



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.44 OF 2015

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29, 41, 47, 48, 50, 206, 159, 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO FAIR HEARING, DIGNITY AND PROTECTION FROM DISCRIMINATION AND SECURITY OF PERSON

BETWEEN

SAMUEL K. TONU.....PETITIONER/RESPONDENT

VERSUS

THE SPEAKER,

NAKURU COUNTY ASSEMBLY.....1ST RESPONDENT/APPLICANT

THE CLERK, NAKURU COUNTY ASSEMBLY.....1ST RESPONDENT/APPLICANT

JAMES KIPKOROS TUEI.....1ST RESPONDENT/APPLICANT

RULING

INTRODUCTION

1. The application before court is the Notice of Motion dated 7th July, 2015. The prayers sought are listed as follows:

1. Spent

2. **THAT** this Honourable Court be pleased to stay the proceedings before the Honourable Court pending the hearing and determination of this application.

3. **THAT** this Honourable court be pleased to stay the proceedings before this Honourable Court

pending the hearing and determination of Applicants' appeal in the Court of Appeal against the ruling by the Honourable Employment and Labour Relations Court on 19th June, 2015.

4. THAT costs of the application be in the cause.

2. The same is premised on seven (7) grounds as listed herebelow and supported by the sworn affidavit of Joseph M. Mahinda, the 2nd Respondent:

1. THAT the Employment and Labour Relations Court (ELRC) made a ruling on 19th June, 2015 upholding the Applicants' preliminary objection to the court's jurisdiction.

2. THAT the honourable court in the ruling ordered the transfer of the suit to the High Court for hearing and determination.

3. THAT the Applicants were dissatisfied with the transfer of the suit to the High Court and have preferred an appeal against the orders to the Court of Appeal.

4. THAT the Applicants have an arguable appeal that will be rendered nugatory should the suit proceed in the High Court.

5. THAT THE Applicants have made this application without delay and pray that the same be allowed as prayed.

6. THAT the Applicants stand to suffer prejudice if the proceedings in this Honourable Court are not stayed pending the hearing and determination of the appeal.

7. THAT it is in the interest of justice that the Applicants make this application.

3. The application is opposed and the petitioner (Respondent to the application) has sworn an eleven (11) paragraph affidavit in opposition to the application.

THE APPLICANT'S CASE

4. It is the applicant's case that having been dissatisfied with the ruling of court on 19th June, 2015 transferring this suit to the High Court, the applicant preferred an appeal against the said orders to the Court of Appeal. A copy of the Notice of Appeal is annexed.

A request has been placed to the Deputy Registrar of the Employment and Labour Relations Court requesting for proceedings to enable the filing of the appeal.

5. It is urged that the appeal is arguable and the appeal shall be rendered nugatory and the High Court shall have wasted precious judicial time hearing an application it had no jurisdiction to hear.

THE RESPONDENT'S CASE

6. It is the Respondent's case that the application is a tactical device by the respondents to delay the cause of justice as the same is ill intent (sic), unmerited and culminates into abuse of the court process.

7. It is urged that the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013 do not provide for stay of proceedings pending appeal as dictated by rule 32, which anyway should be made before the court which made the ruling.

8. Allowing the application, it is urged, would cause the wheels of justice to grind to a halt as the court would be condoning criminal activities of respondents. Any unprocedural dismissal should be dealt with by the court as custodians of the rights under **Chapter 4** of the **Constitution of Kenya**.

9. No substantial loss will be visited upon the applicant should stay be denied. There is no security furnished by the applicant.

10. I am urged not to allow procedural technicalities to impede the cause of justice.

THE APPLICANT'S SUBMISSIONS

11. Oral arguments were advanced by both parties.

The applicant's counsel submitted in a brief address to the court indicating that the applicant has a strong appeal as the ELRC has no powers to transfer the suit. He referred me to various authorities to which I will revert later in the analysis hereafter

THE RESPONDENT'S SUBMISSION

12. For the Respondent, counsel submits that what is being invoked is the discretionary powers of the court. This matter is about a Constitutional Petition under the “*Mutunga*” rules 2013. There is no rule on stay of proceedings after any ruling or judgment.

