



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E377 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

DR. PATRICK WAFULA KULOBA.....CLAIMANT/DECREE HOLDER

VERSUS

THE DIRECTOR/CHIEF EXECUTIVE OFFICER,

KENYA INDUSTRIAL RESEARCH AND

DEVELOPMENT INSTITUTE.....RESPONDENT/APPLICANT

RULING

1. Before me for determination is the Respondent's application dated 29th April 2021. The Applicant seeks orders THAT:

(i) Spent.

(ii) Spent.

(iii) THAT this Court be pleased to grant an order of stay of taxation proceedings pending the hearing and determination of **Nairobi Civil Appeal No. E172 of 2021: The Director/Chief Executive Officer Kenya Industrial Research and Development Institute v Dr Patrick Wafula Kuloba.**

(iv) THAT the costs of and incidental to this application be provided for.

2. The application is supported by the affidavit of PROF. DAVID K. ROTICH TUIGONG the Applicant's Director/Chief Executive Officer annexed hereto and based on the following grounds:

(i) THAT the Court vide its judgment dated, signed and delivered in open court in Nairobi via Teams on the 22nd day of January, 2021 by the Onyango J. held that the claimant's suspension was unlawful.

(ii) THAT the Learned Judge lifted the suspension and terminated the anticipated disciplinary action, ordered that the claimant be reinstated and be paid all withheld salary and emoluments and awarded the claimant costs of the suit.

(iii) THAT the Respondent being aggrieved by the judgment and decree of the Court; Onyango J. delivered on 22nd January, 2021 filed before the **Court of Appeal at Nairobi Civil Appeal No. E172 of 2021: The Director/Chief Executive Officer Kenya Industrial Research and Development Institute Dr. Patrick Wafula Kuloba.** The Respondent was served with the record of appeal on 20th April, 2021.

(iv) THAT though the claimant is fully back to office, the Claimant's Advocates have filed bill of costs and taken notice of taxation and therefore, the applicant is apprehensive that the Claimant's advocate is keen on proceeding with taxation in this matter.

(v) THAT the applicant has an arguable appeal with high chances of success and the said appeal would be rendered nugatory in the event the appeal is successful as demonstrated in the annexed memorandum of appeal.

(vi) THAT the applicant is apprehensive that unless this application is heard and conservatory orders issued in terms of the motion filed herewith, the claimant's advocates will proceed with taxation in this matter to the detriment of the applicant and the pending **Civil Appeal No. E172 of 2021: The Director/Chief Executive Officer Kenya Industrial Research and Development Institute v Dr**

Patrick Wafula Kuloba.

(vii) *THAT the applicant is further apprehensive that it will loss public funds if the taxation is allowed to proceed and the appeal subsequently succeeds.*

(viii) *THAT the taxation proceedings if not stayed, the Applicant may be compelled to pay costs which cannot be recovered in the event the appeal is successful since the said costs are payable to the claimant's advocates.*

(ix) *THAT the applicant is further apprehensive that if the orders sought are not granted, the Applicant will be committed to civil jail hence taking away its right to fair hearing and its undoubted right to pursue an appeal in the matter.*

(x) *THAT the application has been made without undue delay.*

(xi) *THAT the Attorney-General is legally exempt from the requirements of furnishing security for costs.*

(xii) *THAT this Court has the jurisdiction and discretion to issue the reliefs sought.*

(xiii) *THAT execution of the findings and orders issued would occasion a state of affairs that will render the appeal nugatory should the appellate court reverse the decision of the superior court.*

(xiv) *THAT there exists no overwhelming hindrance to issuance of the orders sought.*

(xv) *THAT considering the peculiar circumstances of the case and its unique requirements discretion ought to be exercised in favour of granting the reliefs sought.*

3. The Claimant/Decree Holder responded to the application via a Replying Affidavit sworn by BRYAN KHAEMBA on 31st May 2021. He avers that execution of the said judgement has neither been stayed by this Court nor the Appellate Court despite the Respondent/Applicant having filed an appeal against it.

4. That the Bill of Costs was filed on the 1st February 2021 and the taxation was fixed for 4th May, 2021, before the Deputy Registrar of the Court. Therefore, the application herein has been brought prematurely as the said bill of costs has not been assessed and thus there is nothing capable of being stayed at this point. Additionally, the application for stay does not meet the threshold at this point as provision for security cannot be addressed now since costs are yet to be assessed.

5. The Claimant states that contrary to the allegations by the Applicant, taxation proceedings will not lead to committal to civil jail as it is only meant to determine the costs payable to a successful litigant which determination can be challenged in this Court and the Court of Appeal.

6. The Claimant avers that arguability of an appeal is not a ground for this Court to stay the taxation proceedings as the appeal will not be rendered nugatory if stay of the taxation is declined. He states that his Advocate, being a well-established law firm will be in a position to refund the costs if the appeal will be allowed. He concludes that there is nothing irreversible here and that the application is frivolous and an abuse of the court process and the same ought to be dismissed with costs.

Submissions

7. Parties made oral submissions. The Applicant submitted that the application is made pursuant to Order 42(6) sub rule (2) of the Civil Procedure Rules which encompasses the principles upon which the application is based.

8. The Claimant/Decree Holder submitted that taxation is a special jurisdiction of the Taxing Officer and until the said jurisdiction has been exercised, this court has no jurisdiction to entertain the application. He submitted that once taxation is over, the Applicant can seek stay of recovery of costs and that there is no loss to the Applicant in taxation is allowed.

9. He prayed that the application be disallowed and the Bill be taxed then the Applicant can seek stay of execution of taxed costs.

Determination

10. I have considered the pleadings and submissions of the parties on the instant application. The issue for determination is whether the Applicant is entitled to stay of taxation pending appeal.

11. Order 42 Rule 6 provides that an appeal shall not operate as a stay of the judgment or ruling against which the appeal is filed. A party who wishes the have execution of the decision appealed from stayed must therefore file an application for stay.

12. Under order 42 Rule 6, the Courts have wide discretion in granting stay pending appeal subject to the Applicant satisfying the Court that substantial loss may result if the orders are not granted, that the application is timeously made and the Applicant is ready to provide such security for due performance of the decree as may be binding.

13. In its judgment which is the subject of the appeal, the Court lifted the suspension of the Claimant and directed the disciplinary process

against the Claimant be terminated, that he be reinstated and all salary withheld as a consequence of the suspension be released to him.

14. The Applicant has not sought the stay of the decision, only the taxation.

15. This matter having gone on appeal, there is likely to be either additional costs against the Applicant if the appeal is lost, or the Applicant may be discharged from the burden of payment of costs if it succeeds.

16. It therefore makes judicial sense to avoid a situation where the taxation will eventually have to be repeated or become redundant depending on the outcome of the appeal.

17. It is for the foregoing reasons that I find that the application is merited and grant orders prayed for in the application.

18. I accordingly stay the taxation of the Bill of Costs filed by the Claimant/Decree Holder pending determination of **Civil Appeal No. E172 of 2020: The Director/Chief Executive Officer, Kenya Industrial Research and Development**

Institute v Dr. Patrick Wafula Kuloba.

19. The costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JULY 2021

MAUREEN ONYANGO

JUDGE

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.

MAUREEN ONYANGO

JUDGE