



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, OUKO, KIAGE, JJ.A)

CIVIL APPLICATION NO. NAI 32 OF 2014 (UR 25/2014)

BETWEEN

KAYUM KHANAPPLICANT

AND

INTERNATIONAL COMMERCIAL

COMPANY (K) LTDRESPONDENT

(Being an application for stay of further proceedings from the Ruling and Orders issued by Hon. Lady Justice Monicah Mbaru on 5th February, 2014

in

CIVIL APPEAL NO. 3 OF 2014)

RULING OF THE COURT

By his motion dated 24th February 2014 brought under **Section 3A** of the

Appellate Jurisdiction Act and **Rules 5 (2) (b)** and **42** of the **Court of Appeal Rules**,

KAYUM KHAN (the Applicant), who is acting in person, prays that this Honourable Court be pleased to grant stay of further proceedings in **Industrial Court Case Number 66** of **2013** pending the determination of **Civil Appeal No. 3** of **2014**.

The applicant bases his application on some three grounds which appear on the face of the motion as follows;

“i) *If as per the Ruling of 5th February, 2014 of Hon. Lady Justice Monicah Mbaru, the Industrial Court matter, No. 66 of 2013, continues with hearing and adjudication and judgment is delivered thereof, (sic) the pending Civil Appeal No, 3 of 2014 will be rendered nugatory as the prayers sought in the Appeal are intended to bring in the entire issues in dispute to be heard and determined before judgment is delivered.*

That by principle of Res judicata, the Applicant herein will be unable to bring

another legal action against the Respondent for claim of the part of remuneration of KShs. 803,903.00 as contained in the Amended Memorandum of Claim.

iii. *The Applicant will suffer loss of this amount of KShs. 803,903.00 and his legal*

rights to claim remuneration for work done under the Employment Act will be jeopardized and his Constitutional rights to justice will be infringed upon.”

There was also filed an affidavit sworn by the applicant on 24th February 2014 which was supplemented by his further affidavit sworn on 19th May 2014 in which he provided the factual backing to the grounds on which his application is premised.

By an affidavit sworn by **SAADIA KARIMBUX – EFFENDY** on 7th May 2014, the respondent opposed the applicant’s motion and averred in sum that the Applicant had not satisfied the conditions that would warrant our granting him of the relief he seeks. She swore that the application before court was clogging and frustrating the expeditious adjudication of the dispute still pending in the Industrial Court, averments strongly denied by the applicant in his Further Affidavit.

Arguing the appeal before us with aplomb to rival a lawyer’s, the applicant first addressed us on the arguability of his already filed appeal stating that the learned Judge erred in disallowing the applicant’s application to amend his Statement of Claim given that the right to amend the claim was recognized by both the **Civil Procedure Rules, 2010** and the **Industrial Court Procedure Rules**. He argued that delay should not have militated against the proposed amendments as the substance of those amendments far outweighed whatever inconveniences, if any, that the respondent might have suffered. In support of that contention the applicant cited several authorities including **KENYA PIPELINE WORKERS UNION – VS-KENYA PIPELINE CO. LTD [2014]eKLR**, a decision of the Industrial Court at Kisumu; **ERASTUS CHOMBA WAHOME & 2 OTHERS –VS- DAVID KARIUKI GITHIGA & 4 OTHERS [2006] eKLR** decided by the High Court at Nakuru as well as **ELIJAH KIPNGENO ARAP BII –VS- KENYA COMMERCIAL BANK LTD [2013] eKLR** which is a decision of this Court.

The applicant submitted further that were the case at the Industrial Court to proceed to hearing and determination, his rights to a fair hearing would be violated in that a significant part of his claim against the respondent would have been improperly shut out and that would render his appeal nugatory and futile and would, moreover, lead to extra costs in fresh litigation, if *res judicata* does not crop in. He thus prayed that we bear in mind the overriding objectives of the **Court of Appeal Act and Rules** which are the facilitation of just, expeditious, proportionate and affordable resolution of appeals and thus find that a stay will conduce to the meeting of those objectives. He cited this Court’s decision in **KARUTURI NETWORKS LTD & ANOR –VS- DALY & FIGGIS ADVOCATES [2009] eKLR** to emphasize that point.

Opposing the application, **MRS. SAADIA K. EFFENDY**, the respondent’s learned counsel posited that the applicant had not met the threshold for the grant of relief under **Rule 5(2) (b)** of the **Court of Appeal Rules**. She contended that in so far as the applicant’s application for leave to amend his statement of claim was brought before the Industrial Court after the applicant had already closed his case, the learned Judge was right in disallowing the application and that any appeal against that decision such as filed by the applicant would only be frivolous and not arguable.

On whether the applicant’s appeal would be rendered nugatory were it to eventually succeed yet no stay was granted in the meantime, counsel submitted that it would not be so. Citing this Court’s decision in **DREAM CAMP KENYA LTD – VS- MOHAMMED ELFAFF & 3 OTHERS [2013] eKLR**, counsel submitted that there is nothing irreversible about any orders the Judge of the Industrial Court may make so that even were the refusal to allow the amendment to be reversed, whatever orders the learned Judge would have made in the meantime are amenable to quashing and an order of costs would suffice to compensate the applicant. She submitted that it was in the interests of justice that the

proceedings at the Industrial Court be concluded expeditiously.

The principles that apply in the consideration of an application for injunction or stay, be it of execution or proceedings, pending appeal, are notorious. An applicant must satisfy the Court that he has an arguable appeal by which is meant, not an appeal that must of necessity succeed, but one that is deserving of full argument before the Court, one which is not frivolous. See **JOSEPH GITAUGACHAU & ANOTHER –VS- PIONEER HOLDINGS (A) LTD & 2 OTHERS, Civil Application No. 124 OF 2008**. So long as a single bone fide arguable ground is shown, it is sufficient to satisfy this limb. See **DAMJI PRAGJI MANDAVIA – VS- SARA LEE HOUSEHOLD & BODY CAR E (K) LTD Civil Application No.NAI 345 OF 2004**.

Bearing these considerations in mind, we have no doubt that the applicant's appeal is eminently arguable. Given the statutory and judicial authorities cited for the proposition that amendments to pleadings are meant to bring the totality of the parties' respective claims so as to allow the court to substantively determine all the issues in controversy and should be allowed at any stage, we are unable to agree with **Mrs. Effendy** that the applicant's appeal is frivolous and unarguable.

As to whether the appeal would be rendered nugatory, the applicant contends that the amendment he had sought to make was to include claim for KShs.830,903 against the Respondent, being his remuneration for work done. There is merit in his assertion that were the claim before the court below to proceed to hearing and determination without that aspect of his claim being considered, he would suffer prejudice in that he would be forced to have to file fresh proceedings for it, with the attendant delay and costs implications and also risk being barred by *res judicata*.

We are cognizant of the fact that the grant of relief such as we are prayed is a matter within our discretion which is unfettered but to be exercised judicially and judiciously. We are not persuaded that in the circumstances of this case it would be in consonance with our bounden duty to do substantial justice and to meet the overriding objective of the adjudicative process were we to turn the applicant away with the platitude that, even were he to succeed on appeal, he could still file a fresh

5 claim against the respondent. The appeal would have been rendered nugatory and in this we give the term 'nugatory' its full meaning to embrace not only worthless, futile or invalid, but also trifling, consistent with this Court's decision in

RELIANCE BANK LTD –VS- NORLAKE INVESTMENTS LTD [2002] IEA 27 at p232.

The applicant has satisfied both limbs or principles for grant of stay of proceedings and we accordingly allow the application in terms of prayer 3 of the Motion.

Costs shall be in the appeal.

Dated and delivered at Nairobi this 21st day of November 2014.

P. M. MWILU

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR