REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 85 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(4), (5) AND (6), 27(1) & (2), 28, 41(1) & (2) AND 48 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

GEORGE ODUORI OTIENO..... PETITIONER

VERSUS

THE AFRICAN TRADE INSURANCE AGENCY (ATI)..... 1ST RESPONDENT

HON. ATTORNEY GENERAL..... 2ND RESPONDENT

RULING

The application before me for determination is dated 11th December 2019. The applicant seeks stay of proceedings in this suit pending appeal to the Court of Appeal against my ruling delivered on 25th October 2019. It also prays that costs of the application be provided for.

The application is supported by the grounds on the face thereof and the affidavit of John Lentaigne, the Acting Chief Executive Officer of the applicant. The grounds as set out in both the application and the affidavit in support thereof are that –

1. The Applicant herein is dissatisfied with the Ruling of this Court delivered on 25th October 2019 dismissing the preliminary objection filed by the Applicant on 24th May 2019.

2. The Applicant intends to appeal against the Ruling and if the Petitioner is allowed to proceed with Petition No. 85 of 2019, the Applicant's appeal will be rendered nugatory.

3. Despite all reasonable efforts being made to obtain the typed proceedings for purposes of lodging the appeal, the Employment and Labour Relations Court has a backlog in its typing pool and it is unlikely that the proceedings will be typed, proof read and certified in time to allow filing of the appeal.

4. The Applicant has an arguable appeal with good chances of success for the following reasons:

a) The learned Judge erred in law in dismissing the preliminary objection filed by the Applicant when in fact:

i) The Applicant is a holder of immunity under the Privileges and Immunities Act (Chapter 179 of the Laws of Kenya) and other duly ratified instruments which form part of the Laws of Kenya and as such immune from suit and legal process.

ii) It is a matter of international law that the Courts will not entertain an action against privileged persons and

institutions unless the privilege is expressly waived. The Applicant herein has not waived its immunity.

iii) The Petitioner had mischievously presented a purely employment claim as a constitutional Petition in an attempt to defeat the protection /immunity granted to the Applicant by the law.

b) The learned Judge erred in law by dismissing the preliminary objection contrary to the evidence on record and the Law.

c) The learned Judge erred in law in misapprehending and misapplying the principles set out by Court of Appeal and Supreme Court in the case of **Karen Njeri Kandie v Alassane Ba & Shelter Afrique [2017] eKLR** by failing to apply the correct principles as relates to ouster of immunity.

5. That the intended Appeal will be rendered nugatory unless stay of this proceedings Petition No. 85 of 2019 is forthwith granted by this Court because:

a) The Applicant shall suffer irreparable loss to its reputation if the proceedings are allowed to proceed and the Appeal subsequently succeeds. The immunity from suit and legal process has not been waived and the fact that the proceedings are ongoing is affecting the Applicant's core business as its institutional investors are concerned noting the immunities and privileges granted to it by the Government of the Republic of Kenya to perform its functions.

b) The Appeal is an arguable one and not frivolous.

6. The Petitioner will not suffer any prejudice if the Orders sought are granted.

7. It would only be fair and just to grant the Orders as sought in this application.

The petitioner did not file any response to the application. The application was argued orally in court on 3rd February 2020. Mr. Macharia appeared with Mrs Ouma for the applicant/1st respondent, Mr. Eredi for the 2nd respondent and Ms. Mina for the petitioner.

Mr Macharia submitted that the applicant has filed a Notice of Appeal and has received proceedings. It was awaiting a certificate of delay before filing the Memorandum of Appeal.

He submitted that the principles for grant of stay of proceedings pending appeal are whether the appeal is arguable and whether the appeal would be rendered nugatory should stay not be granted. He submitted that the 1st respondent had filed draft Grounds of Appeal that demonstrate that the appeal is not frivolous as it is contesting the jurisdiction of this court and that the appeal raises grounds of law.

Mr. Macharia submitted that it is trite that arguability suffices even if only a single point is arguable. That the issue of jurisdiction is an arguable matter as immunity which the applicant seeks to rely on is challenged by the petitioner. That there is further the issue whether the 1st respondent has waived its immunity. That it is the 1st respondent's positon that immunity is a bar to legal process. That it is important that the rights of the 1st respondent remain intact so that it is not denied a forum.

Mr. Macharia submitted that the decision of the Supreme Court in the case of **Karen Kandie** is that jurisdiction is a procedural bar. That one of the arguments the 1st respondent will be placing before the Court of Appeal is that the constitutional issues have been raised to circumvent the procedural bar. That the 1st respondent will also be seeking a determination whether the case of **Karen Kandie** determined the issue in this suit.

Mrs Ouma, taking over from Mr. Macharia, submitted on the second issue is that the appeal will be rendered nugatory if orders sought herein are declined. She submitted that under the Civil Procedure Rules, the court looks at substantial loss and security for costs. She submitted that substantial loss will be suffered by the applicant/1st respondent for reason that institutional investors are concerned that although the applicant is granted immunity from suit, it appears that such immunity does not exist. That the applicant has quite a number of member states who have threatened to withdraw. She urged the court to grant the orders.

Mr. Eredi for the 2nd respondent supported the application and the submissions made on behalf of the applicant. He added that Kenya is signatory to the Vienna Convention. That under Article 27 of the Treaty, a party may invoke internal law for its failure to perform a treaty. That what is before the court and what is challenged is the Treaty establishing Article 16(b) which removes personal matters from the jurisdiction of this court. That the agreement is between member states and Kenya has an obligation to member states. That this suit is embarrassing Kenya in the face of member states as it is not only a member but a host country immunity.

He submitted that the 1st respondent raised a preliminary objection to assert its immunity and having appealed, it is fair that proceedings be stayed so that the preliminary objection can be ventilated in the Court of Appeal. He submitted that the flipside is that the petitioner has remedies in his contract which he can invoke until the Court of Appeal has determined the Appeal.

Referring to the decision in the **Karen Kandie** case, he submitted that the Supreme Court has already settled the issue that the constitutionality of the Treaty cannot be challenged because Article 1, Clause 6 of the Constitution domesticates Treaties which become part of the Laws of Kenya and secondly, that Kenya law provides limitations which include the rights of the petitioner which are limited by the Treaty and governed by the instruments, the Treaty, the Host Country Agreement and the petitioner's contract of employment.

Ms. Maina for the petitioner submitted that the petitioner objects to the application as it is bad in law having been framed as an appeal. That

the application touches on the merits of the appeal. That the arguments by Counsel should be made in the Court of Appeal. That the applicant and 2nd respondent cannot base the application for stay on facts that have already been argued before this court.

Ms. Maina submitted that under Order 42, Rule 6 there are three principles to be met being substantial loss, delay and furnishing of security. That these have not been argued in the application.

She submitted that the petitioner is out of office and has not been paid and is thus the one suffering substantial loss.

On the second principle, Ms Maina submitted that the application was filed after almost two months and that this delay has not been explained. On security for costs she submitted that the applicant has made no offer to pay any. She submitted that such security should in the least be an equivalent of the petitioner's salary for 12 months.

Ms. Maina further submitted that the dismissal of the preliminary objection is a negative order, that stay of proceedings should only be made against a positive order.

She submitted that the applicant has not met the threshold under Order 42 Rule 6 and the application should be dismissed.

In a brief rejoinder, Mr. Macharia submitted that Order 42 is for stay of execution and not stay of proceedings before judgment. That what is before the court is not a stay of an order and the issue of negative order does not arise. He submitted that deposit of security is only applicable for stay of execution. That the petitioner's contract ended and there are no stay orders in force. That there is thus no basis for deposit of security.

On inordinate delay Counsel submitted that the applicant wanted to look at the proceedings which unfortunately took too long. He submitted that it is in the interest of justice to allow the application as this is matter a that transcends this case. That there are other agencies that enjoy similar immunity and are waiting for the determination in order to make a commercial decision whether or not to move offices from Kenya.

Determination

I have considered the application and the submissions for and against the grant of the orders sought therein.

The issue for the court's determination is whether the applicant meets the threshold for grant of stay of proceedings pending appeal. Although parties have relied on Order 42 Rule 4, my reading of the whole of Order 42 is that it provides for stay of execution pending appeal and not stay of proceedings where there are no orders to be executed like the instant application as was stated by Githima J. in the case of **Kenya Power and Lighting Company Limited v Esther Wanjiru Wokabi**. In the said case, the Judge set out the principles for grant of stay of proceedings as follows –

> *"To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;*
>
> *a) Whether the applicant has established that he/she has a prima facie arguable case.*
>
> *b) Whether the application was filed expeditiously and*
>
> *c) 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."*

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** (cited with approval in **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi (2014) eKLR** Ringera J (as he then was) stated as follows: -

> *"…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."*

In the instant suit, the petitioner did not file either a replying affidavit or gourds of opposition. The submissions made by Counsel for the petitioner were in respect of stay of execution under Order 42 Rule 6 which as I have observed above, are not relevant in an application like this one where there are no orders to be stayed or that are likely to be executed.

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.

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.

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.

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.

On the issue of delay, Counsel for the applicant gave satisfactory explanation that the applicant was waiting for proceedings so that the appeal can be wholistic. In any event, as there was no threat of execution (as in cases of stay of execution) and no steps had been made to set down the case for hearing of the petition as the petitioner was pursuing its application dated 11th June 2019, I find that there was no inordinate delay in filing the application, relying on the decision of M'Inoti JA in **Joseph Njau v Benson Maina Kabau (2013) eKLR** where he held that delay should not be based solely on length of time it has taken to file the application for stay but rather on the context of each case.

For the foregoing reasons, I am inclined to allow the application and consequently make the following orders –

1. **Pending the hearing and determination of the intended appeal against this court's ruling in Petition No. 85 of 2019, delivered on 25th October 2019, this court hereby grants stay of further proceedings.**

2. **The costs of this applications shall abide the appeal.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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 has 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