



**East Africa Portland Cement Limited v Maina (Appeal
16 of 2020) [2023] KEELRC 1459 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1459 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 16 OF 2020
MN NDUMA, J
JUNE 8, 2023**

**BETWEEN
EAST AFRICA PORTLAND CEMENT LIMITED APPELLANT
AND
BERNARD TINDI MAINA RESPONDENT**

RULING

1. The applicant filed a notice of motion application dated 5th March, 2020 seeking for an order in the following terms:-
 1. Spent.
 2. That there be stay of proceedings in the Chief Magistrate Court in Mavoko Civil Case No. 523 of 2018; Bernard Tindi Maina -vs- East Africa Portland Cement Limited, pending the inter-partes hearing and determination of this Application.
 3. That there be stay of proceedings in the Chief Magistrate Court in Mavoko, Civil case No. 523 of 2018; Bernard Tindi Maina -vs- East Africa Portland Cement Limited, pending the inter-partes hearing and determination of this Appeal.
 3. That costs of this Application be in the cause.
2. The application is premised on grounds set out on the face of the application and the supporting affidavit of the applicant to wit; that cause of action in Mavoko CMCC No. 523 of 2018 - Bernard Tindi Maina –vs- East Africa Portland Cement Limited, is based on a contract of employment and is alleged to have arisen on 2nd June, 2012.
3. That the suit was filed by the respondent on 26th April, 2018, a period of over six (6) years from the date the cause of action arose.



4. That in a clear misapprehension of the provisions of Section 90 of the Employment Act, 2007, the lower Court irregularly granted the respondent leave to file the suit out of time on 25th April, 2018.
5. That on 3rd September, 2019, the appellant filed a notice of motion application dated 19th September, 2018, to strike out the suit on the grounds that it was statute barred by dint of Section 90 of the Employment Act, 2007.
6. The lower Court on 29th January, 2020 delivered a ruling dismissing the appellant's application.
7. That the appellant filed this appeal against the ruling/orders of the lower Court made on 29th January, 2020.
8. That the suit before the lower Court is scheduled for mention to fix a hearing date on 18th March, 2020.
9. That unless the proceedings in the lower Court are stayed, the lower Court shall proceed to hear the suit before it and give a judgment thereby rendering the Appellant's Appeal nugatory.
10. That the application be granted and confirm the interim orders granted on 6th October, 2021.
11. The respondent did not file a replying affidavit but both parties filed written submissions. The issue for determination is primarily a legal issue that may be determined on the submissions by the parties.
12. It is not in dispute that the suit in Mavoko Civil Case No. 523 of 2018 - Bernard Tindi Maina –vs- East Africa Portland Cement Limited, was filed on 26th April, 2018. The cause of action as set out in the pleadings of the respondent thereof was on 2nd June, 2012.
13. The appellant has brought this application seeking stay of the proceedings before the lower Court pending the hearing and determination of an appeal against the ruling of the lower Court delivered on 29th January, 2020 allowing the suit to proceed on the merits before the lower Court. The issue for stay of proceedings before the lower Court pending appeal is governed by Order 42, Rule 6(1) of the Civil Procedure Rules as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

14. The application before us is of such a nature and the principles to be followed were well stated in the case of *Global Tours and Travel Limited*; Nairobi HC Winding Up Cause No. 43 of 2000

“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 for 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.”

15. The present application was brought without inordinate delay upon reading of the ruling of the lower Court on 9th January, 2020 and filing of the intended appeal on 27th February, 2020.
16. The intended appeal on the facts placed before this Court is arguable and given that the issue arises from a Preliminary Objection comprising a pure point of law that has the potential of finally determining the suit filed before the lower Court, it is in our view optimal utilisation of judicial time to hear and determine the intended appeal before the matter before the lower Court is proceeded on, on its merits.
17. Accordingly, the application is granted and the following orders made:-
 - (a) The proceedings in Mavoko Civil Case No. 523 of 2018, Bernard Tindi Maina –vs- East Africa Portland Cement Limited are stayed pending the hearing and determination of this appeal.
 - (b) The costs of the application be in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Ocharo Ongeru for Respondent

Ekale: Court Assistant

