REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1888 OF 2017

MIRIAM CHEROGONY.....CLAIMANT

VERSUS

AFRICAN RURAL AGRICULTURAL CREDIT ASSOCIATION.....RESPONDENT

RULING

1. The 2nd Respondent/Applicant filed a Notice of Motion Application dated 12th February 2021 seeking to be heard for Orders that:

i. Spent

ii. Spent

iii. Pending the hearing and determination of the intended Appeal in the Court of Appeal regarding the Ruling by the Learned Judge S. Radido, Judge of the Employment and Labour Relations Court at Nairobi, dismissing the 2nd Respondent/ Applicant's Preliminary Objection, the full hearing of this matter be stayed.

iv. Costs of this Application be provided for.

2. The Application is premised on grounds that the 2nd Respondent intends to Appeal against the decision of Hon. Radido J. to dismiss its Preliminary Objection dated 5th February 2020, which raised the Plea of Immunity against legal process. The 2nd Respondent that it has duly filed a Notice of Appeal and further requested for types proceedings in this regard and that the outcome of the Appeal shall determine the 2nd Respondent's Constitutional and Statutory Right to Immunity from Legal Proceedings as upheld by the Supreme Court in the case of **Karen Njeri Kandie *v* Alassane Ba & Another [2017] eKLR**. The 2nd Respondent asserts that despite the 2nd Respondent having lodged a Notice of Appeal against the said decision, the Claimant's Advocates proceeded to set a hearing date for this matter which hearing was scheduled for 16th February 2021. The 2nd Respondent asserts that the Applicant's Appeal risks being rendered nugatory and a mere academic exercise and that the 2nd Respondent's Constitutional and Statutory Right to Immunity from Legal Proceedings would be unjustifiably disregarded. The 2nd Respondent asserts that it is therefore imperative that the proceedings herein are stayed pending hearing and determination on the Applicant's Appeal.

3. The Application is supported by the affidavit of the Respondent/Applicant's Advocate, Henry Omino. He avers that if the main claim is allowed to proceed and the Applicant is subsequently successful in its Appeal, the Applicant's constitutional and statutory right to Immunity from legal process shall be infringed and which infringement shall be extremely prejudicial to it as a specialized agency of the United Nations entitled to diplomatic immunity under international and Kenyan law. He further avers that such issues have previously been litigated all the way to the Supreme Court and should thus be allowed to be litigated in the Court of Appeal in this instance. That it is in the interest of justice that the Application is allowed as prayed and contends that the Application herein has not been brought after unreasonable delay and that any delay, if at all, is because:

i. The set date for the hearing and current proceedings coincided with preparations for the sessions of IFAD's Governing Bodies, including the annual session of the Governing Council, which required special attention from the organization and impacts the timeliness with which its officials can issue instructions and analyse the relevant documentation required to adequately move forward with court proceedings.

ii. The proceedings coincided with a period when IFAD had been dealing with staffing transitions, which impacted the timeliness with which it would issue its advocates with instructions for the present case.

iii. The advocates have now duly obtained appropriate instructions from the organization via an email dated 11th February 2021.

4. The Claimant/Respondent was opposed and filed a Replying Affidavit sworn on 25th February 2021 wherein she avers that the 2nd Respondent's application is a ploy to unjustifiably delay and/or forestall the hearing and determination of the instant suit and is further an abashed abuse of the Honourable Court's process. She asserts that the Honourable Court while dismissing the said 2nd Respondent's Preliminary Objection, gave directions on the hearing of the suit and how the same would proceed. That the 2nd Respondent even made an oral application for stay of proceedings but the Honourable Court advised it to file the necessary formal application. The Claimant averred that however the 2nd Respondent decided to lie on its laurels and failed to comply with the said directions of the Court and only filed the instant application 4 days to the hearing date slated for 16th February 2021. She asserted that was 5 months since delivery of the Ruling on its Preliminary Objection. Further, she asserts that the 2nd Respondent was served with a hearing notice on or about 13th January 2021 but still waited for an extra thirty (30) days to file the instant application. She further avers that the 2nd Respondent has formed a habit of filing applications on the eve of hearing dates as was similarly the case with the filing of its aforementioned Preliminary Objection and which habit can be construed to be an effort to delay the hearing and determination of the suit.

