



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1393 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ADAM MILLER.....CLAIMANT

VERSUS

WS INSIGHT LIMITED.....RESPONDENT

RULING

Before me for determination is the Notice of Motion Application dated 7th March, 2019. The Application is filed by the Respondent under Certificate of Urgency seeking the following orders that: -

1. Spent.
2. There be a stay of any further proceedings in Employment and Labour Relations Court Cause No. 1393 of 2017, pending hearing and determination of this Application inter-partes.
3. There be a stay of any further proceedings in Employment and Labour Relations Court Cause No. 1393 of 2017, pending the hearing and determination of the Applicant's intended Appeal against the ruling of the Employment and Labour Relations Court of Nairobi of Onyango J. delivered on 26th October 2018 in the Employment and Labour Relations Cause No. 1393 of 2017.
4. The Costs of this Application be provided for.

The Application is premised on the grounds as set out on the face of the Notice of Motion Application, in which the Applicant contends that being dissatisfied with the ruling of this Court delivered on 26th October, 2018 it has lodged an appeal on the same.

The Applicant avers that it has an arguable appeal based on the provisions of Section 12(1)(a) of the Employment and Labour Relations Court Act.

The Applicant maintains that its relationship with the Claimant was not an employer-employee relationship under Section 12(1) of the Employment and Labour Relations Court Act and therefore lacks the legal standing to institute the Claim herein.

The Applicant is apprehensive that should the proceedings herein be allowed to continue it will be subjected to a hearing that is based on mere allegations and will be deprived of its legal right to raise an objection to the Claim.

It is further the Applicant's contention that if the orders sought in its application are not granted its Appeal will be rendered nugatory. It further argued that it is in the interest of justice that the instant Application is allowed as prayed.

The Application is further supported by the Affidavit by SIMON ROBERTS, the Country Director of the Respondent sworn on 7th March, 2019 in which he reiterates the grounds on the face of the motion.

The Application is filed under Section 12 of the Employment & Labour Relations Court Act, Rule 17 of the Employment & Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law.

The Claimant opposes the Application and filed Grounds of Opposition dated 8th July, 2019, raising the following grounds:-

a. The Respondent has not illustrated any good ground for the exercise of the Court's discretion to stay further proceedings in this cause.

b. The Respondent herein filed its Notice of Appeal in the Employment and Labour Relations Court on 9th November, 2018. The Respondent has however never served the Notice of Appeal contrary to the provisions of Rule 77 of the Court of Appeal Rules, 2010.

The application was disposed of by way of written submissions.

Submissions by the Parties

It is submitted on behalf of the Respondents/Applicants that it has demonstrated that it has met the threshold to warrant granting of the orders sought in the instant Application as set out in the case of **Kenya Power and Lighting Company Limited v Esther Wanjiru Wokabi (2014) eKLR**.

The Applicant further submitted that its grounds of Appeal are not only arguable but are also not frivolous. It further averred that the same will be rendered nugatory should the Orders sought in the instant Application not be allowed by this Court.

The Applicant further submitted that no prejudice will be visited upon the Claimant herein if the same is allowed.

In conclusion the Applicant urged this Court to exercise its discretionary power and allow its Application as prayed.

Claimant's Submissions

The Claimant on the other hand submitted that the Applicant herein has failed to demonstrate sufficient grounds for the grant of the stay of proceedings sought herein and therefore urged this Court to dismiss the same.

The Claimant further submitted that the failure by the Applicant to serve the alleged Notice of Appeal and its subsequent failure to institute the same within 60 days as provided under Rule 82 (1) of the Court of Appeal Rules only means that the intended Appeal stands withdrawn.

The Claimant further submitted that the Applicant has not met the threshold for the grant of an Order of Stay of Proceedings as highlighted in the case of **Kenya Power and Lighting Company Limited v Esther Wanjiru Wokabi (2014) eKLR**.

The Claimant further submitted that the Respondent's Draft Memorandum of Appeal as annexed to its Application lacks merit and does not disclose any arguable grounds of Appeal.

The Claimant further submitted that the issue of an employer-employee relationship can only be determined by taking evidence at a full trial and therefore this Court was correct in dismissing the Preliminary Objection. The Claimant cited the case of **Stanley Mungai Muchai v National Oil Corporation of Kenya (2012) eKLR** where the Court in dismissing a Preliminary Objection opined that an issue whether the Contract of Service exists is not an issue that can be decided in a Preliminary Objection but a reserve of the main hearing of the Claim.

It was therefore the Claimant's contention that the Court's Ruling of 26th October, 2018 was founded in law and thus correct.

The Claimant further submitted that an Order for Stay of Proceedings would delay the expeditious disposal of this suit. It is further submitted that the Respondent has failed to demonstrate that it would suffer loss should the court fail to grant the orders sought in the Application.

The Claimant submitted that the Application has been filed with unreasonable delay the same having been filed more than 5 months after the delivery of the Court's Ruling.

In conclusion the Claimant urged this Court to dismiss the instant Application as the same is void of merit.

Analysis and Determination

Having carefully considered the grounds in support of the application as set out on the face of the motion and the Supporting Affidavit, the Claimant's grounds of opposition and the submissions made by the parties, the only issue for determination is whether the Application dated 7th March 2019 is merited.

What is the threshold of Stay of Proceedings Pending Appeal Applications?

It is not in doubt that this Court has powers to stay proceedings pending appeal. This jurisdiction is derived from both Order 42 rule 6 of the Civil Procedure Rules as well the inherent jurisdiction reserved in section 3A of the Civil Procedure Act. Refer to the case of **George Oraro v Kenya Television Network Nairobi HCCC No. 151 of 1992**.

The principles for grant of stay of proceedings were set in the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi (2014) eKLR** where the Court held 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.”

The instant suit was filed in July 2018. The respondent did not file a defence. In fact, to date, it has not filed a defence. When the claimant fixed the matter for pre-trial directions and sought a date for formal proof on 14th December 2017, which was some four months after it filed appearance but having not filed a defence, the respondent sought leave to file a preliminary objection. The same was however not filed until 2nd February 2018.

Ruling on the preliminary objection which is the subject of the instant application, was delivered on 26th October 2018. Counsel for the respondent then applied for leave to file defence within 14 days, which was granted. Instead, the respondent filed a notice of appeal on 9th November 2018.

As has been submitted by the claimant, the notice of appeal had not been served upon it as of the date of hearing this application. Even to date no notice of appeal has been served upon the claimant. This is contrary to the provisions of Rule 77(1) of the Court of Appeal Rules.

A letter applying for proceedings was filed by the respondent on 14th November 2018.

The principles for stay of proceedings pending appeal from an order such as the instant application were set out in the case of **Kenya Power and Lighting company Limited v Esther Wanjiru Wokabi** (supra) where the court cited with approval the decision of Ringera J. (as he then was) in the matter of **Global Tours and Travels Limited: Nairobi Winding Up Cause No. 43 of 2000**. The principles are –

- a. Whether the applicant has established that he/she has a prima facie arguable appeal;
- 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.

Njuguna J. adopted the above set of principles in **Robert Gathigana Njagi v John Mutua Manda [2017] eKLR**. The learned Judge stated:

“In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, 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 utilisation of judicial time and whether the application has been brought expeditiously.”

Mbaru J. agreed with the above proposition in **Michael Njai v Juan Torres & Another [2015] eKLR**. Further, the learned judge followed with approval the Court of Appeal decision in **UAP Provincial Insurance Company Limited v. Michael John Beckett, Civil Appeal No. 26 of 2007**, where the Court of Appeal stated:

“In order for the applicant to succeed in an application for stay of proceedings pending appeal, it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise. It is not for the court in this type of application to go deeply into the merits of the intended appeal but only to decide whether there is an arguable appeal, which is not frivolous.”

What is an Arguable Appeal?

One has to look at the grounds of appeal to establish whether or not the appeal is frivolous. In the draft memorandum of appeal, the applicant has raised three grounds being that –

1. The learned Honourable Judge erred both in law and in fact by failing to address the Appellant’s second ground of its notice of preliminary objection on the maxim of *exturpi causa oritur non actio* thereby arriving at a wrong conclusion.

2. The learned Honourable Judge erred both in law and in fact when she addressed a contract of service and a contract for services within the purview of the maxim *exturpi causa oritur non actio* thereby arriving at a wrong conclusion.

3. The learned Honourable Judge erred in law and in fact in holding that the Employment and Labour Relations Court had jurisdiction to hear and determine Cause No. 1393 of 2017.

A perusal of the ruling which is the subject of the intended appeal would reveal that what the court determined is the question whether or not a preliminary objection could be raised in a suit where there was no defence on record and further which court should determine whether or not an employment relationship existed between the parties.

The court decided that the issues raised in the preliminary objection are of both law and fact and can only be determined after hearing evidence from the parties.

The issues raised in the grounds of appeal are thus not matters that were the subject of the impugned ruling.

The second test is whether the application was filed expeditiously.

As was held by M'Inoti J.A in Joseph **Wanjohi Njau v Benson Maina Kabau (2013) eKLR**, the length of delay must be considered in the context of each case.

In the instant case the ruling was delivered on 26th October 2018. It was not until 7th March 2019 that this application was filed. This was a delay of more than 4 months.

It is not lost to the court that this is a 2017 suit where the claimant was ready to take pre-trial directions on 14th December 2017. This was not done because of the request by the respondent for leave to file its preliminary objection. Leave was granted for 7 days but again the respondent did not file the same until 2nd February 2018, instead of 20th December 2017.

Thereafter, the respondent was on 6th February 2018 directed to file submissions on the preliminary objection within 14 days. It did not do so until 25th June 2018, a delay of a further 4 months.

The cumulative delay attributable to the respondent in the prosecution of this case is thus about one year.

The third ground is whether it is in the interest of justice to grant the orders sought. In the intended appeal, the respondent/applicant has prayed for the following orders –

- i. The appeal herein be allowed.
- ii. The Order made on the 26th October 2018 by the Onyango J. in Employment and Labour Relations Court Case No. 1393 of 2017 – Nairobi be wholly set aside with costs to the Appellant.
- iii. Costs of this appeal be provided for.

From the prayers, the appeal is unlikely to finally determine this suit. Should the appeal succeed, the only likely orders for the Court of Appeal to make would be to remit the matter back to this court for rehearing of the preliminary objection. If I decline to grant the orders, the applicant would be compelled to file a defence and the suit would proceed, in which event it will still have a right of appeal at which all the issues raised in the preliminary objection can be raised for determination in the appeal. The applicant would thus not suffer any irreparable loss or damage.

Taking all the foregoing into account as well as the need for disposal of cases expeditiously and the optimum utilisation of the scarce judicial time, I am inclined to decline to grant the orders sought by the applicant.

I accordingly dismiss the application with costs to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH 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