



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 12 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

JOHN BIYY.....CLAIMANT

-VERSUS-

SETH PANYAKO.....1ST RESPONDENT

REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT

KENYA NATIONAL UNION OF NURSES.....3RD RESPONDENT

AND

LAPFUND.....1ST INTERESTED PARTY

LAPTRUST.....2ND INTERESTED PARTY

RULING

1. Pending before me for determination is the Notice of Motion Application dated 30th September, 2019. The same is brought under Certificate of Urgency under the Under Section 20 (1) & (4) of the Employment and Labour Relations Court, Rule 17(1), (2), (3), & (7) of the Employment and Labour Relations Court (Procedure) Rules, 2016, and all other enabling provisions of the Law seeking Orders that:-

1. The Application herewith be certified as urgent, service of the same be dispensed with in the first instance and the same be heard ex-parte (Spent).

2. The interim ex-parte orders of Justice Hellen Wasilwa issued on 20th December, 2017 be declared as having lapsed and have no legal sequences.

3. This Honourable Court be pleased to allow the 1st Respondent's Notice of Preliminary Objection dated 18th December, 2108 and filed on the same date and to dismiss the suit in its entirety.

4. This Honourable Court be pleased to issue any further orders and directions as it may deem fit in the interest of justice.

5. Cost of this application be provided for.

2. The Application which is premised on the grounds that:-

1. The ex parte orders issued on 20th December, 2017 in favour of the Claimant/Respondent were issued within the Employment & Labour Relations Court (procedure) Rules No. 17(4) and (7) thus; -

(4) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by order of the Court for a period not exceeding fourteen days.

(7) Any order for injunction may be discharged, varied or set aside by the Court on application by any party dissatisfied with such order.

3. The Claimant/Respondent is now ridding on interim orders issued on 20th December, 2017 which, by nature and Law, lapsed on 20th December, 2018 subject to the mandatory provisions of Order 40 of the Civil Procedure Act Cap 21 Laws of Kenya.

4. Order 40 rule 6 on the other hand states as follows: -

”Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise”.

5. That the Claimant/Respondent One Mr. John K. Biiy has since abandoned, refused to prosecute the substantive suit contrary to the existing Laws and practices as ordained by the Civil Procedure Act, Cap 21 and the Employment and Labour Relations Court (Procedure) Rules, 2016 with impunity.

6. That in paragraph 13 & 14 of ruling delivered by Hon. Wasilwa Judge on 6th April, 2019, the Judge found and held as follows; -

13. Order 40 rule 6 on the other hand states as follows:-

”Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise”.

14. This relates to an order of Injunction issued by Court. The order indicates that such an Injunction lapses within 12 months unless the matter is determined. This is however discretionary dependent on further orders of the Court. There is no application before me to extend orders, which have lapsed if at all.

7. That the Claimant/Respondent is now ridding on interim orders issued on 20th December, 2017 which, by nature and Law, lapsed on 20th December, 2018 subject to the mandatory provisions of Order 40 of the Civil Procedure Act Cap 21 Laws of Kenya as read together with Rule 17(4) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Mr. John Biiy is blackmailing this Honourable Court that he is still the National Chairman of the 3rd Respondent-Kenya National Union of Nurses is an abuse of Court process and with impunity.

8. That on 7th November 2017, this Honourable Court issued an order on an application by the 1st Respondent to clarify orders of 6th April 2017, which orders were clarified and reviewed in the following terms:-

1. THAT, on the Court clarification the Respondent are not barred from taking any action on Claimant.

2. THAT, the ruling dated 6/4/2017 is not a super-injunction.

3. THAT, the Claimant shall serve the 1st Respondent and 2nd Respondent with the application.

4. THAT, a hearing date shall be allocated at the registry on priority basis.

5. THAT, 1st Respondent shall aid Justice and take service personally.

6. THAT on the ruling of 6/4/2017 the Court refer parties to order (d) and deal as appropriate.

9. That the Claimant/Respondent is continuously filing multiple suits in pretense that he still holds the position of National Chairman of the 3rd Respondent even in the face of the decision of the Registrar of Trade Unions made on 10th November, 2017 of effecting the changes in the Extract of the Union reflecting the current position; this continual blackmail by one Mr. John K. Biiy is not only an abuse to this Honourable Court and the Rule of Law but contumelious in nature.