5. The Claimant/Respondent avers that the 2nd Respondent is also yet to file a memorandum of appeal and/or record of appeal. She asserts that the 2nd Respondent/Applicant has further not shown any efforts it has made on following up on the progress of the proceedings and certified copy of the Ruling and that it thus has no interest in filing the appeal and/or having this matter proceed. She asserts that there has been unreasonable delay by the 2nd Respondent in filing the instant application which is aimed at denying her, the right to a fair hearing and that the 2nd Respondent/Applicant has admitted the delay in the affidavit sworn on its behalf by Henry Omino and the Applicant's attempted explanation shows the contempt with which it holds this Honourable Court's process since it made no efforts to issue its advocates with instructions on the matter until 11th February 2021, which was five days to the hearing.

6. She asserts that further, that the said affidavit by Henry Omino offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules, 2010 since the deponent is not an employee, does not work for the 2nd Respondent and neither does he have authority and capacity to make averments on the internal affairs of the 2nd Respondent. Secondly, that no authority to depone has been filed by the 2nd Respondent giving the said Henry Omino authority to depone and/or swear any affidavits on its behalf and further, the said Henry Omino has not produced any Power of Attorney enabling to him to swear an affidavit and/or give evidence on behalf of the 2nd Respondent. She avers that the said affidavit should therefore be struck out and/or expunged from the court record. She averred that the intended appeal has no prospects of success and that it is now settled law in both international and domestic jurisprudence that employment contracts are in the purview of private law where immunity is restricted and/or does not apply. That the 2nd Respondent is seeking the equitable relief of injunctive orders as against her yet it has not come before this Court with clean hands and that delay defeats equity. She urges this Honourable Court to use its discretion to deny the stay orders sought and further ensure that this matter is moved forward as was decided by the Honourable Justice Radido, since the suit has dragged on owing to numerous unmeritorious applications filed by the Respondents.

7. In response to the Claimant's replying affidavit, the 2nd Respondent/Applicant filed a Further Affidavit sworn on 20th April 2021 by Henry Omino. He avers that the Applicant could not file a Memorandum of Reply, witness Statements and documents in the matter having filed a Notice of Appeal to signify its intention to appeal the decision of Hon. Justice Radido. He also avers that the allegation that he does not have authority to swear the Affidavits on behalf of the Applicant is unfounded because he acts for the Applicant in this matter and has knowledge of the same through the usual communication between an Advocate and Client. Further, that the Claimant/Respondent has failed to demonstrate that only a holder of a Power of Attorney can swear an Affidavit on behalf of the Applicant.

8. The 2nd Respondent/Applicant submits that Order 19 Rule 3(1) of the Civil Procedure Rules provides as follows:

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof (emphasis theirs)

The 2nd Respondent submitted that the proviso to Rule 3(1) is instructive in relation to the issue presently before this Honourable Court and that the averments made by Henry Omino constitute matters specifically within the knowledge of the Advocate handling the Applicant's matter. The Applicant cites the case of **Factory Guards Limited *v* Factory Guards Limited [2014] eKLR** where the High Court observed that there is no law that bars an advocate from swearing an affidavit in a client's cause, on matters which he as an advocate has personal knowledge of and that it had not been shown that the affidavit in issue had offended the best rule evidence as per Order 19 rule 3(1). That the said holding is also reiterated in the case of **Regina Waihira Mwangi *v* Boniface Nthenge [2015] eKLR**. It submitted that similarly in this case, the affidavits sworn by its Advocate have not broken any rules of procedure as alleged by the Claimant/Respondent, as supported by the aforementioned authorities. Further, that authority for Henry Omino to swear an Affidavit on behalf of the Applicant is annexed to the Supporting Affidavit sworn on 12th February 2021 and expressly contained in an email issued by a legal officer of the Applicant, Carolina Jatena. The Applicant submitted that the Court in the case of **George Oduori Otieno *v* African Trade Insurance Agency & Another [2020] eKLR** held that an applicant seeking stay of proceedings must demonstrate the following principles:

i. Whether the Applicant has established that he/she has a prima facie arguable case;

ii. Whether the Application has been filed expeditiously and whether explanation has been provided for any delay; and

iii. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

9. It submits that it has established a *prima facie* arguable appeal on the ground that the learned Judge in his Ruling, departed from the

