



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.136 of 2018

STEPHEN WEKATI MAYUKUVA.....CLAIMANT

VERSUS

KENOLKOBIL LIMITED.....RESPONDENT

RULING

The respondent by application dated 24th June, 2019 is seeking for orders that pending hearing and determination of the intended appeal against the ruling delivered on 25th April, 2019 the court be pleased to stay any further proceedings in this matter. The orders sought in the main are couched thus;

Pending the hearing and determination of the intended appeal against the ruling delivered on 25th April, 2019, this court be pleased to grant an order to stay any further proceedings in this matter.

The application is supported by the Affidavit of Jean-Christian Bergeron and on the grounds that on 29th January, 2019 the claimant filed application seeking to amend his claim dated 4th May, 2018 to include claims relating to payment of cash value of his alleged Kenya Oil Company Group Employee Share Plan (ESOP) shares. The respondent replied thereto by affidavit of David Ohana opposing the application on the grounds that by virtue of agreement entered into by the parties, any claims in respect of the ESOP shares are to be referred to arbitration and the court did not have jurisdiction to hear and determine the claims in light of the arbitration clause.

Other grounds are that on 25th April, 2019 the court delivered ruling allowing the claimant's application to amend his claim to include the ESOP shares and the respondent being dissatisfied intends to appeal against the same and has filed Notice of Appeal dated 2nd May, 2019.

The respondent is apprehensive that the proceedings before court will progress substantively before the intended appeal is heard and determined by the Court of Appeal and the claimant has already filed his Amended memorandum of Claim to include the ESOP claims and attached a list of documents to include the ESOP shares.

In reply the claimant refilled his Replying Affidavit and on the grounds that the respondent is seeking for twin orders of stay of execution of orders issued on 25th April, 2019 and stay of proceedings which is not addressed under provisions of Order 42 Rule 6 of the Civil procedure Rules. The only order made by the court is the one allowing the amendment of pleadings within set timelines which has already been done.

The claimant also avers that there shall be no prejudice suffered by the respondent where the orders sought are not allowed and the application made is a delay tactic considering the respondent company has been sold and it will be difficult to execute in case the court orders in the claimant's favour. Unless the respondent is ready to deposit security in court, it will be difficult to execute any judgement of the court.

The claimant also avers that since the Notice of Appeal was filed no action has been taken by the respondent in filing the record of appeal and since 30 days have lapsed. There is obvious delay in filing this application since the orders granted and it should be dismissed with costs.

Both parties filed written submissions.

The court has put into account the filed submissions by both parties and the single issues which emerge for determination is whether the court should stay further proceedings herein to allow the respondent to be heard on its intended appeal following the court ruling delivered on 25th April, 2019 and which allowed for the amendment of the memorandum of Claim.

The respondent has relied on the provisions of Order 42 rule 6 (1) of the Civil Procedure Rules which provides as follows:

No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.

For the court to allow for a stay of proceedings, an applicant must establish sufficient cause for the court to address and make an order that is fair and just. As correctly submitted by the respondent in the case of **global Tours & Travels Limited High Court Winding Up Cause No.43 of 2000** the court must also be satisfied that the interests of justice shall be met with the stay of proceedings. See also the principles to apply enunciated in the case of **Focin Motorcycle Co. Limited versus Ann Wambui Wangui & another [2018] eKLR**.

It was further held in **Ezekiel Mule Musembi versus H. Young & Company (E.A) Limited [2019] eKLR** that;

This jurisdiction [to stay proceedings] is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account

The respondent submitted that the court failed to uphold the dispute resolution mechanism elected by the parties in respondent of ESOP and which the claimant has addressed in the Amended claim and that the court erred in allowing these amendments without jurisdiction and that it shall serve the interests of justice to stay proceeding herein to allow for an appeal.

As noted above, on good cause the court can stay proceedings where moved without delay particularly as regard on-going proceedings moved by the claimant to assert his rights in employment.

The claimant has since filed His Amended Memorandum of Claim on 3rd May, 2019 and served the respondent.

Subsequently on 6th May, the respondent filed Notice of Appeal.

On the court ruling on 25th April, 2019 each party is entitled to the right of appeal save this right should not apply to stall the course of justice particularly in employment and labour relations claims premised on the provisions of section 3 of the Employment and Labour Relations Court Act, 2011 which obligates this court to promote the just, expeditious and efficient disposal of disputes but mindful that this should not be at the expense of any party who wishes to ventilate any matter on appeal.

In this regard the court is mindful of findings relied upon in the case of **Ezekiel Mule Musembi**, cited above in the case of **Official Receiver versus Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243** that:

In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.

Accordingly, the court shall issue conditional stay of proceedings and allow the respondent the next 30 days to move with the intended appeal and to ensure that the record of appeal is prepared and directions on the appeal taken. In default, the orders of stay issued herein shall stand vacated. It is fair to award costs to the claimant.

Delivered at Nakuru this 14th day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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