



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 115 OF 2016

SAS AFRICA GENERAL TRADING CO. LTD.....1ST APPELLANT

LUCY NASHIBA LEMUK.....2ND APPELLANT

VERSUS

R K M (Minor suing through

Mother And Next Friend

P M M).....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 31st October 2016, filed by the Appellants, seeking orders that there be a stay of proceedings of in **Machakos CMCC No. 884 of 2015 – R K M (Minor suing through Mother and Next Friend P M M) vs SAS Africa Trading Co Limited and Lucy Nashiba Lemuke**), pending the hearing and determination of the appeal filed herein.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on the same dated by Joan Oburu, the Claims Director at Directline Assurance Company Limited, who are the insurers of motor vehicle registration number KCE 468 G at whose instance the claim is being defended. The main ground is that on 21st September 2016, the trial Court dismissed the Appellant's application to compel the Plaintiff/Respondent to undergo a 2nd Medical examination, and they were granted leave to appeal the decision but denied a stay of proceedings. Further, that the Appellants being aggrieved with the lower court's ruling have filed the appeal herein, and that unless the stay is granted as prayed, the Respondent will proceed with the hearing thus rendering this application and the Appellant's appeal nugatory. The Appellants annexed a copy of their Memorandum of Appeal.

The Response

The Respondent opposed the Appellant's application in a Replying Affidavit she swore on dated 7th November 2016, wherein it was urged that the Appellant's application is bad in law and incompetent, an abuse of the court process and is intended to delay the finalization of this matter. The Respondent contended that she received documents from her Advocates in December 2016 requesting her to take the minor to attend a 2nd medical examination, which she did on 4th February 2016, and the Appellant's Advocates were informed accordingly. A copy of the letter to the Appellants' Advocates was attached.

Further, that the Appellants never raised the issue of the 2nd medical examination during the pretrial procedures, and on 21st September 2016 sought an adjournment in the trial Court for examination of the Plaintiff by a Doctor of their choice without any referral letter. Therefore, that it is misleading to allege that the Plaintiff was not re-examined for a 2nd Medical report and the application has no merit.

The Issues and Determination

The Court on 15th November 2016 directed that the Appellants' application be canvassed by way of written submissions. Kairu & McCourt, the Appellants' learned counsel, filed submissions dated 28th November 2016, while the submissions filed by Kamolo & Associates, the learned counsel for the Respondent, were dated 22nd November 2016.

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is whether the proceedings of the trial Court in **Machakos CMCC No. 884 of 2015 – R K M (Minor suing through Mother and Next Friend P M M) vs SAS Africa Trading Co Limited and Lucy Nashiba Lemuke**), should be stayed pending the hearing of the appeal herein.

I note in this regard that the applicable law on stay of proceedings is not as clear cut as that on stay of execution that is provided in Order 42 Rule 6 of the Civil Procedure Rules. However, the legal considerations to be applied in an application for stay of proceedings have been laid down in various judicial decisions, and particularly by **Ringera J. (as he then was) in Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 wherein it was held as follows:**

“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

The courts discretion in deciding whether or not to grant stay of proceedings is thus to be guided by the main principle of the interest of justice, as determined by three main factors;

- a) Whether the applicant has an arguable appeal.
- b) Whether the application was filed expeditiously, and
- c) The need for expeditious disposal of the cases and optimum utilization of judicial time.

The Appellants in this respect relied on section 3A and Section 3B of the Insurance (Motor Vehicle Third Party Risk) Amendment 2013, to argue that an insurer has a right to request for a medical examination of a claimant before any judgment is payable, and to obtain and verify information from any institution which issued the documents. They submitted that they have an arguable appeal which has a likelihood to succeed as they have been denied the chance to verify the injuries and documents which is critical in determining the issue of liability and quantum.

Reliance was also placed on section 3A of the Civil Procedure Act, and the decisions in **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2014) eKLR**, and **Hashmukhlal Virchand Shah & 2 Others vs Investment & Mortgages Bank Limited (2014) e KLR** for the position that there are no limits or restrictions on the court's discretion to stay proceedings, and that the main concern of the court is to do justice to the parties. Lastly, the Appellants submitted that they moved this Court in a timely manner and without delay, since the ruling by the trial court was on 21st

September 2016, and filed their Appeal on 19th October 2016 within time.

The Respondent on the other hand submitted that the Plaintiff in the trial Court was re-examined by the Appellant's doctor of choice, and neither the report nor confirmation was made to the Respondent's advocates. Further, that the said Plaintiff has already testified and tendered in evidence his intended claim and supporting documents, and to stay the proceedings in the lower court matter would amount to denying the Plaintiff justice .

It is not contested in the present application that leave was granted to the Appellant to appeal the ruling given by the trial Court on 21st September 2016, and that the Memorandum of Appeal and the application herein were lodged on 19th October 2016 and 31st October 2016 respectively. The application was accordingly filed expeditiously. What is in contention is whether the Applicant has an arguable appeal, and whether it would be in the interest of expeditious and efficient disposal of the case in the trial Court to order stay of proceedings of the same.

I find that to the extent that the Appellants are allowed by law to tender their own medical reports on a claimant as evidence by virtue of sections 3A and 3B of the Insurance (Motor Vehicle Third Party Risk) Amendment 2013, they have an arguable appeal, and the delay in seeking to have the Plaintiff re-examined is one that can reasonably be mitigated by costs. In addition if proceedings in the trial Court are not stayed, the Appellant's appeal will be rendered nugatory as the case therein may be heard without their evidence. This eventuality would not only prejudice the Appellants, but would also militate against the promotion of substantive justice that is now required to be dispensed by Courts under Article 159 of the Constitution. The Respondent will also have the opportunity to challenge any such new evidence in the trial Court in the event that the Appellant's appeal succeeds, and will not be prejudiced in this regard.

These findings notwithstanding, the Court also notes that the proceedings in the trial Court were at an advanced stage, and it is in the interests of justice that no undue delay is caused in the finalization of the said case. The necessary conditions will be therefore be imposed by the Court to avoid any prejudice to the Respondent in this regard.

The order that accordingly commends itself to me is that the Appellants' Notice of Motion dated 15th May 2015 is allowed on the terms that there shall be a stay of proceedings in **Machakos CMCC No. 884 of 2015 – R K M (Minor suing through Mother and Next Friend P M M) vs SAS Africa Trading Co Limited and Lucy Nashiba Lemuke**), pending the hearing and determination of the Appellant's appeal, on the condition that Appellants shall prosecute their appeal within six (6) months from the date of this ruling, failing which the stay orders herein shall stand vacated.

The Appellants shall meet the Respondent's costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of February, 2017.

P. NYAMWEYA

JUDGE