binding decision of the Supreme Court in the **Karen Njeri Kandie** case *(supra)* that immunity applies to employment related claims, without exception. That it has further sufficiently explained the delay in bringing the present application although it was not inordinate and has also demonstrated sufficient cause for the grant of the orders sought. It further submits that the prejudice it would suffer if the order is not granted must be weighed against any prejudice that may be suffered by the Claimant/Respondent if an Order of Stay of Proceedings is granted. The 2nd Respondent submitted that the Claimant/Respondent on the contrast has failed to demonstrate what prejudice she would suffer if the Order for Stay of Proceedings is granted as prayed by the Applicant. The Applicant further relies on the decision in the case of **George Oduori Otieno** *(supra)* where Lady Justice Maureen Onyango stated that:

> *"The only questions that are relevant therefore are whether it is in the interest of justice to stay proceedings, taking into consideration issues such as expeditious disposal of cases, prima facie merits of the intended appeal and optimum utilisation of scarce judicial time.*
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> *As has been submitted by Counsels for both respondents, there is a serious issue about the interpretation of the Supreme Court decision in the case of **Karen Kandie** and whether it would operate to bar or to enable the jurisdiction of Kenyan courts to determine issues of diplomatic immunity.*
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> *Further, as submitted by the applicant and 2nd respondent, this is a matter that transcends the parties herein, and which is of great importance to all organisations in Kenya operating under diplomatic immunity. Should the Court of Appeal decide in favour of the applicant, the efforts and time expended in pursuing the petition in this court would have been wasted, while if it decides against the applicant, the petitioner would still have his day in court.*
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> *Balancing the interests of the petitioner whose contract has in any event come to an end, and those of the 1st respondent and the 2nd respondent who has intimated that it has been embarrassed by the case, it is my opinion that it is in the interest of justice to grant the orders sought by the applicant herein." (emphasis theirs)*

10. The 2nd Respondent submitted that in a similar application touching on diplomatic immunity in the case of **Lucy Muingo Kusewa *v* Embassy of Sweden, Nairobi [2019] eKLR**, Lady Justice Wasilwa held that it would be a waste of precious judicial time for the Court to assume the fact that the Applicants' Appeal to the Court of Appeal was pending hearing and determination, and proceed to hear the Claim which may render the hearing an academic exercise if the Appeal is allowed. The 2nd Respondent submitted that the Learned Judge Wasilwa stayed proceedings in the said case despite the Application having been brought two (2) years after delivery of the decision of the Court appealed against. The Applicant also cited the case of **Leland I. Selano *v* Intercontinental Hotel [2016] eKLR** where your Lordship allowed an Application for Stay of Proceedings and further submits that it is in the interest of judicial time for the Order of Stay to be granted pending the hearing and determination of its Appeal to the Court of Appeal, which appeal has great chances of success.

11. The Claimant/Respondent submits that Henry Omino deponed matters of fact which are intrinsically related and/or are about the internal matters or affairs of the 2nd Respondent yet he is not an employee of the 2nd Respondent. Further, that Henry Omino did not aver whether he attended the said internal meetings and staffing transitions so as to comply with the general principles of the Evidence Act of personally perceiving the facts deponed about. The Claimant submitted that Section 62 of the Evidence Act Chapter 80 Laws of Kenya provides that all facts, except the contents of documents, may be proved by oral evidence. That together with Section 63 of the Evidence Act on oral evidence and Order 19 rule 3 of the Civil Procedure Rules, 2010 the said provisions dictate and provide for the principle of law that all facts apart from contents of documents must be proved by direct evidence. The Claimant submitted that this is the principle of hearsay meaning that the person alleging the existence of a particular fact must have witnessed that particular fact personally and/or perceived the said fact through their own senses. That the same applies to production and/or adducing evidence through affidavits and that the averments made by Henry Omino should be expunged from the court record. She relied on the case of **Republic *v* Attorney General [Sued for and on behalf of the Ministry of Lands] & 2 Others *ex parte* South and Central [Thika] Investments Limited [2015] eKLR** where Odunga J. while declaring an affidavit sworn by an advocate on behalf of his client on matters of fact as worthless, stated as follows:

