



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 417 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JOSPHAT COSMAS ONYANGO.....CLAIMANT

VERSUS

TRIBE HOTEL LIMITED.....RESPONDENT

RULING

The Claimant, Josphat Cosmas Onyango, filed a Notice of Motion Application dated 3rd July 2017, brought under Order 42 Rule 6 of the Civil Procedure Rules, Section 12(3) and 20 of the Employment and Labour Relations Court Act, 2011, Rules 17 and 28 of the Employment and Labour Relations Court (Procedure Rules) 2016, Sections 1A, IB, 3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya seeking an order of the unconditional stay of the proceedings in this suit pending the hearing and determination of the application dated 27th April 2018 in CIVIL APPEAL 282 OF 2017-NAIROBI (TRIBE HOTEL -VS- JOSPHAT COSMAS ONYANGO).

The Application is premised on the grounds that:-

- 1) The Respondent appealed to the Court of Appeal vide Civil Appeal 282 of 2017 against the ruling and orders dated 6th April 2017 issued by Honourable Justice Monica Mbaru in this cause that found the Respondent in contempt of Court Orders.
- 2) The Honourable Justices of the Court appeal delivered a Judgement on 23rd February 2018 and held that;-
 - a) The applicant herein had refused to report back to work and thus had evinced an intention no longer to be bound to his employment with the respondent;
 - b) The applicant was employed elsewhere; and
 - c) The orders issued by Justice Mbaru on 6th April 2017 were set aside.
- 3) The applicant was never aware of the existence of the appeal in Civil Appeal 282 of 2017 until 6th April 2018 when his former advocate on record relayed to him a copy of the Judgement and as such he filed an application for review of the aforementioned orders vide an application dated 27th April 2018 filed on 8th May 2018.
- 4) It is the applicant's contention that the Honourable Court of appeal erroneously considered extraneous matters that ought not to have been before it for determination hence divesting the Employment and Labour relations Court of its jurisdiction to determine the matter.
- 5) As such, it is the applicant's humble prayer that the proceedings herein be stayed pending determination of the application dated 27th April 2018 in Civil Appeal 282 of 2017 as the outcome therein directly affects the adjudication of the claim herein.
- 6) The prosecution of this cause is highly predicated on the outcome of the application dated 27th April 2018 in Civil Appeal 282 of 2017 for the following reasons;-
 - a) Since the court of Appeal rendered a decision stating that the applicant herein voluntarily left his employment, the applicant's memorandum of claim has been rendered nugatory as intrinsically then he was not dismissed and the applicant

cannot prosecute the main claim until and when the application seeking to set aside that decision of the court of appeal is heard and determined

b) Further, the applicant's cause of action has been derogated by the decision of the court of appeal wherein by the court's finding that the applicant was employed elsewhere hence not entitled to derive a salary from the respondent, it has given rise to the counter claim filed by the respondent and noting that the said decision is binding on this Court, the applicant lacks any defence that can be put forth in this court before adjudication of the application dated 27th April 2018 in Civil Appeal 282 of 2017

c) That for the aforementioned reasons it is only just that the parties be allowed to ventilate the application in the court of appeal before adjudicating the claim in this court

d) That if the prayers sought are not granted, this Honourable Court shall implicitly and indirectly be dismissing the applicant's memorandum of claim and hence condemning him unheard against the principles of natural justice

7) To avoid injustice being occasioned to the Applicant, the Applicant prays that this Honourable court grants an unconditional stay of the proceedings in ELRC Cause No. 417/2016 to pave way for the adjudication of Civil Appeal No. 282/2016 that will directly affect the ELRC Cause No. 417 of 2016.

8) It is in the interest of Justice that this application be allowed as sought.

Respondent's Case

The Respondent filed a Replying Affidavit dated 13th July 2018 by Elizabeth Chege, the Respondent's Human Resource Manager, opposing the Claimant's Application, she avers that the Claimant is out to delay the quick disposal of this matter after his tactics to unfairly enrich himself at the expense of the Respondent have been curtailed.

She states that there is no good reason why the proceedings herein should be stayed as the matter pending in the Court of Appeal has no effect on the prosecution and outcome of this suit. That the Court of Appeal only observed that this court had not interrogated some facts when it convicted the Respondent's directors.

That whether or not the Claimant was aware of the Civil Appeal 282 of 2017 is not for this court to determine and it has no jurisdiction to determine whether the Court of Appeal was right or wrong. That the appeal court has already made its decision and there is no other outcome the Claimant is waiting for from that court. As such, his application is an attempt to fish for defence at the Court of Appeal. Further, that the Respondent stands to suffer prejudice if the stay of proceedings is ordered since its counter-claim will remain unprosecuted and occasion it damages.

She avers that the a consent was recorded between the parties before this court on 3rd May 2018 allowing the Respondent to file a counter-claim and the Claimant to file a defence to that counter-claim to which they complied with on 11th May 2018 but the Claimant is yet to do his part. That to that effect, the court should only stay the proceedings on condition that the Claimant deposits Kshs.1,305,662.14 in court or in an interest earning account as claimed in the counter-claim.

Applicant's Submissions

The Applicant/Claimant submits that the issue in the Appeal was in regard to the Respondent being in contempt and the Court of Appeal in answering the same, delved into the issues in dispute. That the Judges pursued the question as to whether the orders of the court required the Appellant to continue paying the Claimant and they concluded that if the Claimant was not terminated, he is not entitled to payment.

He submits that the issue of contempt cannot be decided without deciding whether or not he as the Claimant was not entitled to the salaries he was claiming and the Respondent could not be held in contempt for money that the claimant was not entitled to. That the sentiments of the Court of Appeal are binding on this court.

The Claimant submits that the Respondent's counsel had gone to seek interpretation and that is why they came back to this court with a counter-claim. That even if the Claimant is to proceed to prosecute the claim, this court can only award maximum damages of 12 months' pay and as such, the Claimant will be prejudiced if this claim is heard before the review of the Court of Appeal decision.

He further submits that a stay will not prejudice the Respondent at all and prays that in light of the consequences of the judgment, this matter be stayed.

The Claimant also submits that the counter-claim served upon him is dated 28th May 2018. He states that he is not in a fishing expedition for a defence but it is about this court being bound by the Court of Appeal decision and the claimant cannot have a defence to the counter-claim.

Respondent's Submissions

The Respondent submits that the Claimant's sentiments that they are in agreement with the decision of the Court of Appeal is farfetched as the decision of the Court of Appeal was delivered in May 2018 but the amendment was in 2017, one year earlier.

It states that the Court of Appeal judgment is just an observation and does not divest this court of its obligations to hear the claim. That the

Court of Appeal merely observed that the court failed to interrogate that this person was employed elsewhere or whether this person has been chased or not. This does not mean that this court has been divested of its obligations to hear this suit.

Determination

I have considered the applications together with the grounds and affidavit in support thereof. I have further considered the replying affidavit, and the submission of the parties made orally in court. I have further perused the decision of the Court of Appeal that is the basis for the application herein.

My understanding of the decision of the Court of Appeal is that this court's finding that the respondent's Directors and Human Resource Manager were in contempt was made in error as the court failed to establish that the stoppage of the claimant's salary was wilful, a question that was crucial to a finding in civil contempt under Section 4 of the Contempt of Court Act, No. 46 of 2016. The Court of Appeal found that the Judge failed to address the issue whether the orders of the court alleged to have been disobeyed required the respondent to pay the claimant's salary even after the claimant had himself terminated his employment.

In my understanding, the Court of Appeal only pointed out a factual situation, that the court did not address the issue of the claimant failing to report back from annual leave, sought and obtained employment elsewhere, that he was therefore not entitled to salary he did not earn, and that if this was true then there was no contempt as no salary was due.

I do not think the Court of Appeal made any finding on these issues. The court only pointed out that these issues were not considered before this court made its findings.

This being the case, I do not agree with the applicant that his application pending in the Court of Appeal would have any impact on the hearing and determination of this suit as this court will still have to address and make a determination on the issues the Court of Appeal found were not considered. The decision of the Court of Appeal addressed only the finding on contempt. No finding was made on any of the issues pending for determination in this case.

I therefore do not agree with the averment of the claimant and his counsel that the Court of Appeal in its judgment dated 23rd February 2018 made a finding that the applicant herein had refused to report back to work and thus had evinced an intention no longer to be bound to his employment with the respondent or that the applicant was employed elsewhere.

Since in my opinion the decision of the Court of Appeal does not affect the determination of issues in this suit, staying these proceedings would serve no useful purpose other than delay the conclusion of this case.

For these reasons, I decline the application by the claimant to unconditionally stay the proceedings herein pending the hearing and determination of the claimant's application dated 27th April 2018 in Nairobi Civil Appeal No. 282 of 2017. The result is that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE