



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO.183 OF 2012**

**H. YOUNG (EA) LIMITED.....1<sup>ST</sup> PLAINTIFF**

**FIRST ASSURANCE COMPANY LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAMES MWANGI.....1<sup>ST</sup> DEFENDANT**

**STANLEY DENNIS MUGENDI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Background**

1. On 28<sup>th</sup> May 2012 the Plaintiffs filed a suit against the Respondents in which they prayed for:

a. **Kshs.7,715,399.60**

b. **Interest on (a) above at court rates.**

The Plaintiffs' claim against the defendants was in respect to special damages arising out of the loss of their excavator machine in an accident/incident in which they totally hold the defendants responsible.

2. The Defendants filed a counterclaim on 7<sup>th</sup> September 2012 in which they denied liability for the accident and counterclaimed for the loss caused to the 2<sup>nd</sup> Defendant's motor vehicle in the same accident.

On 31<sup>st</sup> July 2012, the Plaintiffs/Applicants filed the application dated 31<sup>st</sup> July 2012 which is the subject of this ruling.

3. In the said application dated 31<sup>st</sup> July 2012, brought under **Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 3A** and **63(e)** of the **Civil Procedure Act**, the Applicants sought orders as follows:

1. **Spent**

2. **Spent**

**3. There be a stay of further proceedings in the said civil suit Kisii CMCC No.600/2010 pending the hearing and determination of the instant suit.**

**4. The costs of this application be provided for.**

4. The application is premised on the grounds listed on the body of the application the main one being that there exists a similar suit before the lower court being Kisii CMCC.No.600/2010 in which the 1<sup>st</sup> Plaintiff/Applicant herein and the 2<sup>nd</sup> Defendant/Respondent have been sued as joint Defendants in a case filed by a legal representative of the estate of one **DOMINIC CORNEL MOEMI (DEASED)** who lost his life in the same accident the subject matter of this instant suit and application.

5. The application is further supported by the affidavit of one Jane Rose Gitonga, the legal manager of the 2<sup>nd</sup> Applicant/Plaintiff in which she expounds on the grounds on the body of the application.

#### **Applicants' Affidavit evidence**

6. The 2<sup>nd</sup> Applicant's Legal Manager depones that an accident occurred involving the 1<sup>st</sup> Applicant's excavator and the 2<sup>nd</sup> Respondent's motor vehicle which was at the time being driven by the 1<sup>st</sup> Respondent and that according to the police investigations report, the accident was blamed on the negligence of the 1<sup>st</sup> Respondent herein.

7. The Applicants added that the suit pending before the lower court and the instant suit arise out of the same cause of action and therefore it would be prudent to have the twin issues of negligence and liability determined in this suit first as such an outcome would then apply to the case before the lower court.

8. The Applicants contended that this present application would not prejudice the Respondents in any way but would in fact make judicial wisdom by speeding up the finalization of both cases as the determination on liability in this case would apply in the lower court case or any other related claim that would arise.

9. On 1<sup>st</sup> August 2012, the Applicants obtained exparte orders of temporary stay of proceedings of the lower court case pending the hearing and determination of this application inter partes.

#### **Respondents Grounds of opposition**

10. On 28<sup>th</sup> November 2012, the Respondents filed grounds of opposition in response to the Applicant's application in which they stated that the lower court case needed to be heard and determined first since it is a court of first instance while the High Court is a court of 2<sup>nd</sup> instance by way of appeal and therefore the High Court should always refer parties to a court of first instance so that parties can exhaust all the avenues available to them in the judicial hierarchy.

11. The Respondents stated that indeed, it should be the High Court matter to be stayed pending the hearing of the case in the lower court so that parties can have a chance for a retrial in the High Court by way of first appeal.

The Respondents further stated that in view of the doctrine of stare decisis, the present application should be dismissed. The Respondents contended that the lower court case had already proceeded substantially with 4 witnesses and therefore it would prejudice the parties greatly to have the matter start all over again.

12. At the hearing of this instant application on 11<sup>th</sup> November 2013, counsels for both parties agreed to canvass the same by way of written submissions.

#### **Applicant's Submissions**

13. In their written submissions filed on 23<sup>rd</sup> July 2015, the Applicants stated that since the 1<sup>st</sup> Plaintiff

and 2<sup>nd</sup> Defendant herein were Defendants in the lower court case and that the cause of action in both cases were the same, it would negate the provisions of **Section 6** of the **Civil Procedure Act** to have both cases running at the same time.

14. The Applicants relied on the decision in the case of **Phoenix Properties Ltd –vs- Equip Agencies Ltd and 6 others [2006] eKLR** in which it was held that the underlying object of **Section 6 of the Civil Procedure Act** is to avoid two parallel trials on the same issues by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit.

