



Amalgamated Union of Kenya Metal Workers v Mohamed t/a Rizwan Metal Craft (Cause E095 of 2021) [2023] KEELRC 1265 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E095 OF 2021**

M MBARŪ, J

MAY 18, 2023

BETWEEN

AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT

AND

RAIZ UL HAQ MOHAMED T/A RIZWAN METAL CRAFT RESPONDENT

RULING

1. The respondent, Raiz Ul Haq Mohamed t/a Rizwan Metal Craft filed application dated May 26, 2022 seeking for orders that there be stay of proceedings pending appeal. the respondent filed a Supporting Affidavit sworn by Raiz Ull Haq and on the grounds that on February 25, 2022 the court delivered ruling on the application dated December 14, 2021 and dissatisfied with the same filed an appeal to the Court of Appeal on March 9, 2022 and seeking stay of proceeding to allow the appeal be heard on the merits. Unless the proceedings herein are stayed, the appeal will be rendered nugatory and the respondent will suffer prejudice.
2. In reply, the claimant filed the Replying Affidavit of Rose Omamo the general secretary of the claimant and who avers that stay of proceedings relies on judicial discretion and should be exercised in the interests of justice where there exists a prima facie case that the appeal is arguable. A stay of proceedings seriously impedes access to justice and should not be granted unless there are exceptional circumstances which are lacking in this case. The court delivered ruling on February 25, 2022 and allowed parties to amend pleading since there was confusion as to who the respondent is and has stated to be Raiz or Riaz and for the purpose of negotiating a CBA, the respondent will not suffer any prejudice if the claim herein is heard on the merits and the orders sought having been overtaken by events will not aid justice to be issued.
Both parties attended and made oral submissions.
3. The respondent as the applicant submitted that appeal No. E099 of 2022 was filed following ruling delivered herein on February 25, 2022 and it is arguable with high chances of success and stay of



proceedings herein should be allowed to have the respondent heard on the appeal. The claimant will not suffer any prejudice and once the appeal is addressed, directions therefrom will assist the parties to know which way they should take.

4. In response, the claimant submitted that the applicant has failed to comply with principles set out under Order 42 rule 6 of the *Civil Procedure Rules* with regard to the orders sought to stay proceedings pending the hearing of the appeal. The status of the matter has since changed as a result of amendment to pleadings where the contention was whether the respondent was Riaz or Raiz which the court addressed and where the matter is heard on the merits, the respondent will not suffer any loss. The subject of appeal is now mute after the court allowed parties to amend pleadings and list the respondent as Riazullahq Ali Mohamed t/a Rizwan Metal Craft.
5. An applicant seeking stay of proceedings so as to be heard on the appeal has two main parts. On the one part, stay of proceedings should not be confused with stay of execution pending appeal since stay of proceedings is a grave order because it seeks to stop the court from undertaking its primary mandate, dispense justice according to law. On the other Part, the right of appeal is lawful and should be freely allowed subject to the applicant satisfying the provisions of Order 42 rule 6 with regard to stay of execution.
6. This is aptly captured in the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR that;

Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.
7. With regard to stay of proceedings, the court must appraise all matters relevant before allowing for stay of proceedings. In *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 the court in addressing an application seeking stay of proceedings held that;

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.
8. On February 25, 2022 the court delivered a ruling following application by the respondent dated December 15, 2021 on the grounds that the suit should be struck out with costs for the reasons that the claimant had pleaded it is a company registered and operating as a sole proprietorship. The case was also that in ELRC No.469 of 2018 Mombasa, where the parties herein were the same, the court held that no company existed by the respondent's name.
9. In the referenced ruling, the court held that the claimant should be permitted to amend the Memorandum of Claim to reflect the proper respondent as "Riazullahq Ali Mohamed Trading as Rizwan Metal Craft". The respondent as the applicant herein has filed his Supporting Affidavit to his application dated May 26, 2022 and a Further Affidavit dated October 28, 2022 sworn by Riaz Ull Haq and hence giving his full names as the sole proprietor of the respondent company of Rizwan Metal Craft. The claimant was directed to meet the costs due to the respondent for the application. The court put into account that the claimant was acting in person and for given reasons, the court allowed



parties to amend pleadings together with summons to enter appearance and to attend court for pre-trial directions.

10. Aggrieved by the orders of the court, the respondent has filed an appeal No. E099 of 2022.
11. The issue in dispute between the parties as registered in the Memorandum of Claim is that there is failure to agree on the gratuity rate in the CBA negotiations and the court should address by hearing the parties.
12. To arrive at CBA negotiations, parties must enjoy a Recognition Agreement. Within that recognition, parties agree to engage in collective bargaining on terms and conditions of employment for the employees. At the end of the suit herein are employees whose terms and conditions of employment are due for negotiations.
13. The stay of proceedings herein would mean that such matter(s) will be kept pending.
14. Even though the respondent has the unfettered right of appeal, the challenge being the application of the correct name, such matter can still be heard by the Court of Appeal while with the allowed amendments to pleadings herein, once complied with, the respondent will have a chance to urge its defence in response and the court shall hear the claim on the merits. Each party is protected, one with a claim and another with a response.
15. The ruling of February 25, 2022 well recognised the provisions of Article 159 of the Constitution which mandates the court to proceed without undue regard to technicalities and the parties having been well guided and allowed to amend pleadings, the issue at hand well addressed, once there is compliance, the respondent will well be heard on the response and determination of the claim be addressed on the merits.
16. To stay proceedings on the background that parties were allowed to amend pleadings would therefore not aid justice and the principle objectives of the Court underlined in Section 3 of the Employment and Labour Relations Court Act, 2011.
17. Accordingly, application dated May 26, 2022 is hereby dismissed. Costs to the claimant.
18. Upon delivery of the ruling, the court will give hearing directions.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

