



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 874 OF 2016

REBECCA WANJIKU MATHENGE.....CLAIMANT

VS

ALPINE INSURANCE BROKERS LIMITED.....RESPONDENT

RULING

1. By its application brought by Notice of Motion dated 13th December 2018, the Respondent seeks an order staying any further proceedings in this matter pending the hearing and determination of an appeal against the ruling of the Court delivered on 7th November 2018.
2. The application is supported by a supporting affidavit and a supplementary affidavit sworn by the Respondent's Counsel, Randolph M. Tindika on 13th December 2018 and 15th January 2019 respectively. It is based on the following grounds:
 - a) The Respondent filed a Notice of Appeal dated 22nd October 2018 seeking to set aside the *ex parte* proceedings and orders made on 18th July 2018 and to have the matter start afresh;
 - b) The application was duly heard and the Court delivered its ruling on 7th November 2018, dismissing the said application with costs to the Claimant;
 - c) The Respondent's Counsel sought leave to appeal against the said decision which the Court granted;
 - d) Upon being granted leave, the Respondent filed a Notice of Appeal on 19th November 2018;
 - e) The Respondent is exercising its right of appeal but is likely to be locked out if the orders sought are not granted;
 - f) The Respondent is willing to comply with any conditions which the Court will attach to the application herein;
 - g) There is urgent need to have the proceedings herein stayed pending the hearing and determination of the intended appeal by the Court of Appeal;
 - h) It is a cardinal rule of law and natural justice that a court of law ought to hear both parties before making final judgment and the Respondent is likely to be greatly prejudiced if the application is not heard before any further steps are taken in these proceedings;
 - i) The Respondent's intended appeal raises triable issues and thus it is important that the Court of Appeal determines the appeal before the suit herein proceeds for hearing and determination.
3. The Claimant's response is contained in her replying affidavit sworn on 18th December 2018. She depones that despite being duly served, the Respondent failed to appear in court for hearing of the suit. The Claimant adds that the current application, which arose from the ruling of the Court delivered on 7th November 2018, was not filed until 13th December 2018.
4. The Claimant states that nothing triable has been raised by the Respondent in this application that necessitates stay of proceedings. She further states that she stands to be prejudiced having testified in the suit way back in July 2018.
5. The Claimant goes on to depone that the Respondent has not demonstrated steps taken towards expediting preparation of the Record of Appeal.
6. The single issue for determination in this application is whether the Respondent has made out a case for stay of proceedings in this Court

pending appeal in the Court of Appeal. I must add that the issue is not whether the *ex parte* proceedings of 18th July 2018 ought to be set aside, as this Court has already rendered itself on that issue in its ruling of 7th November 2018.

7. Under Civil Procedure Rules, provision for stay of proceedings is lumped together with stay of execution generally. In this regard, Order 42 Rule 6(1) and (2) provides as follows:

1. *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

2. *No order of stay shall be made under sub rule (1) unless-*

a. *The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and*

b. *Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

8. With specific reference to stay of proceedings, the Court in *Global Tours and Travels Ltd (WC No. 43 of 2000 (UR))* had this to say:

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.”

9. The *Halsbury’s Laws of England (4th Edition, Vol 37 at pages 330-332* states:

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

10. The gist of the foregoing authorities, with which I fully agree, is that stay of proceedings which in effect halts legal proceedings should be allowed in exceptional circumstances only. In the instant matter, the Respondent failed to convince the Court to reopen the case. Nothing more has been offered to convince it to halt the proceedings before it. As held in *Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] KLR 63*, the right of appeal must always be balanced with the equally important right to expeditious disposal of cases.

11. The Respondent did not bother to file a draft Memorandum of Appeal and the Court had no opportunity to consider the question whether it has an arguable appeal even on *prima facie* basis. Further, the Respondent decided to leave the issue of security to the Court.

12. This is evidently a disinterested party who wants the Court to halt proceedings without solid grounds. The Court finds no reason as to why it should exercise its discretion in favour of such a party.

13. The result is that the Respondent’s application dated 13th December 2018 is declined with costs to the Claimant.

14. The parties are directed to file final submissions on the main claim within the next fourteen (14) days from the date of this ruling.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Maragia for the Claimant

Mr. Tindika for the Respondent