10. That the Claimant/Respondent herein-one Mr. John Biiy is deliberately using the ruling of Hon lady Justice Mbaru delivered on 20th December, 2017 to frustrate the affairs and activities of the 3rd Respondent as evidenced in him filing an application and obtaining interim ex-parte Garnishee order on the 2nd January, 2019 attaching the Account No. 01120309515200 at Co-Operative Bank of Kenya, Aga Khan walk- Nairobi in the sum of Ksh. 1,855,000 of the 3rd Respondent to be attached.

11. The Application further supported by the Affidavit of **SETH PANYAKO** sworn on 30th November, 2019, in which he reiterates the averments made in the Notice of Motion Application.

Claimant/Respondent's Case

12. In response to the Application, the Claimant/Respondent filed a Notice of Preliminary Objection and a Replying Affidavit sworn on 20th January, 2020 raising the following grounds:-

- 1. THAT the application is incurably defective, frivolous, incompetent, bad in law, vexatious and otherwise an abuse of Court process.**
- 2. THAT there is no provision in law providing for seeking orders to allow a preliminary objection filed separately and pending hearing and determination through an application.**
- 3. THAT the jurisdiction of the Court has not been invoked through Order 40 Rule 6 of the Civil Procedure Rules for the Court to grant orders being sought.**
- 4. THAT declaratory orders are not available in law through an interlocutory application.**
- 5. THAT the preliminary objection dated 18/12/2018 is res judicata.**
- 6. THAT the 1st and 3rd Applicants' response dated 20/12/2019 was filed in Court on 23/9/2019 out of time of limitation without leave of the Court.**

13. In further response the Claimant filed a Replying Affidavit, in which he depones that it is not true that he has refused to prosecute the substantive suit contrary to Civil Procedure Act and the Employment and Labour Relations Court (Procedure) Rules 2016.

14. He avers that the Amended the Claim on 27/1/2017 and has filed several applications for Contempt of Court. He avers that his application for Contempt of Court dated 18/5/2018 is still pending in Court and when the same came up for inter partes hearing, the Court indicated that it did not want to hear any more applications in the Claim.

15. He avers that in compliance with the direction of the Court to the effect that he takes a day for hearing, his advocate sought to fix the matter for hearing but was informed that the 1st and 3rd Applicants had not filed any response as at June 2018.

16. He avers that his letter dated 24/10/2018 seeking to have the matter listed for directions was misplaced and that he resubmitted the letter but was never allocated any date for directions.

17. He avers that vide his letter dated 7/5/2019, he was allocated a date for directions on 11/6/2019. However, on the said date, the file was neither listed on the cause list nor taken to Court for directions and upon enquiry, he was informed that the Court file was missing.

18. He contends that it is untrue that the orders granted on 20/12/2017, were granted ex-parte as confirmed from the reading of the Order. He avers that the Court should dismiss the application for being based on falsehoods, innuendos and conjuncture with deliberate erroneous interpretation of the order meant to mislead the Court.

19. He avers that the Order 40 Rule 6 of the Civil Procedure Rules has no equivalent provisions in the Employment and Labour Relations Court (Procedure) Rules 2016 and is therefore irrelevant in the present claim. He further avers that Order 40 Rule 6 of the Civil Procedure Rules is only applicable in cases where only injunctive reliefs are sought.

20. He avers that the 1st and 3rd Applicants filed their respective responses on 23/9/2019 and served on 6/12/2019 which was out of time of the limitation period of 2 years, after service of summons to Enter Appearance on 19/1/2018 without leave of Court.

21. He avers that the Preliminary Objection of 18/12/2018 raised the same issues as the Preliminary Objection dated 13/12/2017 which was heard and determined by the Honourable Court on 1/10/2018 in which the Court dismissed the same. He further avers that the Preliminary Objection dated 18/12/2018 raises issues that were raised in the response to the application dated 27/1/2017 and determined on 6/4/2017.

22. He avers that the orders of 7/11/2017 did not set aside the Orders of 6/4/2017, which remain in force. He further avers that the Applicants have never applied or sought to discharge the orders. He avers that there is no ruling by Mbaru, J. delivered on 20/12/2017 that he is allegedly using to frustrate the affairs of the 3rd Applicant.

23. He contends that he remains the National Chairman of the 3rd Respondent despite efforts to have him removed from office. He avers that the application is incompetent and lacks merit.

1st & 3rd Respondent's Response

24. In response to the Claimant's Replying Affidavit, the 1st Respondent filed a Further Affidavit sworn on 27th January, 2020, in which he maintains that the Claimant has been using lapsed interim injunctive orders against the welfare of the members of the 3rd Respondent union thereby occasioning the 3rd Respondent great damages.

25. The 1st Respondent further averred that the said temporary Orders of 20th December, 2017 were issued ex-parte and that they are prejudicial to the 3rd Respondent.

26. Mr. Panyako, the 1st Respondent further averred that the Claimant's Replying Affidavit is incurably defective as it is sworn by a stranger purporting to be the National Chairman of the 3rd Respondent Union. He therefore urged this Honourable Court to disregard the same as the Claimant is neither a registered official of the union nor its member and can therefore not act on behalf of the union by dint of Section 36 (6) of the Labour Relations Act, 2007.

27. He further averred that this Honourable Court vide its Ruling pronounced that the injunctive orders had lapsed automatically by operation of law the suit having not been determined for more than 12 months.

28. He contended that following this ruling the Claimant did file an Application dated 4th December, 2018 seeking mandatory injunction against the Registrar of Trade Unions to reinstate his name as the National Chairman of the 3rd Respondent Union, an order the 1st Respondent confirms was not granted.

29. Mr. Panyako further contended that the interim Orders of 20th December, 2017 having been issued more than 12 months ago have since lapsed automatically by operation of law in view of the mandatory provisions of Order 40 Rule 6 of the Civil Procedure Rules, 2010 as read with Rule 17 (4) of the Employment and Labour Relations Court Procedure Rules.

30. He further maintained that the continued existence of the said Orders has barred the 3rd Respondent from conducting elections for the position of National Chairman pending hearing and determination of the Application which remains unprosecuted for a period of three (3) years.

31. The 1st Respondent further stated that the Claimant was procedurally removed from office effective June 2017 and therefore the interim injunctive orders barring the 3rd Respondent from conducting elections for the position of National Chairman ought to be set aside and the 3rd Respondent allowed to proceed with the intended elections.

32. The 1st Respondent further avers that the Claimant has filed frivolous Applications to delay the hearing of the main suit, which Applications he has abandoned after the Respondent filed their Responses so as to continue enjoying the lapsed injunctive orders. He further maintains that the Claimant has failed to fix the main claim for hearing despite directions being given on the same.

33. He therefore maintained that his Application is meritorious and urged this Honourable Court in the interest of justice to allow it as prayed.

The 2nd Interested Party's case

34. In response to the Applicant's Notice of Motion, the 2nd Interested Party filed Grounds of Opposition on 23rd January, 2020 raising the following grounds THAT:-

- 1. The application does not meet the legal threshold for discharge of the existing interim interlocutory orders.**
- 2. The subject matters of the underlying claim still requires preservation pending the determination of the claim.**
- 3. Granting the application will result in determining the claim at an interlocutory stage to the detriment of the 2nd Interested Party, members of the 3rd Applicant and the general public.**
- 4. The preliminary objection alluded to in the application is res judicata.**
- 5. The 1st and 3rd Respondents have not filed a complete Memorandum of Response to the Amended Memorandum of Claim**

1st Interested Party's Case

35. The 1st Interested Party was not opposed to the Application.

36. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

1st & 3rd Respondent/Applicants' Submissions

37. The 1st & 3rd Respondent submitted that it has met the threshold for grant of the Orders sought therein. The 1st & 3rd Respondent urged this Honourable Court to exercise its discretion and invoke the provisions of Order 40 Rule 6 of the Civil Procedure Rules, 2010 and Rule 17 (4) of the Employment and Labour Relations Court (Procedure) Rules, 2016 on the issue of lapse of injunctive Orders and allow its Application dated 30th November, 2019.

38. The 1st & 3rd Respondents further submitted that the Claimant has been using lapsed interim injunctive orders against the welfare of the members of the 3rd Respondent union thus stalling the functions of the 3rd Respondent. They further maintained that it is in the interest of justice that this Honourable Court allows their Application.

39. It is further submitted that the Claimant is a stranger to this proceedings as he is neither an official of the 3rd Respondent nor a member of the union and can therefore not purport to act on behalf of the union by dint of Section 35(6) of the Labour Relations Act, 2007.

40. The 1st & 3rd Respondent urged this Honourable Court to be guided by the provisions of Order 40 Rule 6 of the Civil Procedure Rules and prevent a situation where the Claimant has slept on his rights and is hiding under the interim injunctive orders that have in fact lapsed. To buttress this argument the 1st & 3rd Respondents cited the Court of Appeal decision in the case of **Barclays Bank Of Kenya Vs Henry Ndungu Kinuthia & Another (2018) eKLR** where the Court emphasised on the importance of Order 40 Rule 6 of the Civil Procedure Rules in furthering the overriding objective and prevent situations where an Applicant goes on to slumber on the suit after obtaining an injunction. For further emphasis the 1st and 3rd Respondent cited the cases of **David Wambua Ngii Vs Abed Silas Alembi & 6 Others (2014) eKLR**, **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (2014) eKLR** and **Erick Kimingichi Wapang'ana & Another Vs Equity Bank Limited & Another (2015) eKLR** with a similar holding.

41. On the issue of the Notice of Preliminary Objection dated 20th January, 2020 the 1st and 3rd Respondent submitted that the same ought to be dismissed as it offends the provisions of Rule 17 (9) of the Employment and Labour Relations Court (Procedure) Rules. It is further submitted that the said Preliminary Objection does not meet the threshold of a Preliminary Objection as highlighted in the case of **Mukhisa Biscuit Manufacturers Limited Vs West End Distributors Limited**.

42. In conclusion, the 1st & 3rd Respondent urged this Honourable Court to allow the Application dated 30th November, 2019 with costs.

Claimant's submissions

43. The Respondent submitted that the prayer (b) of the application has no foundation in law and ought to be rejected on grounds that a declaratory order cannot be sought for in an interlocutory application thus is an abuse of Court process.

44. He submitted that the Application is brought under Section 20 (1) and (4) of the Employment and Labour Relations Court Act, Rule 17 (1), (2), (3) and (7) of the Employment and Labour Relations Court (Procedure) Rules 2016 which had no provisions for declarations or otherwise lapse of an injunction. It avers that the jurisdiction of the Court under Order 40 Rule 6 of the civil Procedure Rules which deals with lapse of injunctive orders has not been invoked.

45. He submitted that the application has no merit as the orders sought are unrealistic and not possible that all cases in which orders of injunction be determined within 12 months .He relies on the case of **Wilson Tanui Barno & 2 Others v Jeniffer Kositany [2015] eKLR**. It was his submission that Order 40 Rule 6 of the Civil Procedure Rules are inapplicable in this case.

46. He reiterated the averments in his Replying Affidavit and submitted that he has not in any way been a hindrance to the conclusion of the suit.

47. He relied on the provisions of Section 7 of the Civil Procedure Act and submitted that the preliminary objection dated 18/12/2018 is res judicata. He relied on the case of **Christopher Orina Kenyariri v Salama Beach Hotel Limited [2017] eKLR** where the Court held that the principle of res judicata is meant to lock out from the Court system a party that has had its day in a Court of competent jurisdiction.

