



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.25 OF 2015

(Before D. K. N. Marete)

FRANCIS KIMUTAI BII.....CLAIMANT

VERSUS

KAISUGU (K) LTD.....RESPONDENT

RULING

This is an application dated 2nd February, 2016 and brought to court under a certificate of urgency of even date. It seeks the following orders of court;

1. *THAT this application be certified as of utmost urgency and service be dispensed with at the first instance and it be heard ex-parte forthwith.*
2. *THAT for abundance of caution, this court do grant the Claimant/Applicant leave to appeal the ruling and orders of this court of 28th January 2016.*
3. *THAT pending the hearing and determination of this application, this honourable court do order stay of execution of the orders of this court of 28th January, 2016 and any further proceedings in this cause and cause nos 26-95 all of 2015.*
4. *THAT pending the hearing and determination of the appeal, this honourable court do order stay of execution of the orders of this court of 28th January, 2016 and any further proceedings in this cause and cause nos. 26-95 all of 2015.*
5. *THAT costs of this application be provided for. And is grounded as follows;*
 1. *THAT the Claimant/Applicant being dissatisfied with the ruling and orders of this court of 28th January, 2016 wishes to appeal the whole of that decision.*
 2. *THAT for abundance of caution the claimant/applicant prays for leave to appeal the said decision.*
 3. *THAT the intended appeal will not occasion any prejudice on the Respondent herein if the status quo ante be maintained.*

4. THAT the claimant/Applicant will suffer prejudice if stay is not granted as he is jobless and there is a grave danger of being executed against by the respondent in execution of the orders of this court.

5. THAT further, the court risks a possibility of having two contradicting findings in this matter were the proceedings in causes nos. 25-95 of 2015 to proceed to judgment and the court of appeal to find in favour of the applicant claimant.

The respondents, in a Replying Affidavit sworn on 8th February, 2016 oppose the application and pray that the same be dismissed with costs to themselves.

This matter came to court variously until the 22nd February, 2016 when the parties made submissions in support of their respective cases.

The claimant/applicant at the hearing submitted that essentially their case lies on two prayers namely;

- i. a prayer for leave to appeal
- ii. stay of execution pending hearing of the appeal.

The claimant/applicant in his submissions also cited the unique nature of this court as a creature of the constitution and therefore the continuing learning process of its practice. This court, he submitted is created with parity to the High Court. Proceedings in the High Court confer an automatic right of appeal. Here, however, section 17 directs that all appeals shall lie to the court of appeal in accordance with Article 164 (3) (b) of the Constitution of Kenya, 2010. Section 17 above is operationalized by rule 27 (4) of the Industrial Court (Procedure) Rules which restates the procedure on appeals from this court.

The claimant/applicant further submits that Section 3 (1) of the Appellate Jurisdiction Act awards the Court of Appeal with jurisdiction to hear appeals from the High Court and other Courts and Tribunals. Rules 74 and 75 of the Court of Appeal Rules caters for this including the mode of approach per section 12 (3) (8). It is their further submission that section 17 of the Act makes a right of appeal automatic.

The claimant/applicant further submits that on the issue of stay of execution, this court is guided by long established principles per Order 42 rule 6(2) of the Civil Procedure Rules.

1. Mukuma v Abuoga Court of Appeal, at Nairobi July 13, 1988 Platt, Gachuhi & Masime JJA Civil Application No. NAI 95 of 1987 646 Kenya Law Reports (1988) KLR.
2. Kenya Commercial Bank Limited v Muturi, Gakuo & Company Advocates Milimani Commercial Courts Civil Case No.591 of 2003 (2005) eKLR.

The applicant submits that he has satisfied this and prays for an award of his case. The applicants further oppose paragraph 5 of the Replying Affidavit of the respondent as being untruthful and submits that this court has the power of review and only the principles differ in this case. They also oppose paragraph 8 as being frivolous and submit that the issue in contention is a consent judgment and that all parties should await the outcome of a determination of the issue at the Court of Appeal.

