



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL NO E110 OF 2021

IMCO HOLDINGS LIMITED.....APPLICANT

VERSUS

MALACHI N. NYANGAU.....RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated 27th October, 2021, expressed to be brought under Order 42 Rule 6, Order 51, Order 50 Rule 6 of the Civil Procedure Rules, 2010, Sections 3A and 79G of the Civil Procedure Act.

2. The Application seeks the following orders;

1. That this Honourable Court be pleased to admit the appeal filed on 1st October, 2021 out of time in respect of the Ruling in Milimani CMCC No. 9906 of 2018.

2. Spent.

3. THAT all proceedings in the suit herein and any other suit arising from the alleged industrial accident of 24th October, 2017 involving the parties herein be stayed pending the hearing and determination of the Appeal.

4. THAT costs of this Application be provided for.

3. The Application is premised on the grounds set out in its body and on the supporting affidavit of Ms. Nereah Mary, Advocate on record for the Applicant/Appellant. Briefly, the grounds are that;

i. the ruling in Milimani CMCC no. 9906 of 2018 was delivered in absence of the Applicant.

ii. the Applicant's Advocate attended court virtually on 4th August, 2021 in the morning and the Court informed the parties that the Ruling will be delivered in the afternoon.

iii. the Applicant's Advocate logged back into the virtual court session in the afternoon of 4th August, 2021 but was not admitted into the session.

iv. the Applicant's Advocate was not aware that the ruling was eventually delivered.

v. that when the Applicant's Advocate were served with a pretrial date of 30th September, 2021 by the Respondent's Advocate, they were made aware that the Ruling was delivered and its preliminary objection dated 13th October, 2020 dismissed.

vi. the time required for filing an appeal had already expired and there was no stay of proceedings in the main suit.

vii. the Applicant/ Appellant has preferred an appeal against the entire Ruling.

viii. the Appeal has a probability of success as jurisdiction of the trial court to hear and determine the suit in Milimani CMCC No. 9906 of 2018 is highly disputed.

ix. unless stay of proceedings is granted the defendant will be denied a right to appeal from the Ruling and Judgement in the suit herein is likely to be to the detriment of the Defendant and cause it irreparable harm.

x. the Applicant has moved the court without unreasonable delay.

4. The Application was certified urgent on 1st November, 2021 and the Applicant directed to serve the same upon the Respondent within 7 days. The Court further granted stay of proceedings in Milimani CMCC No. 9906 of 2018 pending hearing and determination of the Application.

5. The Respondent filed a Replying Affidavit in response to the Application where he deponed that;

i. the Application was premature as the issue regarding the jurisdiction of WIBA is subject to a pending appeal at Kisumu.

ii. the learned magistrate gave a reasoned Ruling based on the principle of legitimate expectation.

iii. it would be futile to entertain the application as the lower courts are not dealing with the WIBA matters as they are awaiting the outcome of the Kisumu Appeal in that regard.

iv. the status quo be maintained pending the outcome of the Ruling to avoid conflict of judgement between the Court of Appeal and this court.

v. the application be dismissed with costs.

6. The Applicant filed submissions in support of the Application through which it reiterated the averments contained in the Application. It submitted that there was no unreasonable delay in making the Application and that the Applicant had demonstrated sufficient reason to explain the said delay. The Applicant further argued that the Respondent will not suffer any prejudice in the event the Application is allowed. The Applicant placed reliance on several authorities including **Charles Karanja Kiiru vs Charles Githinji Muigwa (2017) eKLR** and **Jennifer Njuguna & another vs Robert Kamiti Gichuhi (2017) eKLR**. As regards the issue of stay of proceedings, the Applicant submitted that it will suffer great harm if the orders are not granted, that it had an arguable appeal and that the balance of convenience was in its favor. It invited the court to consider several authorities including **Giella vs Cassman Brown & company limited (1973) EA 358**, **Anne Njeri Mwangi vs Muzaffer Musafee Esajee & another (2014) eKLR** and **Africa Safari Club Limited vs Safe Rentals Limited (2010) eKLR**.

7. The Respondent opted not to file submissions and instead, chose to rely on the averments contained in his Replying Affidavit.

Analysis and Determination

8. I have considered the Application and note that the main prayers being sought by the Applicant are; leave to appeal out of the statutory stipulated period and stay of proceedings pending Appeal in Milimani CMCC No. 9906 of 2018. To this end, the issues for determination are twofold thus;

i. Leave to appeal out of time; and

ii. Stay of proceedings.

