



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 105 OF 2013

GIBB AFRICA LIMITED.....APPELLANT/APPLICANT

VERSUS

DAVID KIPLAGAT ROTICH.....RESPONDENT/RESPONDENT

RULING

The genesis of this application is that in Civil Suit No. 892 of 2013 of which is pending in the lower court, *David Kiplagat Rotich* the plaintiff/Respondent, sued Gibb Africa Limited, the defendant/Applicant for general damages for pain and suffering and damages assessment under the Workmen's compensation amounting to 1,407,600/- and damages for loss of future earnings. Other prayers are for the costs of and incidental to the suit, and interest at court rates.

On 11th March, 2013 the Defendant/Applicant made an application in the lower court seeking for the orders that the plaintiff/Respondent suit be struck out with costs for it is:-

- (1) Based on a contract of employment to which the defendant/Applicant is a stranger as it was not the plaintiff's employer.
- (2) Time barred by virtue of the provisions of Section 90 of the Employment Act No. 11 of 2007.
- (3) Bad in law as it is premised upon inquiry under Section of Work Injury Benefits Act which were declared unconstitutional in Nairobi High Court Petition No. 185 of 2008.

The said application was opposed by the plaintiff/respondent. The same was dismissed with costs to the plaintiff/Respondent, on 19th July, 2013.

The Defendant/Applicant dissatisfied with the ruling, expressed intention to appeal and duly applied for the certified copies of the proceedings and the ruling for the purpose of doing so. There was delay in typing the records and the Defendants/Applicant was only able to file the Memorandum of Appeal on 19th August, 2013. On 14th October, 2013 the Defendant/Applicant made an application in the lower court seeking stay of the proceedings pending hearing and determination of the filed appeal, Civil Appeal No. 105 of 2013. The lower court equally dismissed the said application of which triggered the current application by the Defendant/Applicant, dated 9th February, 2015. Similarly, as the application filed in the lower court, this application seeks stay of further proceedings in Eldoret CMCC No. 892 of 2012, pending the hearing and determination of appeal No. 105 of 2013. The additional grounds to which the said application is premised are that:-

- (1) No inordinate delay has been occasioned by the Applicant prior to the filing of this application.
- (2) The applicant stands to suffer irreparable financial harm and damage should the suit in the lower court be allowed to proceed to its conclusion before the appeal is heard and determined.
- (3) The appellant is ready and willing to abide by any terms as to security that the court may direct to be furnished, pending the hearing and determination of the appeal.

The Respondent opposes this application on the grounds that:-

- (1) The application is made in bad faith and lacks merit.
- (2) The applicant's counsel delayed the hearing of the suit in the lower court by seeking adjournments on the grounds that he was held up in Meru and intended to institute third party proceedings against an undisclosed third party.

(3) The application has been overtaken by events since the appellant has elected to pursue third party proceedings and enjoin a third party whom they allege was the respondent's employer.

(4) The application is an afterthought having been made nine months from the date of the ruling and lacks basis for stay of proceedings as the applicant will have an opportunity to challenge the case during trial.

(5) The appeal is time barred since the same was filed 3 months from the date of ruling without leave of the court to file it out of time.

I have weighed all the issues presented to me by both parties in this application.

Ringera J (as he then was) in **Global Tours and Travels Limited; Nairobi High Court Winding up cause No. 43 of 2000**, stated that:

“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”.

Halsbury's Law of England, 4th Edition Vol 37 at page 330 and 332 gives good guidance on the legal threshold to be considered on the issue of stay of proceedings. It is as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

The application appealed against by the Defendant sought to strike out the lower court suit with costs. If the said appeal is heard and succeeds, this would mean the death of the lower court suit No. 892 of 2013 as it will stand struck out with costs. If the stay of proceedings in the suit, pending hearing and determination of the appeal is not granted, there is danger of the suit proceeding to the end; and incase the finding would be favourable to the plaintiff and is made before the appeal is heard and determined; and such appeal succeeds thereafter, a state of confusion would arise, and judicial variable time and mind would have been wasted in process of the lower court hearing. It is not therefore in the interest of justice to allow the proceedings in the lower court to continue where there is a pending appeal in the High Court likely to bring the said suit to an end. On this ground I find the application merited. I therefore order that there be stay of proceedings in the civil suit No. 892 of 2013, pending hearing and determination of Civil Appeal No. 105 of 2013.

Cost be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th day of October, 2018.

In the presence of:-

(1) Applicant absent

(2) Respondent absent

(3) Mr. Mwelem- Court assistant