



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS NO. E050 OF 2021**

**KENYA AIRWAYS LIMITED.....APPLICANT**

**VERSUS**

**DANIEL GISIORA NYAKUNDI.....RESPONDENT**

**RULING**

1. The application before me is the Applicant Notice of Motion Application dated 19<sup>th</sup> March 2021. The application seeks for the following:

*i. Spent.*

*ii. Spent.*

*iii. There be an order of stay of all proceedings in the Subordinate Court pending the hearing and determination of the intended Appeal.*

*iv. The Draft Memorandum of Appeal be deemed as filed.*

*v. That costs of this application be provided for.*

2. The Application is premised on the grounds expressed on the face of the notice of motion which are to the effect that the Applicant is aggrieved by the Ruling of the Subordinate Court in **MCCC E3189 of 2020; Daniel Gisióra Nyakundi versus Kenya Airways** delivered on 26<sup>th</sup> February 2021, which dismissed the Applicant's Preliminary Objection dated 14<sup>th</sup> October 2020. The Applicant asserts that it intends to appeal the said Ruling and which intended Appeal has high prospects of success. The Applicant further seeks stay of proceedings and is apprehensive that the intended Appeal shall be rendered otiose if stay of proceedings pending Appeal is not granted at this stage. It also asserts that it has an arguable appeal which may rendered nugatory if the hearing of the main suit in the lower court commences and that the subject matter of the intended appeal ought to therefore be preserved in the interest of justice. It is the Applicant's assertion that the instant application has been made without delay and is meritorious, and it should therefore not be condemned unheard.

3. The Application is supported by an affidavit sworn by the Applicant's Legal Officer, Mr. Caleb Abayo. He depones that the Respondent herein had filed the said claim in the Subordinate Court seeking general damages for slander allegedly caused when the Applicant filed a criminal complaint against the Respondent in the year 2013 and that in response, the Applicant filed a Statement of Defence and Preliminary Objection both dated 14<sup>th</sup> October 2021 and which had raised the issue of *res judicata* and abuse of court process. He deponed that after the Subordinate Court delivered its ruling dismissing the Preliminary Objection they have been unable to obtain a copy of the ruling from the court's registry within 14 days but that they undertake to provide a copy of the same. He further avers that the intended Appeal has high prospects of success and outlines some for reasons in his affidavit.

4. The Respondent filed a Replying Affidavit sworn on 16<sup>th</sup> April 2021 wherein he depones that the instant application lacks basis for entertainment and determination by this Honourable Court as there is no proper Memorandum of Appeal on which it stems from. That Rule 8(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 allows for a period of 30 days within which to file a Memorandum of Appeal, and which period lapsed on 28<sup>th</sup> March 2021. That the Applicant has therefore not met the basic prerequisites for instituting an appeal before this Honourable Court as under Rule 8 and that the application is further an abuse of the legal process. He avers that in the circumstances, the appeal before Court is incompetent and incapable of supporting the application to stay proceedings of the lower court pending appeal. It is argued that the intended appeal also fails to raise any triable issues to be determined by this Honourable Court and is merely a delay tactic and that the granting of stay or lack of it does not therefore change the circumstances of the case. The Respondent urges this Court to dismiss the application dated 19<sup>th</sup> March 2021.

5. The Respondent subsequently filed Grounds of Opposition dated 26<sup>th</sup> April 2021 opposing the Application on the aforementioned grounds and further on grounds that the instant application is premature, untenable, unmerited, frivolous and vexatious. The Applicant submits that it relies on **Gichuhi Macharia & Another v Kiai Mbaki & 2 Others [2016] eKLR** which restated the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 (unreported)** where the court 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 cases, 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.”(emphasis theirs)*

6. The Respondent further cites the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** where the court opined that a court should mostly consider whether the applicant has established sufficient cause to convince the court that it would be in the interest of justice to allow the application; whether the applicant has demonstrated that if the court were to decline granting orders of stay as sought, it will suffer prejudice which will expose it to injustice. The Applicant further submits that the issues raised in its appeal regarding the determination of the Preliminary Objection on the principle of *Res Judicata* warrants the stay of proceedings, to prevent a waste of judicial time in the event this Court accepts the argument that the *Res Judicata* principle applied contrary to the finding of the lower court. It is the Applicant's case that *Res Judicata* will avert unnecessary litigation by the parties once determined. On the issue of having filed its appeal out of time, the Applicant cites administrative delays in the provision of the Ruling by the lower court, as the cause as they received the typed proceedings in April 2021 which was outside the period for filing an appeal. It relies on the case of **Antony Mwau Wambua v Cooperative Bank of Kenya Ltd [2021] eKLR** which restated the holding in **Raila Odinga v IEBC & 4 Others [2013] eKLR** where the Supreme Court stated that a court should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties and should instead appreciate all the relevant circumstances and requirements of a particular case and conscientiously determine the best outcome. The Applicant further submits that it also prays for leave to file the intended appeal out of time to be granted and that since the Respondent will have time to submit on the appeal, it will not suffer prejudice.

7. The Respondent submits that Rule 8 of the Employment and Labour Relations Court provides as follows:-

*(1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.*

*(2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.*

*(3) A memorandum of appeal shall be in Form 1 set out in the First Schedule with necessary modifications.*

8. He submits that a similar position is pronounced under Order 42 Rule 1 of the Civil Procedure Rules which states that:-

*(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*

*(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.*

9. He submits that while the Applicant does not require leave of court to file the Memorandum of Appeal, it is yet to place the same on record. Further, that the Memorandum of Appeal which the Applicant seeks to have determined as duly filed is not as per Form 1 of the first schedule of the Employment and Labour Relations Court (Procedure) Rules 2016. That any motion seeking to stay execution or proceedings pending appeal must be premised on the existence of a competent appeal and that compliance with Rule 8 of the Employment and Labour Relations Court (Procedure) Rules 2016 is a condition precedent to the granting of orders of stay of proceedings pending appeal. He relies on the case of **JWB v RNK [2015] eKLR** where the High Court held and found there was no valid appeal in existence since there was no memorandum of appeal on record in the matter and struck out the filed Motion for being misconceived, incompetent and abuse of the court process. The Respondent also relies on the case of Abraham **Lenauia Lenkeu v Charles Katekeyo Nkaru [2016] eKLR** where the Court agreed with counsel for the respondent that the court lacked jurisdiction by virtue of lack of a competent appeal by the applicant pursuant to Order 42(1)(2) and 32 of the Civil Procedure Rules. The said Court went on to allow the objection on jurisdiction based on the grounds on mode of commencement of an action, non-fulfilment of condition precedent and abuse of the court process by the appellant. The Respondent submits that whether or not the appeal may be rendered nugatory does not come into play at this point as the Applicant is yet to file a memorandum of appeal and/or make an application for extension to file the memorandum of appeal out of time.

10. There is before me for determination a motion that is dead on arrival. There is no Ruling from which the intended appeal shall flow. As a consequence of not attaching any material for the Court to use to determine the merits of the stay application the Applicant's application dated 19<sup>th</sup> March 2021 is dismissed with costs to the Respondent. No useful purpose will be served delving into the authorities cited in support of the motion or even going into the parameters for grant of stay.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**