



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Civil Appeal 100 of 2011**

**JOSEPH WAMBUGU GITHAIGA.....APPELLANT**

**Versus**

**REDEMPTA WAYUA GITHINJI.....1ST RESPONDENT**

**JOHN N. MUGI.....2ND RESPONDENT**

**CHARLES MAINA KARIUKI.....3RD RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6th April 2012 the appellant/Applicant moved the court under section 1A, 1B and 3A and order 42 Rule 6 Order 51 Rule 1 of the Civil Procedure Act and Rules for order

***That there be a stay of proceedings in Nyeri CMCC No. 375 of 2011 Redempta Wayua Githinji v Gateway Insurance Co. Ltd. Pending the hearing and determination of the appeal with costs.***

2. It was grounded upon the affidavit of JOSEPH WAMBUGU GITHAIGA wherein the same deponed that he was the 2nd defendant in Nyeri CMCC No. 347 of 2008 wherein judgment was entered in his favour.

3. Being dissatisfied with the said decision he filed this appeal and thereafter the 2nd respondent who was the plaintiff in the said suit filed a suit against his insurers M/S Gateway Insurance Co. Ltd namely Nyeri CMCC No. 375 of 2011 which is pending hearing and determination.

4. That these suit arose out of the same cause of action.

5. The application is opposed by the 1st Respondent through an affidavit sworn on 19th November 2012 wherein she deponed that the intended suit to be stayed is between herself and M/s Gateway Insurance Co. Ltd. and therefore it is untenable and unprocedural for the appellant to seek orders from and on behalf and benefit of a party not before the court.

6. That the defendant in Nyeri CMCC No. 375/2011 had a right to appeal upon the dismissal of its application dated 24th November 2011 and that she had a right to file a declaratory suit against the defendant in the matter sought to be stayed.

7. The appellant filed a supplementary affidavit wherein he deponed that he is the proper person to swear affidavit under the doctrine of subrogation.

8. That upon the dismissal of the application by his Insurers it was not necessary to file unnecessary appeal and add the number of cases pending since if his appeal succeeds it will settle both CMCC No. 347/2008 and CMCC No. 375 of 2011 declaratory suit.

9. Parties agreed that this application be disposed off by way of written submission which have now been filed.

10. It was submitted on behalf of the Applicant that the contractual relationship between the appellant and Gateway Insurance company Ltd. Inevitably establishes the principal of subrogation.

11. It is therefore inescapable that the appeal herein cannot be isolated from Nyeri CMCC No. 375 of 2011 and the denial of stay of proceedings herein shall inevitably render the prosecution of the appeal herein nugatory as the declaratory suit shall proceed without regard to the outcome of the appeal herein.

12. It was submitted on behalf of the respondent that after the delivery of judgment in Nyeri CMCC No. 347 of 2008 the Applicant herein file an application for stay of execution pending appeal herein which application was dismissed with cost.

13. That the respondent filed the declaration suit Nyeri C.M.C.C No. 375 of 2011 before the said suit could be heard the defendant therein Ms Gateway Insurance Ltd filed an application under certificate of urgency seeking stay of proceedings pending the hearing of this appeal which application was dismissed and since no appeal was preferred this application is resjudicata.

14. It was further submitted that the Applicant is guilty of material non disclosure having failed to disclose to court that a similar application had been made in CMCC No. 347 of 2008.

15. It was submitted that the Applicant had not met the five principles governing order for stay of proceedings namely:

***a) There must be a strong cause for doing so.***

***b) Mere balance of convenience is not enough.***

16. It was further submitted that the Applicant had not met the conditions for grant of stay of execution pending appeal under order 42 rule 6 upon which the application is founded.

17. I must point out that the Applicant whereas disclosed that his insurance had filed an application for stay of proceedings in the suit sought to be stayed and that the same was disallowed on 25th January 2012 the said ruling was not annexed for the benefit of this court.

18. In the absence of the said ruling I therefore agree with the submission by the Respondents advocate that the application herein is resjudicata and therefore an abuse of court process.

19. I have also noted that there is no prejudice that will be suffered by the Applicant if the order sought is not granted since the existence of this appeal provides a defence to the Applicants insurer in the suit sought to be stayed that is Nyeri CMCC No. 375 of 2011.

20. It is therefore my considered view that the Applicant has not made any case for the grant of order sought since the issue of subrogation can only rise where his insurer have already paid the claim which is not the issue herein.

21. I therefore dismiss the application herein with costs being in the cause.

Dated and delivered at Nyeri this 9th day of May 2013.

**J. WAKIAGA**

**JUDGE**

Court: Ruling read in open court in the absence of the parties.

**J. WAKIAGA**

**JUDGE**