



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC NO. 2181 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 24th January, 2019)

TRAILINK GROUP LTD.....APPLICANT

VERSUS

KENYA LONG DISTANCE TRUCK

DRIVERS & ALLIED WORKERS UNION.....RESPONDENT

RULING

1. The Application before this Honourable Court for determination is the one dated 5th April 2018 and filed under the provisions of Section 12 of the Employment and Labour Relations Court Act, 2007 and Rule 17 of the Employment and Labour Relations Court Rules, 2016, and all other enabling provisions of the Law.
2. The Applicant seeks the following orders:-
 - a) ***THAT the Honourable Court do stay further proceedings in Cause No. 2181 of 2014 pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. 88 of 2018 between Trailink Group Ltd vs. Kenya Long Distance Truck Drivers & Allied Workers Union.***
 - b) ***THAT there be stay of computation of award pending the hearing and determination of the pending appeal in the Court of Appeal.***
 - c) ***THAT costs of this application be provided for.***
3. The Application is supported by the Affidavit of Peter Njenga and is based on the grounds as set out herein below.
4. The Claimant avers that it has an Application for stay of execution namely **NAI No. 53 of 2018** and an Appeal in the Court of Appeal. It is the Claimant's case that neither party has filed computation proceedings as ordered by the Court hence the need to stay computation of any award.
5. The Claimant avers that the pending appeal raises weighty legal issues. As such, it is necessary to stay further proceedings in this matter until conclusion of the appeal otherwise, these proceedings will be rendered nugatory.
6. It is the Claimant's case that no single union member testified to prove the counter-claim and therefore the evidence of the Secretary General is not conclusive proof of the counter-claim. Further, the Secretary General of the Respondent has usurped the prosecutorial powers of unknown grievant to demand sum of KShs. 32.6 Million from the Claimant as decree of this Honourable Court which amount is subject of a pending Appeal.
7. The Respondent has opposed the Application vide the Replying Affidavit of Nicholas Mbugua sworn on 14th May 2018 and filed on even date.
8. The Respondent avers that the Application lacks merit and is incompetent *ab initio* since the Honourable Court made its judgment, and various rulings thereafter on the same prayers for stay. Further, the Application does not state any material fact or sufficient reason for grant of stay and is therefore an abuse of the Court process.
9. It is the Respondent's case that there are no sufficient grounds for Appeal. It is also the Respondent's case that the Applicant has failed to

provide reasonable security as ordered by this Honourable Court, and as such the proceedings cannot be stayed before the compliance of said Orders.

10. The Respondent avers that the Application herein is a disguise as it is similar to the Application dated 13th December 2018.

11. It is the Respondent's case that the claim was calculated per the Court's judgment and the Applicant is well aware of the number of employees they dismissed between 21st November 2014 to 16th December 2014 and should therefore not lie to this Court about numbers.

12. The Respondent avers that the Applicant has come to this Honourable Court with unclean hands as it has refused to comply with the orders directing them to honour the Recognition Agreement entered on 15th December 2014 and should therefore not be given audience. The Respondent further avers that the issues raised should be subject of the preferred appeal as this Honourable Court is *functus officio*.

13. It is the Respondent's case that they exchanged numerous letters with the Applicant on the computations and even wrote an invitation letter dated 18th January 2018 for a sit down to try and mutually compute the award by the Court, but the same was turned down by the Applicants.

14. On 2nd August 2018, the Applicant filed the Supplementary Supporting Affidavit of Solomon Wamwayi sworn on 31st July 2018 and in response to the Respondent's Replying Affidavit, the complete judgment issued by the Honourable Nderi Nduma J., the Application dated 12th December 2017 and the Ruling delivered by the Honourable Radido J were annexed thereto and the contents of the Supporting Affidavit reiterated.

15. On 10th August 2018, the Respondent filed the Further Affidavit of Nicholas Mbugua sworn on even date, in response to the Applicant's Supplementary Affidavit. The Respondent avers that the Honourable Radido J. dismissed the Application dated 13th December 2017 for being an abuse of the Court process.

16. The Respondent further avers that the Application herein is filed to obstruct the Respondent from executing its decree even though the Ruling on stay of execution by the Honourable Nderi Nduma J. clearly stated that after the lapse of 30 days granted for stay of execution, the stay was to lapse automatically and execution to issue.

17. The Respondent avers that its Bill of Costs Application was stood over generally to allow the prosecution of the Application herein. It is also the Respondent's averment that it has not been served with the Applicant's grounds stated in NAI 53 of 2018. The Respondent further avers that the Applicant has not appealed against the orders of the trial Court hence the Application herein is an afterthought.

Submissions by the parties

18. The Applicant in its written submissions dated 18th September 2018 and filed on 20th September 2018, submits that the Respondent's threat of execution in the sum of KShs. 32,616,329.00 is incompetent, premature and untenable in law for want of computation and/or approval of computation as ordered by the trial Court and more pertinently, for want of competent decree capable of being executed.

19. It is the Applicant's submissions that the Application herein is different from the Application dated 13th December 2017, which was heard by the Honourable Justice Radido.

20. The Applicant submits that the Respondent is aware of the pending Appeal, which has overwhelming chances of success and might be rendered nugatory if the prayers sought herein are not granted. Further, the Respondent shall not suffer any loss if the prayers are not granted.

21. The Respondent gives a summary of the Application and the history of the case in its submissions dated 28th September 2018 and filed on 2nd October 2018.

22. It is the Respondent's submissions that the decision to stay judicial proceedings is a matter of judicial discretion and should be exercised in the interest of justice. The Respondent relies on the case of **Daniel Walter Rasugu Nbi HCCC No. 15 of 2006; Global Tours & Travel Limited; Nairobi HC Winding Cause No. 43 of 2000** for further emphasis.

23. The Respondent submits that the appeal will not be rendered nugatory if application is denied. It relies on the case of **Chesilyot Enterprises Ltd vs. Co-operative Bank (K)(Ltd) [2008] eKLR** where the Court noted that the provisions of **Rule 5(2) (b) of the Court of Appeal Rules** are not applicable in the trial Court which is the case herein. The Respondent further submits that the Application before this Court is not made to it as an Appellate Court but rather as the trial Court and as such the principles set out therein do not apply.

24. It is the Respondent's submissions that the Application has been brought with so much inordinate delay and should be dismissed with costs. The Respondent further submits that no sufficient cause has been shown by the Claimant why stay of proceedings should issue. However, the Respondent will be prejudiced if the stay of proceedings is allowed. The Respondent relies on the case of **Anders Bruel T/A Queenscross Aviation vs. Nyambura Musyimi & 2 Others [2015] eKLR**.

25. Lastly, the Respondent submits that the Application as filed is not merited and is an abuse of the Court process hence should be dismissed.

26. I have considered the averments of both parties. I note that the Applicants seek stay of this Court's Proceedings on the grounds that they have preferred an appeal being NAI CA No. 53/2018.

27. Previously, the Applicants sought stay orders which were granted on condition that they deposit the decretal sum in a joint interest earning account. This condition was never met.

28. The Applicants then filed an application for review, which was dismissed by Court.

29. They have now come up with this application, which seeks stay of proceedings. The only proceedings pending in this Court are taxation of bill of costs and execution, which in my view are similar to the previous application for stay and which was granted conditionally.

30. It is my position that the current application is an abuse of the Court process as it has already been determined. The Applicants having already filed an appeal, the only forum for them to seek the current application would be before the Court of Appeal.

31. I do not find this application merited. I dismiss it accordingly. Costs to abide the outcome of the appeal if at all.

Dated and delivered in open Court this 24th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

F.I. Kimani for Respondent – Present

No appearance for Claimant – Absent