



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2193 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th October, 2019)

LUCY MINGO KUSEWACLAIMANT

VERSUS

EMBASSY OF SWEDEN, NAIROBI.....RESPONDENT

AND

CAUSE NO. 2194 OF 2015

RENALD MBOJE MJOMBACLAIMANT

VERSUS

EMBASSY OF SWEDEN, NAIROBI.....RESPONDENT

RULING

1. The Applicant/Respondent, Embassy of Sweden, Nairobi filed a Notice of Motion dated 11/04/2019 brought under *Sections 3 and 12 of the Employment & Labour Relations Court Act, and Rule 16(1) and 27(1) of the Industrial Court (Procedure) Rules*. It seeks for Orders that there be a stay of proceedings herein and a stay of further proceedings pending the hearing and determination of this Application and the Appeal against the order made on 31st July 2017.
2. The Application is founded on the grounds: That by a ruling delivered on 31/07/2017 the Court dismissed the Respondent's application which sought to strike out the claims herein on grounds of sovereign and diplomatic authority and being dissatisfied, the Respondent filed a Notice of Appeal on 07/08/2017 and the Record of Appeal on 05/10/2017.
3. That parties attended Court on 28/03/2019 wherein the Claimant intimated the intention to proceed with the hearing of the suit notwithstanding the pending appeal.
4. That the Respondent is following up with the Court of Appeal for a date for case management to expedite the hearing of the appeal which has a high chance of success considering the provisions of the Privileges & Immunities Act as read together with the Vienna Convention on Diplomatic Relations, 1961.
5. That the appeal will be rendered nugatory unless the proceedings herein are stayed and that it is only just that the issue of jurisdiction and the Respondent's immunity are determined on appeal before further proceedings are taken herein. That the overriding objective will be met by the grant of the orders sought and that the application has been made without undue delay.
6. The Application is supported by the Affidavit sworn by the Respondent/Applicant's Advocate, Michi Kirimi who attaches to his affidavit copies of the notice of appeal and record of appeal at *pages 1 and 2 of the exhibit* marked **MK1**.
7. That the memorandum of appeal containing the grounds of appeal is at *pages 3 and 4* of the said exhibit and that at *page 5*, is a copy of the letter to the Court of Appeal requesting for a date for case management. That there is a real risk that unless an order to stay further proceedings is granted, the matter will be heard to the detriment of the Respondent and that it is in the interest of justice that there be a stay of proceedings pending the hearing and determination of appeal. He lastly produced the exhibit marked **MK1**.

8. The Claimants, Lucy Muingo Kusewa (Cause 2193/2015) and Renald Mboje Mjomba (Cause 2194/2015) filed a Replying Affidavit sworn by their Advocate, Victor Kazungu who avers that the Appeal which was lodged in 04/08/2017 has not been heard two years later and that the Respondent has therefore not acted expeditiously as alleged.

9. That the Respondent has not been keen to prosecute its Appeal for two years and that the Application herein which is intended to delay the determination of this matter is therefore an abuse of the Court process. That the Application and the intended Appeal lack merit and have been brought in bad faith and that it would be in vain and unjust to grant orders of stay proceedings.

10. That the same is meant to have this matter stay in Court and prevent the Claimants from accessing the fruits of a successful litigation and that the Application should therefore be dismissed with costs.

Applicant/Respondent's Submissions

11. The Applicant/Respondent submits that the High Court has inherent powers under Section 3A of the Civil Procedure Act to grant a stay of proceedings as held in the case of **Symon Nyamu Muthigani v Charity Wangui Munene [2015] eKLR**. That in determining when a Court should exercise its discretionary powers and grant a stay of proceedings pending the hearing and determination of appeal, Ringera J (as he then was) answered 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**) 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.”

12. That the Court in the **Kenya Power & Lighting case** above thus set out the test as follows:-

“The Court’s discretion in deciding whether or not to grant stay of proceedings is thus to be guided by the main principle of the interest of justice, as determined by three main factors- (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.”