> *"On the issue of the competency of the supporting affidavit sworn by Anthony Muriithi Kireria, the law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure. In the case of **Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463**, Ojwang, J (as he then was stated as follows:*
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> *"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to Order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".*
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> *In this case, deponent of the supporting affidavit, Anthony Muriithi Kireria, did not even pretend to be acting on information obtained from the client. Similarly, in **Small Enterprises Finance Co. Ltd. vs. George Gikubu Mbuthia Nairobi HCCC No. 3088 of 1994** it was held that advocates should not depose to contested matters of facts.*
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> *It has been held and it is the law that an affidavit based on information and belief without disclosing the source of information and the grounds for holding the belief are worthless.*
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> *This rule was eloquently propounded by the East African Court of Appeal in **Life Insurance Corporation of India vs. Panesar***

[1967] EA 614 *(Sir Charles Newbold, P) as hereunder:*

> *"Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. That the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings does not therefore mean that there exist no rules as to what may be set out in the affidavits, other than rule 3 of Order 18, or as to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before…I would accept it…the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of Order 18 rule 3(1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise rule 3 would be a classic example of straining at a gnat but swallowing the camel. Even in relation to rule 3 the court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact…It is clear that the court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out precisely which are the facts based on information and the source of that information. To suggest that the court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is manifestly absurd. Whereas it is true that the Evidence Act does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence instead of oral evidence is destroyed at a blow."*

12. The Claimant/Respondent submits that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation and impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. The Claimant relied on the case of **Kenya Wildlife Service *v* James Mutembei [2019] eKLR**. She urged this Court in exercising its discretion, to look at the conduct of the 2nd Respondent from the moment it was notified of the existence of this suit to the date of filing the instant application. The Claimant submitted that the 2nd Respondent/Applicant has further not filed a draft memorandum of appeal to show that it has an arguable appeal and that its conduct in the suit is a clear affront to her right to fair hearing under Article 50 of the Constitution. She further submits that even though stay of proceedings is an equitable right, equitable rights are conditional and that delay defeats equity as equity aids the vigilant, not the indolent. She relies on the case of **Ezekiel Mule Musembi *v* H. Young & Company (E.A) Limited [2019] eKLR** where Odunga J. (as he then was) similarly observed that delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent. It is the Claimant/Respondent's further submission that it is well established law that employment contracts belong to the private law domain and absolute immunity does not therefore apply. She relied on the case of **Embassy of Sweden, Nairobi *v* Lucy Muingo Kusewa & Another, Nairobi Civil Appeal No. 345 of 2017** and that of **Karen Njeri Kandie *v* Alssane Ba & Another [2015] eKLR**. The Claimant submitted that on a *prima facie* basis it is evident that the intended appeal by the 2nd Respondent has no merit and the same is not an arguable one. The Claimant/Respondent submitted that the 2nd Respondent has not met any of the factors to be considered by this Court in granting an order for stay. Further, that it is in the interest of justice that the instant application is dismissed and the Court directs the suit be heard forthwith and that directions on the hearing be issued.

13. For a party to obtain stay, various factors are considered by the Court. The Court has to consider whether the Applicant has established a *prima facie* arguable case; whether the Application has been filed expeditiously and whether explanation has been provided for any delay; and finally, whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders so sought. In the present case, the 2nd Respondent seeks stay of proceedings as it intends to pursue an appeal against the Ruling of Radido J. who dismissed the 2nd Respondent's Preliminary Objection dated 5th February 2020, which raised the plea of immunity against legal process. The 2nd Respondent has the burden of demonstrating a *prima facie* case in regard to the intended appeal. The 2nd Respondent has not filed a draft memorandum of appeal and merely argues through its advocate that it has an arguable appeal with a probability of success. The 2nd Respondent did not file the motion expeditiously as required. It however has stated through Counsel that it was in the throes of preparing for meetings hence the delay in filing the motion for stay. The 2nd Respondent curiously did not file any affidavit sworn by its officials thus placing doubt that the reasons advanced for the delay since Counsel is the one who seems to be on the drivers seat. Order 19 Rule 3 of the Civil Procedure Rules, 2010 provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. In the proviso it is stated that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof. In the matter before me, the Counsel for the 2nd Respondent swore the affidavit giving reason for the delay instead of the officials of the 2nd Respondent thus rendering the same moot. From the foregoing it is clear the 2nd Respondent has not established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought. As such, the motion for stay pending appeal fails and is accordingly dismissed with costs to the Claimant. Directions on the hearing of the suit to be given immediately after this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE