



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 185 OF 2018
IN THE MATTER OF: ALLOEGED CONTRAVENTION OF THE
CONSTITUTION OF KENYA’S FREEDOM OF MOVEMENT ARTICLE 39
AND
IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF THE SOCIAL ECONOMIC
RIGHT TO WORK
AND
IN THE MATTER OF: THE ALLEGED INFRINGEMENT OF THE
FREEDOM FROM DISCRIMINATION UNDER ARTICLE 27
BETWEEN
MAXWELL MWAILONGO MWANDAWIRO.....PETITIONER
VERSUS
KENYA PORTS AUTHORITY.....RESPONDENT

RULING

1. The Notice of Motion application before the court dated 4/6/19 prays for orders of stay of execution of the Judgment delivered in this court on 1/4/19.
2. The application is premised on the grounds that the Applicant is dissatisfied with the Judgment of this court aforesaid and has filed a Notice of Appeal which has overwhelming chance fo success and that if the stay is not granted then the Applicant is likely to suffer irreparable loss.
3. The application is supported by affidavit sworn by Safari Abongo on 4/6/19.

The Response

4. The motion is opposed by the Respondent through grounds of opposition filed herein on 23/10/19. The

Respondent's case is that:

- (a) That the application is an abuse of court process.
- (b) That the Notice of Appeal filed notwithstanding, the Respondent has failed to attach a draft memorandum of appeal or state the grounds of the intended appeal to demonstrate at least the existence of even one arguable point that will suffice in their favour.
- (c) That the applicant has fundamentally failed to demonstrate how the intended appeal will be rendered nugatory if the stay orders are not granted.
- (d) That further the application fails to meet the condition precedent that it is anchored on being Order 42(6) Civil Procedure Rules, 2010 and in any event the very provisions states that no appeal shall operate as a stay of execution.
- (e) That the Petitioner's right to earn a living will continue to be infringed upon if the application for stay is granted which is based on mere suspicions of theft which have never been proved.

The Determination

5. Parties made oral submissions in court which I have carefully considered together with the pleadings of parties.

6. In my view there is only one issue for the determination by this court, that is whether this is an appropriate case in which to issue stay of execution. The issue for the determination by this court is whether or not the Applicant will suffer irreparable loss if stay is not granted and the intended appeal succeeds.

7. By the Judgment of this court dated 1/4/19 this court made the following orders:

- (a) That a declaration be and is hereby issued declaring the Petitioner's rights under Article 24, 27, 39 and 50(2) (a) of the Constitution of Kenya, 2010 have been infringed by the Respondent.
- (b) That the Respondent be and is hereby compelled to issue the Petitioner with a Port-Pass also known as a Gate Pass upon submission of the requisite application forms and any payments if any.
- (c) Costs of the petition be borne by the Respondent.

8. The above are the orders sought to be stayed herein pending the intended appeal.

9. Order 42 Rule 6 of the Civil Procedure Rules provide circumstances under which a stay can issue as follows:

"42(6)

(2)

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

10. The Applicant states that if stay is not granted then it stands to suffer irreparable loss.

11. Looking at the orders contained in the Judgment to be stayed it is clear that if any party is to suffer

any loss it will be the Respondent. The aforesaid rights of the Respondent became enjoyable immediately the court declared them in paragraph (a) of the orders. Paragraph (b) required the Applicant to immediately issue the Petitioner with a Port Pas or Gate Pass upon requisite application. I do not see how the performance of these orders prejudices the Applicant or how the satisfaction of the same would cause irreparable loss to the Applicant. To the contrary, it is the Respondent who is likely to suffer for the continued delay by the Applicant to effect the declared rights of the Respondent. I accept submissions by the Respondent that his right to earn a living will continue to be infringed as long as the Applicant is not reinstating the Respondent's right already declared by the court.

12. In my view the Applicant will not suffer any loss or prejudice if stay is not granted. Should the intended appeal succeed, then the Applicant will simply need to revoke the said Gate Pass. It is the Applicant's contention that the Respondent was engaged in some unproven theft within the port. Those allegations were found by this court to be baseless. But if during the pendency of the intended appeal the Respondent is found in breach of any security details within the Applicant's premises, the law will take care of that.

13. It is the finding hereof that the stay prayed for herein is not deserved, and the application for the same, which is this application is herewith dismissed with costs to the Respondent.

Dated, Signed and Delivered at Mombasa this 17th day of December, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Njau for Petitioner

Ms. Kamau for Respondent

Mr. Kaunda Court Assistant