13. The leverage available is under **article 159** and the inherent jurisdiction of the court. I am referred to various authorities filed which I will revert to in the analysis. The principle is that stay of proceedings should not be allowed unless there are good reasons.

14. It is urged that it is likely that the petition will be academic as the County Assembly will go for elections in April. It is counsel's position that the petitioner would suffer more prejudice. He would rather the petition goes to full hearing and the applicant herein could apply for stay if dissatisfied with the result.

15. There is no substantive appeal filed despite notice of appeal having been filed in June, 2015. Judicial time will be lost were the Court of Appeal to rule in favour of the petitioner (Respondent). The inertia in filing the appeal shows lack of diligence.

16. Counsel defends the transfer of the case by the ELRC stating that the court exercised its jurisdiction properly. It is urged that the Court of Appeal has shown its distaste to the striking out of suits which will lead to filing of same suits.

17. Mr. Karanja in response to these submissions stated that counsel has referred to the **Nick Salat** case. He states that in the case of **Aramat V. IEBC**, the Supreme Court did state that jurisdiction is everything. In the present petition, there was no issue about reinstatement but on Standing Orders and Constitutional issues.

18. Counsel explains the delay in the filing of the appeal stating that they applied for proceedings.

ANALYSIS AND DETERMINATION

19. On the facts and the law before me the issues for determination are 2:

1. Whether I have jurisdiction to grant the orders sought.
2. whether the applicant has met the threshold for grant of stay of proceedings.

20. On the issue of jurisdiction, I note that the ELRC Court did order a transfer of this matter to this court on the 19th June, 2015. This is the impugned order which is under challenge in the intended appeal. It was open to the applicant herein to lodge the present application in the ELRC.

21. This court is now seized of the petition pursuant to the Orders of 19th June, 2015 by the ELRC. Even

though “*Mutungu*” rules may not expressly provide for a stay of proceedings, this court has inherent powers fortified both by statute and the Constitution specifically **Section 159** to further the interests of justice without undue regard to procedural technicalities.

22. This court has jurisdiction to entertain any application in the matter as the court is properly seized of the same and this includes an application to stay proceedings.

23. On whether, the threshold for a stay of proceedings has been achieved, it is trite law that the granting of a stay of proceedings is a discretionary power to be exercised in the interests of justice depending on the facts of each case. The discretion, like all discretions, must be exercised judiciously.

24. I have considered the application, the response thereto and counsel's submissions as well as the authorities tendered.

25. I place heavily reliance on the case of **Daniel Walter Rasugu V. Johana Nyakwoyo Buti & 2 others** [2008] eKLR where Musinga, J (as he then was) relying on the decision in **In the matter of Global Tours and Travel Limited**, Winding up Cause No.43 of 2000 at Nairobi (unreported) allowed a stay of proceedings.

In the matter of Global Tours and Travel Limited (Supra) the court held:

“In deciding whether to order a stay [of proceedings] 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 facts 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 expeditious.”

26. Applying these principles and on the material before me, I am persuaded that the applicant would merit the prayers for a stay of proceedings.

27. But that relief becomes unavailable to the applicant, in my view, for one major reason that none of the parties have dwelt on.

This court is being asked to stay proceedings pending an appeal that is not yet filed.

28. The explanation given for the delay in the filing of the appeal is that the ELRC Deputy Registrar has not furnished the applicant with proceedings. Equity comes to the aid of the diligent and not the indolent. It is clear from the record that the letter seeking proceedings was done to the Deputy Registrar on 26th June, 2015. One and a half years down the line, no other or further step is shown in pursuing the proceedings.

29. I find it most inappropriate to order a stay of proceeding on the basis of an appeal that is not yet filed and with no guarantee that it will be filed.

30. As submitted by counsel for the Respondent and in the circumstances of this case where an appeal is not yet lodged and in view of the concerns on the ending term of the County Assembly, the dictates of justice would demand that the petition herein be allowed to proceed and should the applicant be aggrieved by the findings (i.e. should the petition be determined, before the appeal), it would be open to the applicant to seek stay of execution at that stage.

31. With the result that the application dated 7th July, 2015 fails, the same is dismissed with costs to the Respondent.

Dates, Signed and Delivered at Nakuru this 24th day of January, 2017.

A. K. NDUNGU

JUDGE