(i) Leave to appeal out of time

9. The relevant statutory provision in respect of such an Application is **Section 79G and 95 of the Civil Procedure Act. Section 79G** provides as follows;

“[79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.]”

10. Section 95 on its part provides as follows;

“[95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.]”

11. It is not in dispute that the Ruling that is sought to be appealed from was delivered on 4th August, 2021, while the instant Application was filed on 29th October, 2021. Evidently, this was beyond the 30 days period stipulated under section 79G of the Civil Procedure Act.

12. The Applicant has attributed this delay to the fact that Counsel on record was not aware that Ruling had been delivered on 4th August, 2021 as she was not admitted to the virtual court session, that afternoon. That as a result, she only became aware of the Ruling when they were served with a mention notice for pretrial directions by the Respondent.

13. It is notable that the Respondent did not controvert these facts in its Replying Affidavit. Indeed, it did not respond to the averments in regards to the delay in filing the Appeal out of time and instead, termed the Application as premature.

14. In the premises, this court finds that the reason advanced by the Applicant in explaining the delay in filing the Appeal out of time as plausible. In the circumstances, the said delay is not inexcusable as to warrant denying the Applicant an opportunity to present its case by way of an appeal to this Court.

(ii) Stay of proceedings

15. The Applicant has also sought an order to stay proceedings in the main suit pending Appeal. Its main reason is that if not granted, the trial court may proceed with the main suit and deliver its Judgement which is likely to be highly detrimental and prejudicial to the Applicant.

16. On its part the Respondent prefers that the status quo be maintained pending hearing and determination of the said Appeal. It argued that there is a pending Appeal at the Court of Appeal at Kisumu hence the Magistrates' courts are not currently handling work injury claims (WIBA). Notably the Respondent did not give a citation of the said Appeal. Nonetheless, the court at this juncture is not considering the merits or otherwise of the Appeal. Rather, it is being called to issue orders in the interim.

17. An order for grant of stay of proceedings is discretionary and the court's jurisdiction is derived from Order 42 rule 6 (1) of the Civil Procedure Rules.

18. In the case of **Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J (as he then was)** held that:

“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 a 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 case, 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...”

19. As such, the Applicant ought to demonstrate amongst others, that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory. It must also demonstrate that there was no inordinate delay on its part.

20. I have perused the Memorandum of Appeal annexed to the Applicant's supporting affidavit and find that the central issue is the trial court's jurisdiction to hear and determine matters related to work injury. The Applicant's argument is premised on the Judgment by the **Supreme Court in Petition No. 4 of 2019: Law Society of Kenya vs Attorney General & Another (2019)**. The Respondent has indicated that there is a pending appeal over the same subject matter before the Court of Appeal at Kisumu.

21. I must hasten to add that an arguable case need not necessarily be one that will succeed in Appeal. Rather, the same ought to be arguable in Appeal.

22. From the observations made above, and upon consideration of the Respondent's Affidavit, I am satisfied that the points of law raised by the Applicant are arguable as they relate to the trial Court's Jurisdiction in light of the decision by the Supreme Court.

23. As regards the nugatory principle, the Applicant has stated that if allowed to proceed, the trial court may issue a Judgment which will be to its detriment thus rendering the Appeal nugatory.

24. The Applicant informed Court that it became aware of the trial court's Ruling when it was served with a mention notice for pretrial directions by the Respondent. This fact was not controverted by the Respondent. It therefore confirms that there is a real likelihood of the main suit proceeding at the trial court, in which case, should the Appeal be successful, it will be rendered nugatory. Further, there would have been duplication of efforts and waste of judicial resources in the process. Indeed, the substratum of the Appeal will have been lost.

25. On this issue, I wish to adapt and echo the sentiments of **Odunga J** in the case of **Ezekiel Mule Musembi vs H. Young & Company (E.A) Limited [2019] eKLR**, thus;

“This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds.”

26. Against this background, I find and hold that the Application is merited and is therefore allowed in terms of prayers 1 and 3. The Applicant is granted 7 days from the date hereof to file and serve the Memorandum of Appeal upon the Respondent.

27. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

Ms. Nereah for the Applicant /Appellant

Mr. Ongeru for the Respondent

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE