



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1299 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 12th July, 2018)

JOHN KAHIATO BARI

JAMES WACIURI

BENARD KANADEA

JACKSON WARUI NJAU

(All suing on behalf of themselves and as

Representatives of all former employees

of the Kenya Cooperative Creameries Limited

as per the schedule of Names attached).....CLAIMANTS

VERSUS

NEW KENYA COOPERATIVE CREAMARIES LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL (for the Government

of the Republic of Kenya).....2nd RESPONDENT

RULING

1. The Application before Court is one dated 5th February 2018 brought under Section 7 of the Appellate Jurisdiction Act, Section 12(3) of the Employment and the Labour Relations Court Act seeking the following orders:-

a. That this application be certified as urgent and the same be heard on priority basis.

b. That leave be granted to the Applicant to appeal against the ruling of Hon. Justice Wasilwa delivered on 21st November 2017.

c. That this Honourable Court grants an extension of time to file a Notice of Appeal, and consequently the Notice of Appeal dated 12th January 2018 be deemed as properly filed.

d. That this Honourable Court grants the applicant an extension of time to file the Memorandum of Appeal and record of Appeal within 45 days from the date of leave herein.

e. This Honourable court do stay proceedings in cause No 1299 of 2013 and pending the hearing and the determination of the intended appeal.

2. The Application is supported by the affidavit of one Peter Kennedy Ombati and is premised on the following grounds:

1. *That the Ruling was not delivered on the day and time that was indicated in the notice of ruling and hence the Applicant did not know of the ruling.*
2. *The Court file went missing from the registry for the better part of December and therefore the Applicant was justified to believe no ruling was delivered in the matter.*
3. *The matter was not listed in the cause list for ruling on 21st November 2017 and therefore the Applicant was justified to believe no ruling was delivered in the matter.*
4. *The intended appeal raises serious issues of law touching on the liability of a company that was wound up. It further raises issues of interpretation of Section 3 of the Business Transfer Act and whether the transferee is liable for the actions of the transferor and hence requiring the input of the Court of Appeal.*
5. *The Applicant's intended appeal is arguable and it further raises issues such as whether incorporation is similar to change of name, whether the wound up company is same as the Applicant and whether mere retention of documents is proof enough that the company is similar.*
6. *The Respondents will not suffer any prejudice if leave to appeal is granted to the Applicant. In addition, the Respondents stand to suffer nothing if leave to file the appeal out of time is granted to the Applicant.*
7. *The Applicant cannot access justice as envisioned under Article 48 of the Constitution without being granted leave to appeal first.*
8. *That the Respondents' claim is colossal and the Applicant will suffer greatly if it is made to pay money that should be paid by the wound up company.*
9. *That the delay was not occasioned by the Applicant and it is explainable.*
10. *The ruling of Hon. Justice Wasilwa of 21st November 2017 was on a preliminary point of whether the Applicant was supposed to be sued in this case, a point that has the capacity to dispose the main case.*
11. *That to save on precious judicial time, it is just and fair that stay of further proceedings be granted to ensure that the matter does not proceed and concluded and hence rendering the Appeal nugatory.*
12. *That the Applicant will suffer substantial loss if the matter proceeds and it is made to pay the huge amount of money that ought to be paid by the wound company.*
13. *The Respondents have no known means and in fact have admitted on several occasions of their impecuniousness and therefore if the matter is to be concluded the Applicant will suffer great loss as the amount of money will never be recovered.*
14. *That if the Applicant was to succeed at the Court of Appeal and this Honourable Court goes ahead to proceed with the matter to the conclusion the success will be futile. This in effect will result to great hardship to the Applicant.*
15. *The Applicant is a known and established company that has huge market coverage and resources to compensate the Respondents if they were to succeed.*
16. *It is in the interest of justice that stay of proceedings in this case do issue and further leave be granted to the Applicant to appeal.*

3. The Claimants filed their Grounds of Opposition where they aver that the application completely lacks merit and is founded on clearly wrong principles and presumptions not supported by law and precedent as the same is misconceived and only meant to vex them. They state that grounds in support of the application are not sustainable as they are preposterous and presumptuous.

4. They further aver that there is no proof or shown substantial loss which the Applicants will suffer if stay is not granted and that there is no appeal as such seeking stay orders would be an abuse of the Court process and therefore the application is frivolous, vexatious and otherwise an abuse of Court process.

Submissions

5. The Applicants/Respondents filed their submissions where they submit that unlike the stay of execution, this Court has unfettered discretion to grant stay of proceedings. The guiding principle is that there must be sufficient cause, they relied on the case of **Francis Njakwe Githiari & Another Vs Daniel Toroitich Arap Moi T/A Moi Educational Centre [2006] eKLR.**

6. They aver that the discretion should take into account the danger of having two parallel processes going on. A fact that they can seek stay after the assessment of the amount after the judgment that is not a ground to deny them stay of proceedings since the availability of alternative remedies is not a reason to deny stay. This was enunciated in **Butt Vs Rent Restriction Tribunal [1979] eKLR.** They also state that this Court has powers under Section 12(3) of the Employment and Labour Relations Court Act 2011 to grant stay.

7. They further aver that the appeal will be rendered nugatory if stay is not granted since this Court might conclude this matter before the Court of Appeal hence, the Applicant will have to pay the decretal amount while it is pursuing an appeal hence the Applicant will suffer irreparable loss.
8. They also state that it will be a waste of precious judicial time to continue with the parallel proceedings. This they submit is a valid guiding factor on grant of stay of proceedings as seen in **E. Torgbor Vs Ladislaus Odongo Ojuok [2015] eKLR**. Moreover, granting stay in order to avert waste of judicial time is a consideration recognized even in other common law jurisdictions.
9. They state that, the prejudice if any to be suffered by the Claimants is less than difficulties which the judicial system would be exposed if these proceedings were to proceed. There is a clear danger that if the trial was to proceed and the Court of Appeal allows the appeal the judicial system will be put in disrepute. To protect the administration of justice stay of proceedings will be affected.
10. They also believe that in balancing whether to grant stay or not there is more pros in granting stay in this case. If the Court grants stay that will save the scarce judicial time in assessing money payable against possibly a wrong party. This will ensure that the appeal is not rendered nugatory since the remaining process is very minute with capacity of ending before the Court of Appeal hears the appeal.
11. They further state that stay should be granted based on the principle of judicial deference. This a common law principle that postulates that Courts seized with the matter should give the higher Court in hierarchy time to conclude the appeal. This principle demands that stay of proceedings should be granted where the appeal has the capacity to dispose of the case against a party.
12. They aver that stay of proceedings will assist parties to concentrate efforts on one process at a time which will save on scarce judicial time since the appeal is capable of settling the dispute as against the Applicant thus, it is only fair and just that these proceedings be stayed pending the Court of Appeal determining whether Applicant is liable.
13. The Claimants filed their submissions where they submit that this Appeal is non-starter. On the averments of the Applicants that the file went missing for the better part of December, they state is a lie as there is no record to show that they made efforts to trace the file, such as a letter to the Deputy Registrar to aid in the retrieval of the file to enable them move the Court appropriately or request for perusal. That this means that they made no effort whatsoever to look for the alleged missing file. They submit that this Court should disregard this averment.
14. They further aver that in the entire application, there is no averment and proof that any substantial loss will be occasioned to the Applicant if stay is not granted, they relied on the case of **Kenya Shell Limited Vs Kibiru[1986] KLR 410, Platt Ag. JA**.
15. They state that it is only one issue in this case that has been canvassed and it is their humble submission that the case should proceed to conclusion and if dissatisfied the Applicant herein can prefer an appeal against the entire judgment and not one limb of a case.
16. They aver that issuing stays orders at this juncture would be delaying the hearing of this case and denying them justice since 2013 which they have waited for their case to kick off but 5 years down the line the Respondents want to further delay this case.
17. They submit that if the Court finds it necessary to allow stay, the law requires an order for security to secure the interest of a successful litigant who is being deprived of the fruits of his judgment. They therefore urge the Court to order for the half payment and the deposit of the balance of the decretal amount in a joint interest earning account to be opened by the two Advocates firms.
18. I have examined the averments of both parties. I note from the Court record that on 20/9/2017, the Claimant and 2nd Respondent appeared before Court. 1st Respondent was not present despite previous service. The Court noted that the parties had filed their submissions and set 21.11.2017 as date of the impugned ruling.
19. On 21/11/2017, the ruling was read accordingly as scheduled in the presence of the Claimant and in the absence of the Respondents who deliberately chose not to attend Court.
20. The Respondent's contention that the ruling was delivered on a day and time not indicated in the notice of ruling is not true as the parties knew of the set date for the delivery of the said ruling.
21. The issue of a missing Court file as raised by the Applicants is also neither here nor there as there is no indication that the Applicants wrote to the Deputy Registrar (DR) inquiring about this file and failed to receive any response.
22. Going to the merits of the application, the Applicant has sought stay of proceedings orders and order for extension of time to file an appeal out of time.
23. Section 7 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya states as follows:-
- "Power of High Court to extend time The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence"***
24. Thus under this Act, this Court has powers to extend time within which an appeal may be filed if the time for making such an appeal has expired.

25. Order 42 rule 6(1) & (2) of the Civil Procedure Rules on the other hand provide 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 appeal case of 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 to 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 for stay of execution shall be made under subrule (1) unless:-

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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”.

26. In the circumstances, it is imperative for the Applicant to demonstrate substantial loss they stand to lose if the stay is not granted. The Applicant have demonstrated that the amounts of money payable herein is colossal and stand to suffer loss if the appeal is allowed as the Respondents would not be in a position to refund the moneys already paid.

27. This cause is at the primary stage of its hearing. The progress of the hearing is dependable on the ruling being appealed against. It would be a waste of judicial time for this Court to progress and determine the main cause and then it turns out that the appeal is allowed.

28. In order therefore to save on precious judicial time, I will exercise my discretion and allow extension of time within which the appeal may be longed by 15 days from the date of this ruling.

29. In the meantime, the proceedings are stayed pending determination of the appeal to be longed.

30. Costs in the cause.

Dated and delivered in open Court this **12th day of July, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wathome for Claimant – Present

Mumbi for 1st Respondent – Present and holding brief for 2nd Respondent