



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1296 OF 2015

VATA NGANDA.....CLAIMANT

VERSUS

AFRICA PRACTICE EAST AFRICA LIMITED.....RESPONDENT

RULING

1. The Respondent seeks through its notice of motion application dated 18<sup>th</sup> November 2020 for stay pending appeal. The application is premised on grounds on the face of the motion as well as the affidavit of Richard Kiplagat sworn in support. The gravamen of the motion is the refusal by the Court to grant a motion to amend the Respondent's defence to include a counterclaim. The application for amendment was made on 6<sup>th</sup> March 2020 and the learned Judge delivered a Ruling on 16<sup>th</sup> October 2020 dismissing the motion. Reasons for the dismissal were given and this precipitated the intended appeal. In the motion before me, the Claimant is opposed and filed grounds in opposition dated 15<sup>th</sup> January 2021. In the grounds the Claimant asserts that it is in the interests of justice for the case to be concluded and that the Respondent's claim will not be prejudiced as it is a fresh cause of action. He argues therefore that the intended appeal will not be rendered nugatory should the same proceed after this case is concluded. He asserts that the intended appeal against the Ruling of 16<sup>th</sup> October 2020 is therefore not arguable in the circumstances and that the Respondent had occasioned major delays in the matter and has not presented sufficient proof to warrant stay of proceedings.

2. In oral arguments presented in support and opposition of the motion, it was argued for the Respondent/Applicant that in opposition to its motion to seek stay pending appeal of the decision to declare amendment of defence to include counter-claim the Claimant only filed grounds of opposition and Mrs. Wetende for the Respondent thus submitted the averments on the Respondent's affidavit in support are uncontroverted. She submitted that the law on stay is settled and urged the Court to grant the stay on balance as unique circumstances in this case exist. It was submitted that further, the speedy disposal of the suit not the only issue Court should consider. She submitted that the prejudice to be suffered by Respondent should be considered as there is an intended counter-claim. It is her submission the counter-claim is not a separate cause of action and ought not be severed. She submitted that the intended appeal is arguable and argued that the Court in its Ruling disregarded a further affidavit by the Respondent and that therefore the Court did not hear it on the further affidavit. It was submitted that the Ruling mistreated the amendment and that the respondent's claim not a fresh cause of action as there is a nexus in the contract and breach of the same. The Respondent submitted that if stay is not granted there will be overuse of judicial resources and ultimately *res judicata* can be raised on the proposed amendment. She submitted that it is not the Respondent's intention to delay the case as the reason for stay is that the intended appeal will be rendered nugatory.

3. The Application is opposed and the Claimant relied on the grounds filed on 15<sup>th</sup> January 2021 and a bundle of authorities filed on the same day. Ms. Ngonde for the Claimant submitted that the issue is the grant of stay and that the principles of law fully support the Ruling of Court in dismissing the motion to amend the defence and include a counter-claim. The Claimant submitted that the decision is merited and on the issue of the appeal being rendered nugatory cited the case of **UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR** where the Court of Appeal held that the appeal is not rendered nugatory if the Respondent is able to prosecute its case. Counsel submitted that the Respondent will not suffer any loss as the effect will be the same if the Claimant fails. He submitted that the Respondent was given the full extent of the right to be heard and because the intended counter-claim is a fresh cause of action it cannot be raised in the suit initiated by the Claimant. He submitted that in considering the matter this Court should consider the pros and cons and the case being such an old matter, a stay of the proceedings would amount to further delay. He submitted that it is not known how long it will take to proceed in the Appellate Court. He thus prayed that the case be allowed to proceed as the delay will be inordinate. On issue of whether there should be any reliance on a further affidavit, Counsel submitted that the leave given was limited and the Respondent did not file on time and because it did not file on time it cannot argue the application is merited.

4. The factors for consideration in an application for stay pending appeal are, I think, settled. I have considered the issues raised in this application. I agree with counsel for the Respondent that if stay is not granted it may lead to the situation where the appeal is rendered nugatory. I say so because there is no doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is meant to avoid a waste of precious judicial time as well as prevent the court from duplication of efforts and prevent multiplicity of suits and motions being filed and where if the stay is not granted and defendant were to succeed it would render 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 matter proceeds and the appeal succeeds. Obviously, the application must be made without unreasonable delay. This power is discretionary hence the need to ascertain the promptness of the motion by the party intending to appeal. **In Re Global Tours & Travel Ltd HCWC No. 43 of 2000** (unreported) 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 matter, 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.”*

5. In my view proceeding with the claim as suggested by the Claimant may well lead to a situation where the Court of Appeal finds that there is merit in the appeal and this Court having proceeded to take proceedings would render the appeal nugatory. As Ringera J. (as he then was) held I must weigh the pros and cons and such factors as to the expeditious disposal of the suit and the *prima facie* merits of the intended appeal. Not in the sense as to whether the appeal would be successful but whether it is an arguable one. The intended appeal is arguable in one respect at the very least. Is a party in a suit such as the one before me entitled to seek amendment to include a counterclaim asserting the same was concomitant with the suit presently before Court? Put another way, is the claim being propounded by the Respondent capable of being pursued in the present suit or is the relief elsewhere? That is a question I believe can be argued in the Court of Appeal as indications by the Respondent point to the questions leading to the doorstep of the Appellate Court. I therefore find there would be a misuse of scarce judicial resources if I heard the case and perhaps even determined it before the Court of Appeal pronounces itself on the merits or otherwise of the plea to amend the defence to include a counterclaim. Being so persuaded I grant the motion but order that the costs do abide the outcome of the intended appeal against the Ruling of 16<sup>th</sup> October 2020. Matter stayed pending the intended appeal.

It is so ordered.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of February 2021**

**Nzioki wa Makau**

**JUDGE**