



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 120 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 28th February, 2020)

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
UNION WORKERS.....CLAIMANT**

VERSUS

GALOT ESTATE KIAMBU.....1ST RESPONDENT

LONDON DISTILLERS (K) LIMITED.....2ND RESPONDENT

MOHAN GALOT.....3RD RESPONDENT

RULING

1. There are two Applications before this Court for determination. The first is the 2nd Respondent's Application dated 18/7/2019. The second is the 1st and 3rd Respondent's application dated 19/7/2019.

2. The 2nd Respondent in its Application of 18/7/2019, seeks the following orders-

a. Spent

b. The Honourable Court be pleased to order stay of proceedings pending the hearing and determination of this application inter partes.

c. The Honourable Court be pleased to order stay of proceedings pending the hearing and determination of the intended appeal.

d. Costs.

3. Similarly, the 1st and 3rd Respondent seek the following orders in their application of 19/7/2019:-

a. Spent.

b. This Honourable Court be pleased to issue an order staying all and/or any proceedings in this claim pending the inter partes hearing of the instant motion.

c. This Honourable Court be pleased to issue an order staying all and/or any proceedings in this claim pending hearing and determination of the intended appeal from the order of this Court made on 9/7/2019.

4. The applications are supported by the grounds set out therein and the 3rd Respondent's Supporting Affidavit annexed to the respective applications in support thereof. The Claimant has opposed the Applications vide the Replying Affidavit of Simon Kimeu sworn on 19/9/2019.

The Applicants' case

5. The Applicants aver that this Honourable Court delivered a ruling on 9/7/2019 dismissing the 2nd Respondent's Notice of Preliminary Objection dated 11/3/2019. It is averred that the Applicants are aggrieved with this decision and intend to appeal the same and have already filed their Notices of Appeal and applied to be supplied with copies of typed proceedings and the ruling to enable them file a record of appeal.

6. The 1st Applicant is of the position that the ruling contravenes the provisions of Section 54 (6) of the Labour Relations Act and the doctrine of separate legal personality as established in the case of **Salmon vs. Salmon & Company Limited [1986] UKHL 1, [1897] AC 22.**

7. The 1st Applicant avers that the decision to dismiss the PO affirms the unlawful actions of the Claimant of filing suits for persons who are not its registered members thus interfering with the peaceful administration, programs and activities of the 1st Applicant.

8. The 1st Applicant avers that unless the orders sought are granted, it will suffer profound prejudice and substantial loss as it will be compelled to litigate a non-existent dispute thereby incurring unnecessary costs. That it shall also be compelled to treat persons who are not its employees as employees, and enter into a recognition agreement with the Claimant as regards the same persons.

9. It is averred that the intended appeal is arguable, meritorious and raises substantial issues of law with high chances of success, as such, if the orders sought are not granted, the same will be rendered nugatory.

10. On the other hand, the 2nd and 3rd Applicants aver that the Claimant will not suffer any prejudice if the orders sought are granted since the employees it purports to represent in the proceedings are still in employment.

11. They further aver that they are willing to comply with such terms as the Court may impose as conditions for grant of the orders. It is also averred that their application has been lodged timeously and without any delays, thus, it is in the interest of justice that the orders sought be granted.

The Claimant's Case

12. The Claimant avers that vide the Ruling delivered on 9/7/2019, the 3rd Respondent was struck out from the proceedings for the reason that the company he owned had the capacity to sue and be sued. It is further averred that the issue of recognition is one that will require the matter to proceed to the main hearing and evidence adduced before this Court.

13. The Claimant avers that in Civil Appeal 362 of 2019 and Civil Appeal 389 of 2019, the Applicants did not seek orders of stay when they were filing the same. Further, that the parties will not suffer any prejudice if the orders sought are not granted as the effect of the impugned ruling is that parties are required to provide evidence which will then be interrogated.

14. The Claimant contends that the orders sought should not be issued and that the matter should proceed to hearing and determination and only then, should the aggrieved parties be allowed to appeal.

15. The Application was disposed of by way of written submissions where the 1st Applicant filed its submissions on 7/10/2019, the 2nd and 3rd Applicants filed theirs on 9/10/2019 while the Claimant filed theirs on 24/10/2019.

The Applicant's Submissions

16. The 1st Applicant submits that its Application seeks to stay the proceedings not execution, and submits that the grant of an order for stay of proceedings is a matter of unfettered judicial discretion to be exercised judiciously and not arbitrarily as was stated in the case of **Blue Shield Insurance Company Limited vs. Gachiri Kariuki T/A Gachiri Kariuki & Co. Advocates [2009] eKLR.**

17. The 1st Applicant has also relied on the case of **Re Global Tours and Travel Limited HCC Winding Up Cause 43 of 2000 (UR)** which outlines the factors that a Court ought to consider in deciding whether to issue an order for stay.

18. It is submitted that if the orders for stay are not granted, the 1st Applicant will suffer a substantial loss as there is a likelihood that a parallel decision will be arrived at once the case is concluded, leading to a state of confusion. Further, parallel proceedings shall lead to waste of judicial time should the appeal proceed.

19. The 2nd and 3rd Applicants submit that the appeal is arguable based on the grounds raised in the draft memorandum of appeal as this Court failed to consider the issues raised in the Preliminary Objection. As such, the same shall be rendered nugatory if the orders sought are not granted. It is therefore its submission that the order for stay should be granted and relies on the case of **Ngaga Enterprises Limited versus Peter Opande [2016] eKLR.**

20. They further submit that proceeding with the claim will render the appeal nugatory as they will be compelled to obey and comply with the orders issued despite there being an appeal. They urge that the purpose of the stay pending appeal is to preserve the subject matter of the litigation. They rely on the case of **Bank Limited vs. Norlake Investments Limited 1 [EA] 227.**

The Claimant's Submissions

21. The Claimant submits that the Applicants will not suffer a substantial loss if the suit proceeds to hearing, to necessitate the granting of the orders for stay. It is submitted that there is no arguable appeal as a recognition agreement is only required for purposes of collective bargaining.

22. The Claimant maintains that a ruling which requires parties to proceed to the main claim to establish the issue in question is not unfair. As such, there is no hardship that the Applicants will suffer if the orders for stay are not granted. It is submitted that staying the proceedings will disadvantage the grievants whose right of association has been infringed upon.

23. I have considered the averments and submissions of both Parties. In my ruling of 9/7/2019, I made a finding that I could not determine the locus of the Claimant without fully being seized of the case and upon hearing the Parties. I decided that the issue would be resolved in the main claim.

24. Being aggrieved with the said ruling, the Applicants/Respondents want this Court to stay its proceedings on the grounds that they have filed a Notice of Appeal at the Court of Appeal.

25. That being the position, the Applicants have already proceeded to the Court of Appeal and it is the Court of Appeal that can grant the orders they now seek before me.

26. I therefore decline to grant the orders sought and order the main claim to proceed unless otherwise ordered by the Court of Appeal.

27. Costs in the cause.

Dated and delivered in open Court this **28th day of February, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awiti holding brief Miss Maumo for 2nd Respondent – Present Muna for Claimant – Present