



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 150 OF 2013

GEMINIA INSURANCE CO. LTD. APPELLANT

VERSUS

JACKSON WAWERU. RESPONDENT

RULING

The application for determination is the Notice of Motion dated 3rd October, 2013 brought under Order 42 Rule 6(6) and Order 50 Rule 1 of the Civil Procedure Rules, 2010.

The Appellant/Applicant seeks the following orders: -

1. Spent
2. Pending the hearing and determination of the application there be stay of proceedings in Civil Case No. 6841 of 2010 at Chief Magistrate's at Nairobi Milimani Commercial Courts.
3. There be a stay of execution of the proceedings in Civil Case No. 6841 of 2010 at Chief Magistrate's court at Nairobi Milimani Commercial Courts pending hearing and determination of the appeal herein.
4. The costs of this application be paid by the Respondent.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit of Kelvin Mogeni sworn on the 3rd day of October, 2013 wherein he depones that a ruling was made on the 18^h day of February, 2013 dismissing the Appellant's preliminary objection dated January, 2013. That the Appellant being dissatisfied with the said ruling filed a Memorandum of Appeal before the Honourable court on the 18th day of March, 2013.

That the Appellant has applied for a certified copy of the proceedings and judgment to enable it prepares a record of appeal. He depones that it is in the interest of justice that the prayers sought herein are granted to allow the appeal to proceed before the main suit pending at the subordinate court. He avers that if stay of proceedings is not granted, the appeal will be rendered nugatory as the suit will proceed to full hearing which will prejudice the appellant as he has an arguable appeal with chances of success.

The application is opposed vide grounds of opposition dated the 4th day of December, 2013 which are as hereunder: -

- 1) The Appellant is yet to file its record of appeal.

- 2) The intended appeal will take an average of two years before it is finally heard and determined.
- 3) It would be greatly prejudicial to the Respondent/Plaintiff if proceedings in Civil Case No. 6841/2010 at Chief Magistrate's court Milimani are to be stayed because it could take years before the matter is set down for hearing and finally determined on merits.
- 4) The Appellant/Defendant will not suffer any prejudice if the parties proceed with the hearing of the said Civil Case No. 6841/2010 since in the event the matter is not decided in its favour it will always have a right to appeal.
- 5) The Appellant/Defendant has not demonstrated how it will suffer harm and injury if the said suit is not stayed.
- 6) The intended appeal will not be rendered nugatory in the event, that the said suit proceeds for hearing since the Appellant is entitled to appeal against the outcome of the suit.

It is noted that the Respondent herein filed a declaratory suit against the Appellant for enforcement of a judgment delivered in his favour way back in the year 2001. In response to the said suit, the Appellant, raised a Preliminary Objection which sought to dismiss the entire suit on the basis that the suit has been brought under the provisions of the Insurance (Motor Vehicle Third Party Risk Act Cap 405) and the Policy that was in force at that time between the Appellant and the employer of the Plaintiff was a third party policy.

The argument of the Appellant in the Preliminary Objection was that the Respondent/Plaintiff was an employee of the insured and therefore, the Appellant did not have an obligation to honour the policy but avoid it, the Respondent having been an employee and not third party in the motor vehicle.

In addition to the depositions contained in the supporting affidavit, the learned counsel for the Appellant/Applicant submitted that Section 10 of the Insurance Act (Motor Vehicle 3rd Party Risk Act) does not apply to the nature of the suit before the magistrate's court. He averred that Section 5 excludes persons who die or sustain injuries while in the course of employment and therefore, a declaratory suit cannot be brought against the Appellant.

He further submitted that the order sought is discretionary and urged the court to exercise its discretion in favour of the Appellant. He relied on the case of **Christopher Ndolo Mutuko & another Vs C.F.C. Stanbank Ltd (Civil Case Number 74 of 2011)** which sets out the principles to be considered when the court is considering an application of this nature.

He averred that if the appeal succeeds, there would be no need to proceed with the case before the Chief Magistrate Court. On the other hand, if stay of execution is not granted pending the appeal the case before the Chief Magistrate will proceed and the Defendant will be forced to satisfy a decree the recovering the money might not be easy considering that the Plaintiff's means are unknown.

On his part, counsel for the Respondent submitted that, the court should consider if the application was brought expeditiously. He asked the court to consider that the Respondent has been in court for the last 25 years the case having been filed in the year 1990. That judgment was obtained in the year 2001 following which the Respondent filed a declaratory suit in the year 2010 and all this time, the Appellant did not raise any issue against the judgment. That the objection was raised late in that it ought to have been raised in the initial suit and that the application was not brought expeditiously in that while the ruling was delivered 18th February, 2013, the application for stay was filed on the 3rd day of October, 2013 which must have been an afterthought. According to him, the only purpose of filing the appeal is to deny the Respondent his fruits of the judgment. He urges the court to dismiss the application.

I have considered the application together with the supporting affidavit, grounds of opposition, submissions by the learned counsels and the list of authorities filed herein. I note that the application is brought under Order 42 Rule 6 (6) and Order 50 Rule 1 of the Civil Procedure Rules. The orders sought

in the application are for stay of proceedings in CMCC No. 6841 of 2010. Order 42 Rule 6 (6) deals with temporary injunction pending appeal while Order 50 Rule 1 deals with computation of time.

Therefore, the application is clearly brought under the wrong provisions of the law but I will consider the same under the provisions of Article 159 (2) (d) of the Constitution.

The legal considerations in an application for stay of proceedings as observed by Hon. Justice Gikonyo in High Court Civil Case No. 74 of 2011 (**Christopher Ndolo Mutuku & Caroline Njoki Mutuku Vs CFC Stanbic Bank Limited**) has been enunciated in a host of judicial decisions. The guiding principles can be summarized as follows: -

- a) The decision 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.
- b) 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.
- c) In deciding whether or not to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.
- d) In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases. In 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.

Considering the above principles and applying the same to the case before us, it is noted that the appeal herein is against a ruling by the trial court. The ruling was pursuant to a preliminary objection on a point of law, specifically Section 10 of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405 Section 10(1) provides: -

“If, after a policy of insurance has been effected judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or may have avoided.... The policy, the insurer shall Pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability...”

While Section 10 (6) provides: -

“..... liability covered by the terms of the policy means liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid... or has avoided... the policy.”

I have perused the Memorandum of Appeal and without going to the merits of the same, I am of the view that the same is arguable and it's only fair that the Appellant is granted a chance to argue the same and as rightly argued by the counsel for the Appellant, in the event that the appeal is successful, there would be no need to proceed with the matter pending before the trial court.

I need to point out that this court has taken notice of the fact that the Respondent has been in court since 1990 when he first filed the initial suit but my discretion is fettered by the fundamental legal issues raised in the appeal herein and the interest of justice demands that a stay of proceedings be granted pending the hearing and determination of the appeal.

In the upshot, the application dated 3rd October, 2013 is hereby allowed but with no orders as to costs.

Bearing in mind such factors as the need for expeditious disposal of cases, the Appellant is ordered to

ensure that the Appeal is prosecuted within 120 days from the date of this ruling failing which, the same shall stand dismissed.

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *For the Appellant*

..... *for the Respondent*