48. He submitted that the preliminary objection dated 18th December, 2018 does not qualify as a preliminary objection as it does not raise a pure point of law capable of determining the suit and was not contained in the Applicant's pleadings. He relied on the cases of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** and **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**.

49. In conclusion, he submitted that the application dated 30th November, 2019 is defective, incompetent and lacks merit and is an abuse of the Court process and urged this Honourable Court to dismiss the same with costs to the Claimant.

2nd Interested Party's submission

50. The 2nd Interested Party submitted that granting the application will result in determining the claim at an interlocutory stage to the detriment of the members of the 3rd Applicant, the public and itself. It submitted that a party to civil litigation should not be deprived lightly of its right to have a suit determined in full trial. It relied on the Court of Appeal decision in **Kivanga Estates Limited v National Bank Kenya Limited [2017] eKLR**.

51. It submitted that it is mischievous for the 1st and 3rd Applicants to seek for dismissal of the claim when they have contributed in the delay of the determination of the claim by filing numerous Preliminary Objection and filed their Memorandum of Response on 11/12/2019 without witness statements.

52. It further submitted that the Preliminary Objection which the 1st and 3rd Applicants want the Court to uphold is res judicata as the gravamen of this objection is similar to the 1st Preliminary Objection dated 13/12/2017 that was dismissed by the Court.

53. It submitted that the 1st and 3rd Applicants never challenged the ruling dismissing the 1st Preliminary Objection thus it is mischievous of them to raise the issues therein in the 2nd Preliminary Objection. In conclusion, it submitted that the application should be dismissed with costs.

54. I have considered all the averments of the Parties herein. The Claimant first approached this Court on 9/1/2017 seeking certain interim orders.

55. Later on, the Applicant filed another application dated 4/12/2017. This Court granted prayer No.3 restraining the Respondent/Applicants from proceeding with election dated 5/1/2018. The Respondents were also enjoined from in any way interfering

with the position of Claimant as Chairman of the 3rd Respondent.

56. The interim orders were extended on 19/2/2018 till 12/3/2018. On 12/3/2018 these orders were not extended and the file was marked SOG (stood over generally).

57. There was inaction on the file until 20/4/2018 when Parties sought a mention date. The Claimant in the interim had filed an application for contempt.

58. The Respondent filed a Preliminary Objection in relation to the contempt application indicating that the case was subjudice. This Preliminary Objection was dismissed on 1/10/2018.

59. On 19/12/2018, the Claimant filed yet another application – contempt application in relation to this Court's orders dated 6/4/2017.

60. I have checked the Court file and note that on the 6/4/2017, J. Mbaru delivered a ruling in relation to joinder of Laptrust in these proceedings. There were no specific orders in favour of the Claimant.

61. From the Court record, it is evident that the orders in place granted by Court on 4/12/2017 were last extended on 19/2/2018 till 12/3/2018 and the Claimant has never moved Court to extend the said orders nor has he moved Court to proceed and prosecute the main application dated 4/12/2017.

62. The Claimant has averred his failure to prosecute the application was because the file disappeared. This does not explain why in the meantime he was able to access the file and file other applications.

63. As submitted by the Applicants, the Claimant has slept on rights and therefore the orders granted on 20/12/2017 and subsequently extended to March 2018 have indeed lapsed and have no legal consequences, the same having not been extended by this Court.

64. The Applicant seeks orders from this Court dismissing this suit in its entirety. In this Court's view, it would be unfair to deny the Claimant an opportunity to prosecute the Main Claim, this Court being aware that this Court has been giving priority to hearings and cases filed before 2015 and therefore the Claimant is not unduly late if he still seeks to prosecute this Claim.

65. I therefore decline to grant prayer No. 3 and direct that the Main Claim proceeds for hearing on a priority basis on a date to be issued by the Deputy Registrar (DR).

66. Costs in the cause.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Seth Panyako for 1st Respondent and holding brief 3rd Respondent –Present

Odhiambo holding brief Muthomi for 2nd Interested Party