13. The Applicant submits that an arguable appeal was interpreted by the Court in **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR** that a raised, single bonafide arguable ground of appeal is sufficient and that arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.

14. That the Court of Appeal needs to settle the issues with finality considering execution of any judgment against the Respondent might impair relations between the Foreign Sovereign, Sweden and the Receiving State, Kenya. That the issues include:-

a. Whether a Foreign Sovereign can be subjected to the jurisdiction of the Receiving State’s Courts without waiving immunity or voluntarily submitting to the jurisdiction of the Court;

b. Whether the United Nations Convention on Jurisdictional Immunities of States and their Property, which is not in force in Kenya, can be relied on by the superior Court;

c. Whether the doctrine of absolute immunity is no longer viable and the immunity enjoyed by the respondent is restrictive and does not cover employment matters; and

d. Whether employment matters fall within the ambit of private law where immunity is restricted.

15. It submits that it filed this Application only 15 days after the directions of the Court given on 27/03/2019 and that this was expeditious and without delay in the peculiar circumstances. That the Claimants were served with all the documents filed in the Court of Appeal and that even though the Appeal was set down for case management on 17/01/2018, it did not proceed on that day.

16. That the outcome of the appeal will directly impact the matter in this Court and it should thus be ventilated first instead of running parallel suits which contravenes the overriding objective under **Sections 1A and 1B of the Civil Procedure Act**. It relies on the case of **Butt v Rent Restriction Tribunal [1979] eKLR** on a stay being granted so that an appeal is not rendered nugatory should the appeal Court reverse the judge’s discretion.

17. The Respondent contends that it has met the test for grant of stay of proceedings and urges this Court to exercise its discretion in its favour and grant the application as prayed.

Claimants/Respondents' Submissions

18. The Claimants/Respondents submit that they rely on the **Kenya Power & Lighting Company Limited –v- Esther Wanjiru Wokabi [2014] eKLR** in terms of the principles to be considered in allowing an application for stay of proceedings and that with this criteria, the application has not been filed expeditiously or in the interest of justice.

19. That having filed this claim 4 years ago, they are entitled to have their claim heard and determined expeditiously and also because they are exposed to unemployment. That the Court in the **Kenya Power & Lighting case** considered the need for expeditious resolution of disputes as an overriding interest and proceeded to dismiss an application for stay of proceedings.

20. They submit that the doctrine of diplomatic immunity is no longer absolute but restrictive and that it does not apply in instances where the subject matter is private relationship/contract such as the employment relationship between the Claimants and the Respondent. That in the case of **Bah v Libyan Embassy 2006 Citation: 2006 (1) BLR 22 (IC)**, the Court expressed the issue of restrictive diplomatic immunity by stating that the doctrine of absolute immunity that was previously applicable in International law is no more and has given way to restrictive immunity. That the **Bah case** above citing with approval the case of **S v India 82 ILR 14 at page 17** addressed the issue of whether the defence of diplomatic immunity is available where the subject matter is an employment contract as follows

“...I have no hesitation whatsoever in holding that an action and or legal suit arising out of breach of the employment contract and or Employment Act involves a private law transaction and is justiciable. In my view there is no reason why the respondent should be immune from a legal suit of this nature. The applicant in this matter is not in any way challenging a governmental act, but is merely seeking compliance with the Employment Act in so far as he is merely claiming payment of severance pay, notice pay and the payment of wrongfully withheld wages...”

21. I have examined the averments of both Parties. I note that the Applicants herein have preferred an appeal at the Court of Appeal which is still pending hearing and determination. For that reason alone, it would be a waste of precious judicial time for this Court to assume that fact and proceed to hear this Claim, which may render this hearing an academic exercise if the appeal is allowed.

22. I therefore find the application has merit. I therefore stay proceedings in this Claim pending the hearing and disposal of the appeal already filed.

Dated and delivered in open Court this 11th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kalua for Claimants – Present

Mary Ongere for Respondent – Present