The applicant's further submit that they are amenable to a conditional stay in the event that this court wishes to direct and order the same. They propose a deposit of the decretal sum of the consent judgment together with the taxed cost be deposited in an interest earning account with a reputable bank in the name of the parties.

The respondent in her submissions opposes the application. It is her submission that the application is bad in law in respect of the prayers sought. This court is a creation of Article 162 (2) (a) of the Constitution and operationalized by the Industrial Court Act, 2011 and Employment Act, 2007. Rule 36 of the Industrial Court (Procedure Rules) provides for the courts power to regulate its procedure but this is

limited and the court cannot confer itself with jurisdiction.

It is the further submission of the respondent that this is not an omission by the rules. Granting an order of stay of execution would amount to the court sitting on appeal of its orders. This is the jurisdiction of the Court of Appeal.

The respondent further submits that the power to grant leave does not exist in the statute or rules of this court. This right is conferred by the Constitution and only on issues of law. The prayer for leave is therefore superfluous and sought without jurisdiction.

Again, this is a specialized court with its own procedures and these are codified vide the Industrial Court (Procedure) Rules and other relevant statutes. These do not import the provisions of the Civil Procedure Act, and particularly as relied on by the applicant. If this was the intention of parliament it would have expressly provided so. A prayer for stay of execution based on the civil procedure is not tenable. Further power to award stay pending appeal are not specifically provided for and any award granted in this direction would be without jurisdiction and untenable.

The respondent in her submissions sets out the criteria for grant of stay pending appeal as follows;

- i. Chances of success of the appeal
- ii. Preservation of the subject matter
- iii. Whether the appeal is intended to frustrate the process of the case

It is her argument that these are not suitable for determination by this court.

A grant of stay of execution would have to assess the degree prejudice on the part of the claimants for a refund of monies irregularly obtained by themselves. She submits that she stands to suffer a bigger prejudice should the stay be granted and she be disabled from recovering the monies irregularly paid out through the contested consent judgment. This was established by this court and a refund is due. The court should facilitate this in the interest of justice.

The claimant/applicant in the penultimate submits that this is an opportunity for the court to restate the law and practice in the two issues raised by this application. I agree. It is also their submission that the Civil Procedure Act and Order 42 Rule 6 is applicable.

The cases and submissions of the parties clearly bring out the following as issues for determination in this ruling;

- i. Is this application as presented tenable in law?
- ii. Is the application for leave to appeal sustainable?
- iii. Does this court have power to grant stay of execution of its orders?
- iv. What becomes the fate of the application?

The 1st issue for determination is whether this application is tenable in law. It is the respondent's submission that it is not sustainable the application having come to court under Civil Procedure Act and rules. It is their further submission that this court is a creature of the Constitution of Kenya, 2010 and the enabling statutes thereto and also the Industrial Court (Procedure) Rules that facilitates and guides the procedure of the court. Any pretensions at bringing this application or any other case under the Civil Procedure Act and rules or any other statutes and rules not designed for application by this court in law would be untenable and outrightly unacceptable. It is the respondent submissions that this being the case, this application is bad in law in respect of the prayers sought.

The application of the Civil Procedure Act in the practice of this court is a gray area. It is not expressly

provided for in any statutes applicable in the practice of the court or even other law. There have been arguments for and against the application of the Civil Procedure Act in our practices. So what is the actual position on this in the practice of this court? What has been the practice in the past? Previous practice of the Employment & Labour Relations Court has borrowed from the High Court of Kenya by incorporating the Civil Procedure Act and Rules in its practice where necessary. This I believe is obviously to take care of any lacuna created by the lapses of the Industrial Court (Procedure) Rules, 2010 and even statute. I agree with the submissions by the respondent that the Industrial Court Act, 2011 and the rules of this court do not address the issues of stay of execution or even leave to appeal. I however, do not agree that in the absence of this provision, this court would be left hanging on the subject. Nature abhors a vacuum and therefore the establishment of precedent and a practice where these issues can be addressed as and when they arise and fall due like in the present case.

