



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT MOMBASA

MISCELLANEOUS APPLICATION NO. 2 OF 2019

(FORMERLY HCMA NO. 5 OF 2019 AT MOMBASA)

REPUBLICAPPLICANT

- VERSUS -

PROFESSOR JAMES NJIRU.....1ST RESPONDENT

DIRECTOR, KENYA MARINE FISHERIES RESEARCH INSTITUTE...2ND RESPONDENT

-EX-PARTE- DR. EZEKIEL NYANGOYA OKEMWA.....EX-PARTE APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 01st April, 2022)

RULING

The ex-parte applicant has filed on 28.02.2022 an application by way of a notice of motion through Wamego Onyango & Associates Advocates. The application is brought under Order 45 Rule 1, 2, and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The applicant prays for orders:

1. ...(spent)
2. That the Honourable Court be pleased to review its orders of 10.02.2022 and set them aside.
3. That the Honourable Court be pleased to give a ruling date in respect of the notice of motion dated 21.02.2022.
4. That costs of the application be provided for.

The application is based on the attached supporting affidavit of the applicant and upon the following grounds:

- a. The court ordered that there be a stay of proceedings herein pending the hearing and determination of Civil Appeal No. 109 of 2019 whereas the issue was res judicata the same having been determined with finalisation by the Court of Appeal in Civil Appeal No. 112 of 2019.
- b. The matter had been listed for mention to confirm whether the parties had reached a settlement.
- c. The parties hence submitted on the application dated 21.02.2019 and what is now pending is the ruling of the Court on the same.
- d. The Court lacked the jurisdiction to issue the orders of 10.02.2022.
- e. The Court was misled on the status of the matter and issued the order of 10.02.2022 in error.
- f. The issuance of the orders of 10.02.2022 effectively allows the respondents to disregard the orders by the Court of Appeal in Civil Appeal No. 113 of 2022.

The respondents have opposed the application by filing on 07.03.2022 the grounds of opposition through Ham Lagat & Associates Advocates. The grounds of opposition are as follows:

- a. The application is an afterthought and misconceived.
- b. The application has sought to pre-empt and reopen the matter pending at the Court of Appeal No. 109/2019.
- c. The impugned order issued on 10.02.2022 alleged to be pending review has not been attached to the affidavit.
- d. The appeal shall take precedence before any other order.
- e. On 17.12.2022 the Appeal No. 109/2019 was admitted through a ruling by three (3) judge bench in Mombasa hence the order of events is that the appeal ought to be heard first as it is a genuine dispute on whether the appellant would be rightly justified in the reliefs sought in the instant judicial review application.

The respondents further filed on 30.03.2022 the replying affidavit of the 1st respondent.

On 08.03.2022 in presence of counsel for both parties, the application was fixed for hearing on 30.03.2022. On 30.03.2022 counsel for the respondents was absent and counsel for the applicant submitted that he relied on the material on record in urging that the application be allowed. The Court has considered the material on record with respect to the application and finds as follows.

First, the applicant seeks a review of the order given on 10.02.2022. as urged for the respondents that order has not been extracted and exhibited by the applicant. It was that the order sought for review be extracted and exhibited on the affidavit supporting the application for review. That omission would appear to the court to be excusable to the extent that the parties are not in dispute that the order was made. The Court is guided that under Article 159(2) (d) of the Constitution of Kenya 2010, justice shall be administered without undue regard to procedural technicalities. The Court record shows that on 01.12.2021, counsel for both parties were in Court and the Court ordered that in view of the Court of Appeal ruling scheduled on 17.12.2021, this matter be mentioned on 10.02.2022 at 9.00am or soon thereafter for recording compromise or further directions on judgment.

On 10.02.2022 counsel for the respondents was present and counsel for the applicant was absent. The Court was informed that on 17.12.2021 the Court of Appeal had delivered the ruling (in Dr. **Ezekiel Nyangoya Okemwa –Versus- Kenya Marine & Fisheries Research Institute, Civil Application No. 88 of 2019 in the Court of Appeal at Mombasa** - Gatembu, Nyamweya & Lesiit JJ. A now exhibited on the replying affidavit). The Court of Appeal by that ruling determined the application by the applicant herein seeking that the record of appeal against the judgement and decree subject of the proceedings in the instant judicial review proceedings be struck out under rules 82 and 84 of the Court of Appeal rules but the Court of Appeal dismissed that application with costs as lacking in merits. Thus, Mr Langat Advocate for the respondents herein urged the Court to adjourn the proceedings herein to await the outcome of the of the pending Civil Appeal No. 109 of 2019 and the Court ordered thus, “**In view of pending Civil Appeal No. 109 of 2019, matter is adjourned accordingly.**” That being the order made on 10.02.2022, the Court finds that there was no order staying proceedings in the instant case as was claimed and urged for the applicant but that it was an order of adjournment. It now appears to the Court that while excusing the failure to extract the order, had the applicant extracted the relevant order, then it would have been clearer that no order of stay of proceedings had actually been made by the Court.

Second, it is not in dispute that the respondents sought stay of execution of the judgment and decree subject of the instant proceedings in **Kenya Marine Fisheries Research Institute –Versus- Dr. Ezekiel Nyangoya Okemwa, Civil Application No. 112 of 2019 at Mombasa and Court** (Nambuye, Okwengu, and Musinga JJ. A) delivered the ruling on 07.08.2020 and ordered thus, “**10. In order to secure the interests of both parties, we hereby order stay of execution of the judgment and decree in Mombasa ELRC Cause 186 of 2013 and stay of proceedings in Mombasa Judicial Review Cause No.5 of 2019 on the following conditions:**

- i. The applicant shall, within thirty (30) days from the date of this ruling, deposit the sum of Kshs.36, 000,000.00 in an interest earning account in the joint names of the parties’ advocates with any reputable bank of the respondent’s choice.**
- ii. In the event of non-compliance with the order in (i) above, the orders of stay of execution and stay of proceedings aforesaid shall stand discharged and the said applications shall be deemed as dismissed.**
- iii. The applicant shall bear the costs of this application.”**

The Court is bound by that order of the Court of Appeal and as urged by the applicant, the order will prevail as to whether the instant proceedings are stayed or not depending with respondent’s compliance with the terms and conditions of that order of the Court of Appeal. There was no material before the court in the instant application attempting to establish the extent of compliance with the terms and conditions of the stay order as given by the Court of Appeal and the order being self-executing, parties should be able to take appropriate steps to advance their respective interests and rights as necessary.

Third, in view of the first and second findings, the application dated and filed on 28.02.2022 for the ex-parte applicant is amenable to dismissal. The Court has found that no valid reason or ground for review has been established by the applicant. The respondent did not attend at the hearing of the application and each party will bear own costs of the application.

In conclusion the application is hereby dismissed with orders parties to bear own costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022

BYRAM ONGAYA

JUDGE