. A response was made in the form of a Replying Affidavit and a supplementary affidavit sworn by Alex Kyalo Mutua, the Advocate for the respondent in opposition of the application. Counsel contended that application is made with an intention to delay the trial of CMCC 59 of 2016. According to him, the matter has been severally adjourned and the hearing dates had been taken by consent of the parties. He further states that the trial court has not yet delivered its judgment in the matter hence the innuendo that the appeal is pre-mature.

8. **This** application was canvassed by way of written submissions by Learned counsels for the respective parties.

9. The applicant's case as can be discerned from the depositions in the affidavits sworn in support of the application and the submissions filed on its behalf is that it has an arguable appeal which has high chances of success as in his view, the learned magistrate erred in law and fact in refusing to give him a chance to be heard.

10. It was the applicant's contention that the rules of natural justice emphasize the obligation to hear all the parties. For this proposition, reliance was placed on the case of ***Central Organization of Trade Union v Benjamin K Nzioka and Others Civil Appeal No 166 of 2003.***

11. It was also the applicant's case that if judgment is given only on hearing one side of the case and not his; that this would render its appeal nugatory in the sense that this is a fatal claim, the amount of damages involved is likely to be substantial thus there is need to allow the defendant's defence to be heard .He urged the court to exercise its discretion to grant the prayers sought as the respondent stands to suffer no

prejudice and so that justice may prevail.

12. In response to the submissions by the applicant, learned counsel for the respondent submitted that the applicant has another chance to appeal over the entire judgment and his appeal will not be rendered nugatory.

13. Counsel further submitted that the application was only meant to delay the trial process in the suit filed in the lower court and has been pending since 2016, the respondent would suffer prejudice as he has a fatal claim that is due for determination. For the foregoing reasons he relied on the case of **KENYA POWER & LIGHTING COMPANY LIMITED vs. ESTHER WANJIRU WOKABI [2014] eKLR,** .

14. I have considered the application, the affidavits on record, the written submissions made by Counsel for both parties as well as the authorities cited.

15. I note that this application is a twinning of two reliefs, premised on ***Order 42 rule 6*** of the ***Rules*** which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal. The applicant ought to argue out the reliefs in the alternative so that I may be able to establish if the applications meets the threshold to warrant the grant of the reliefs sought.

16. See the lamentations of Githua J on the confusion that may arise when such approach is employed, in the case of **KENYA POWER & LIGHTING COMPANY LIMITED vs. ESTHER WANJIRU WOKABI [2014] eKLR,** that:

> ***…It is apparent from the face of the application and from the submissions made by the parties that counsel for both parties were operating on the mistaken belief that the conditions prescribed in Order 42 rule 6(2) were also applicable to applications for stay of proceedings which is not the case."***

17. It is clear that the applicant has made no attempt to demonstrate either through his affidavit or in his submissions that his claim falls under ***Order 42 rule 6(2)***.

18. This being the case, in answering the issue as to whether or not to grant stay of proceedings as sought herein I wish to borrow from the wisdom of **Ringera J (**as he then was**)** when he stated the following when confronted by a similar application in the case of ***Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000***

> ***"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 .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, 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" (emphasis added)***

19. Applying the test, the order in question is the one refusing an adjournment. It will be most imprudent to stay these proceedings on account of what I consider an interim order for an adjournment rather than looking the merits of the case. *A priori*, there is an adequate alternative remedy available to the applicant for quick and ready redress as opposed to a grant of stay. I am guided by the observation by my brother Majanja J in **Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others [2012] eKLR, on the** principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used.

20. In this case the applicant may move the trial court to exercise its discretionary powers to review its decree or order. **Section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules permit the court, on application to do so and to make "**such order thereon as it thinks fit".**

21. In terms of **Order 45** any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if he can demonstrate that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. The court will also review its decision if it finds some mistake or error apparent on the face of the record. The window is open to the court to review its decision if it finds any other sufficient reason to do so and if that window is closed then this court is ready to receive him. I find that this is not a proper case to stay proceedings. Indeed there is no evidence that the Applicant has filed an application for review in the lower court.

22. Therefore, the application dated 16th August, 2018 is devoid of merit and I consequently dismiss it with no order as to costs.

It is so ordered.

Signed, Dated and delivered at Machakos this 9th day of November, 2018.

D.K. KEMEI

JUDGE