An answer to this application would largely have to borrow from the spirit of the constitution in creating this court under Article 162 (2) (a) of the Constitution. Sub article (2) of this section creates courts with status of the High Court as follows;

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a. employment and labour relations; and

b. -----

Here, I wish to lay emphasis on the term *with the status of the High Court* and attempted to analyse its import on the relationship between the two separated court and their practices. Would this mean that this court would, without any other or further authority borrow from the practice, customs and traditions of the High Court in the case of inadequacy and lapse in its provisions? My answer is in the affirmative. It cannot have been the intention of the legislature that this court be grounded in its operations in the transition period. That is why, besides providing for a determination of the jurisdiction and functions of this court by parliament under Article 162 (3), it also from the onset set out a court with the status of the High Court thus enabling parallel procedural but distinguished jurisdictional operations. A broad interpretation of this constitution provision would accommodate this kind of situation. After all, the constitution aspires a broad interpretation of its provisions so as to accommodate its letter and spirit in application and implementation.

This court has pursued the above constitutional spirit and practice in its past dealings. It is therefore my finding that this application is tenable as it is in compliance with the constitution, subsisting tradition, customs and practice of this court.

The other issue for determination is the sustainability of the prayer and application for leave to appeal. The applicant's were guided to bring out this prayer on a cautionary note as follows;

2.THAT for abundance of caution, this court do grant the Claimant/Applicant leave to appeal the ruling and orders of this court of 28th January 2016.

This, I believe, was grounded on the fact that this area has not been overly practiced in this court and neither is the law clear on the subject. The applicants went on to support their application and prayer whereas the respondent opposed the same on grounds that this is not provided for under the law or practice rules it is therefore sought without jurisdiction in a situation where the court cannot confer or assume such jurisdiction. It is her submission that this is unsustainable.

The issue of leave to appeal would not be applicable in the circumstances. This is because, as argued and submitted by the parties, this is clearly provided for under the Appellate Jurisdiction Act and the Court of Appeal Rules. Borrowing from these and High Court practice as above observed, leave to appeal in the circumstances would be automatic and therefore oust a situation for application for the same.

The next issue for determination is whether this court has powers to grant stay of execution of its orders. It does. This is the conventional practice of courts in the common law. Besides, as observed in the analysis above, our High Court practice has incorporated this in his rules of procedure and this has been pursued by this court in the past. The submission by the respondent that this is unsustainable does not therefore suffice and I hold as such.

I, however, observe that this court is not duty bound to issue a blanket order for stay of execution in the absence of compliance with the requirements of the orders of stay of execution. The respondents cites these as;

i. Chances of success of appeal

ii. Preservation of the subject matter

iii. Whether the appeal is intended to frustrate the proceedings of the case

Whereas these may not be the precise criterion for consideration in a case of stay of execution, they make sense. This application was brought to court in good time. The claimant/applicant makes an offer for a deposit of the decretal sum and taxed cost in an interest earning account with a reputable bank in the name of the parties to this application. This is opposed by the respondents on the ground that in all cases and circumstances of grant of stay of execution they are the ones who would suffer irreparably. The issue of appeal and its being rendered nugatory is not clearly demonstrated.

The parties have addressed this court on the unique and peculiar circumstances of this case. The court observes the biggest stake here are monies irregularly paid to the claimants by the respondent under a disputed consent judgment. This court has ordered a refund of the same and therefore this application. However we look at the merits and demerits of the grant of stay of execution and further proceedings of this court, the dictates of fair play and justice must be at the forefront. This is the tricky bit.

A close scrutiny of the cases of the parties and their submissions leads me in one direction. This is the direction of declining a grant of stay of execution and proceedings as prayed. This is dictated by the peculiar circumstances of the case and the likely import of this to the respondent who under these circumstances continues to pay dearly for a cup of tea she has not ordered or requisitioned. I am therefore inclined to dismiss this application with costs to the respondent.

Delivered, dated and signed this 15th day of April, 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Meroka instructed by M/s Meroka & Company Advocates for the claimants/applicants.
2. Mr. Orina instructed by M/s E. M. Orina & Company Advocates for the respondents.