



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAL. 178 OF 2019 (UR. 165/2019)

BETWEEN

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES...APPLICANT

VERSUS

ELIZABETH IRAKO SHIAKAMIRI.....RESPONDENT

(Application for extension of time for giving Notice of Appeal and for leave to appeal out of time of an order from the decision of the Employment and Labour Relations Court of Kenya at Nairobi (J.N. Abuodha, J.) Dated 7th February, 2019 in

ELRC No. 1107 of 2015)

RULING

Before me is a Notice of Motion dated 12th of June, 2019 and filed on 19th June, 2019, brought under **Rule 4** of the Court of Appeal Rules and **section 3A** and **3B** of the Appellate Jurisdiction Act, seeking leave to appeal out of time.

The respondent has raised four (4) grounds of preliminary objections against the said application. These read as follows:

- (1) The applicants are in contempt of Court orders issued by Hon. J.N. Abuodha (J) on 29th June, 2015.*
- (2) The applicant has been cited for contempt in the Employment & Labour Relations Court at Nairobi.*
- (3) The Contemnors ought to appear before the said court to show cause why they have not complied with the orders of the Court. Therefore without purging contempt proceedings, to give audience to the contemnors in this Court will be tantamount to condoning an illegality.*
- (4) The applicants should in the first instance satisfy this Court that they have purged contempt in the Employment & Labour Relations Court before being granted audience.*

When the application came up for hearing before me on 2nd July, 2019, parties agreed that the preliminary objections be disposed of first. These were canvassed by way of oral submissions. Learned counsel **Mr. Odhiambo** holding brief for **Mr. Wangalwa** with the preliminary objections appeared for the respondent, while learned counsel **Miss Wanjohi** holding brief for **Mr. Hassan Abdi** appeared for the applicant.

Supporting the preliminary objections, learned counsel **Mr. Odhiambo** submitted that there are orders that were issued by the Employment and Labour Relations Court (ELRC) on the 29th June, 2015 which have never been appealed against or set aside by the applicant; that the applicant has been in flagrant disobedience of those orders right from the time they were issued; that the said orders being valid they demand obedience from the applicant; that the applicant has been cited for contempt of court of those orders before the court that issued them; that they have not purged the contempt for which they were cited and therefore have no audience before any court of law; that in light of the above undisputed position, the applicants should be rerouted back to the ELRC to purge the contempt before they can be given audience before this Court.

In reply to the preliminary objections, learned counsel **Miss Wanjohi** while not denying the existence of the orders issued on 29th June, 2015 submitted, that right of appeal is constitutionally entrenched; that this Court has jurisdiction to grant the relief sought; that the orders

allegedly disobeyed by the applicant are not before this Court; that issue of alleged breach of those orders can only be canvassed before the very court in which they were issued; that the law provides for sanctions against any party alleged to be in breach of court orders; that denial of a right of appeal or access to justice in a court other than the court that issued the alleged flouted orders is not one of those sanctions; that there is therefore no sufficient basis laid for the court to deny the applicant a right to ventilate the application for leave to appeal out of time, especially when the intended appeal is not against the orders allegedly flouted; that the right forum to redress the respondent's grievances if any should be the court that issued the orders allegedly flouted. On that account counsel urged me to disallow the preliminary objections to pave the way for the merit disposal of the application for leave to appeal out of time.

In reply to the applicant's opposition to the preliminary objections, **Mr. Odhiambo** reiterated his earlier submissions and added that it is the duty of the court to ensure that he who comes to court seeking justice must come before it with clean hands of which the applicant has not as there is admitted disobedience to court orders.

My jurisdiction to intervene on behalf of the respondents has been invoked by way of four grounds of preliminary objections already set out above. The threshold for sustaining a preliminary objection is as was set by the predecessor of the Court, in the **Mukisa Biscuits Co.** case (supra). **LAW JA** had this to say:

“ a preliminary objection consists of a pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

Sir Charles New Bold, P.: on the other hand had this to say:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

From the above, the factors to be taken into consideration when determining sustainability or otherwise of a preliminary objection are as follows:- the preliminary objection must be in the form of a pleading which is argued as a pure point of law and if sustained, may dispose of the suit such as an objection to jurisdiction of the court; a plea of limitation or a submission that parties are bound by the terms of a contract giving rise to the suit to refer the dispute to arbitration; that the facts pleaded by the opposite party are not in dispute and what is sought to be achieved by the P.O. raised is not the exercise of Judicial discretion.

Applying the above threshold to the rival positions herein, it is my finding that the preliminary objections as raised by the respondent are not sustainable for the following reasons: firstly the first prerequisite that a preliminary objection be anchored on a pleading has not been met as it is undisputed that, I have no pleading before me touching on the alleged contempt of Court orders. Neither are the alleged flouted orders before me. Secondly, issues of want of jurisdiction in this Court to handle the application for leave to appeal out of time does not arise as **Rule 4** of the Court of Appeal Rules (CAR) explicitly vests jurisdiction in the Court both to receive, entertain and determine applications for leave to appeal out of time. Issue of limitation does not also apply as it has not been raised as a ground for raising objection. Neither was the issue of reference of the matter to arbitration raised as one of the grounds for raising the preliminary objection.

With regard to existence of consensus on the facts pleaded by the opposite party as being correct, that position does not obtain herein because (i) there is dispute as to whether contempt has been dealt with fully by the court that issued the orders allegedly flouted or not, with the respondent contending that there is contempt while the applicant alleges that the issue was resolved by the court that issued those very orders; (ii) it is also the applicant's argument that the orders intended to be appealed against are not the orders alleged to have been flouted; (iii) there is also alleged want of jurisdiction in this Court to entertain the issue of contempt in the manner presented considering that neither the record nor particulars of the orders allegedly flouted are before me.

In light of the above, it is my finding there is therefore no consensus on the correctness of the facts relied upon by the respondent as basis for raising the preliminary objections which is a necessary prerequisite for sustaining a Preliminary Objection.

Taking the totality of the above assessment and reasoning into consideration, it is my finding that the Preliminary Objections raised are not sustainable for the reasons already given above. They are dismissed. The parties are at liberty to canvass the application for leave of court to file an appeal out of time.

(2) Costs of the Preliminary objection in the application.

Dated and delivered at Nairobi this 5th Day of July, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.