### **Respondents' Submissions**

15. The Respondents' written submissions filed on 30<sup>th</sup> September 2013, basically repeated the points stated on their grounds of opposition and reiterated that it is this instant suit that ought to be stayed first pending the outcome of the lower court case so as to give any aggrieved party before the lower court a second chance to ventilate the issues at the High Court on appeal.

16. The Respondents added that in view of the fact that the lower court case had proceeded with 4 witnesses, it would greatly prejudice the parties to start over the case afresh at the High Court.

### **Analysis at determination**

17. After perusing all the pleadings filed in this case and the various submissions filed by the parties herein, I note that the main issue arising is whether the suit pending before the lower court should be stayed pending the outcome of the High Court case or better still, whether the Applicants herein have made out a valid case to warrant issuance of orders to stay the lower court case pending the outcome of this instant case.

18. The answer to the above question lies in the nature of the pleadings and the parties before the two courts.

19. In both cases, the cause of action arises out of an accident that took place on 18<sup>th</sup> April 2010 involving Excavator EW 1470C registration number WEX 24, and motor vehicle registration number KAQ 645L belonging to the 1<sup>st</sup> Applicant and 2<sup>nd</sup> Respondent respectively.

Before the lower court, one Lawrence Ayako Orero (the Legal and Personal representative of the estate of DOMINIC CORNEL MOEMI (deceased) in his plaint filed in October 2010 has sued both the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Respondent as co-Defendants in a claim for damages arising out of the said accident in which the deceased lost his life while travelling as a passenger in the 2<sup>nd</sup> Respondent's said motor vehicle registration number KAQ 645L.

20. In the said lower court case, the Applicant herein had in December 2010 given notice to his co-Defendant the 2<sup>nd</sup> Respondent that he claims indemnity and contribution against him for the costs and damages arising from the said accident for which he held the 2<sup>nd</sup> Respondent liable due to the negligent acts of commission or omission of his driver.

21. In the instant suit filed on or about May 2012 on the other hand, the 1<sup>st</sup> Applicant and its insurer have sued the 2<sup>nd</sup> Respondent and his driver for the destruction caused to their excavator following the said accident.

The lower court case, would thus determine, not only the issue of damages payable to the deceased, but also the question of liability between the two defendants.

22. The instant suit was filed, over two years after the lower court case had commenced. The 2<sup>nd</sup> Respondent has stated that the lower court case has proceeded to an advanced stage with at least 4

witnesses testifying while the instant case is yet to start.

The Plaintiff in the lower court case is not an interested party in the High Court case yet it is his case that the Applicant seeks to stay pending the outcome of the instant case.

23. I find the 2<sup>nd</sup> Respondent's argument and position that the trial before the lower court should be heard first so that a dissatisfied party can appeal to the High Court to be missing the point or off the mark.

The issue here is not which case should be heard first, but rather if the applicant is justified in staying proceedings in a suit that was initiated way before it initiated its suit and in which the Plaintiff is a completely different party who has his own claim against the two parties.

24. I find that Applicant is not justified in seeking a stay of proceedings of the lower court case for the following reasons:-

- **Firstly**, the lower court case was filed much earlier than the instant case and has according to the 2<sup>nd</sup> Respondent, proceeded to an advanced stage. The Applicant has shown to the satisfaction of this court how the determination of the lower court case would affect or prejudice the instant case.
- **Secondly**, the claimant in the lower court case is different from the claimant in the instant case. The fate of the Plaintiff before the lower court should not be pegged on the outcome of the instant case wherein the said claimant is not a party/player as he would be greatly prejudiced if the parties in the instant case decided to delay their case, compromise it or if the said case was for one reason or another dismissed.
- **Thirdly** and most importantly, the issue of liability and the extent thereof, between the 1<sup>st</sup> Applicant as the owner of the excavator and the 2<sup>nd</sup> Respondent as owner of the motor vehicle, is an issue that is pending determination before the lower court that has jurisdiction and is seized with the same following the 'Notice to Co-Defendant' dated 22<sup>nd</sup> December 2010 by the 1<sup>st</sup> Applicant to the 2<sup>nd</sup> Respondent.

25. In my view, the Applicants will have ample opportunity before the lower court to canvass the issue of liability which has jurisdiction to fully adjudicate on the same with any appeal arising therefrom being sent to the High Court.

26. The upshot of my ruling is that the instant suit and the suit before the lower court are two distinct suits which should be left to run their own courses as none should be seen or deemed to precede the other.

27. For the reasons set out above, I hereby dismiss the Notice of Motion dated 21<sup>st</sup> July 2012 with costs to the Respondents. Consequently, the Interim Stay of proceedings Orders issued on 8<sup>th</sup> August 2012 are hereby vacated.

**Dated, signed and delivered in open court this 10<sup>th</sup> day of February 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- Miss. Nyaega for Tombe for Plaintiff/Applicant
- Oguttu for Kiarie for Defendant/Respondent
- Omwoyo: court clerk