

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

CAUSE NO. 805 OF 2012

LELAND I. SOLANO.....CLAIMANT/RESPONDENT

VERSUS

INTERCONTINENTAL HOTEL.....RESPONDENT/APPLICANT

RULING

1. The Respondent filed a notice of motion application on 11th May 2016 expressed to be brought under Section 12(3)(i) and (vii) of the Industrial Court Act and Rule 16 of the Industrial Court (Procedure) Rules 2010 and all other enabling provisions of the law seeking a stay of the full hearing of the case herein pending the hearing and determination of the intended appeal in the Court of Appeal against the Ruling of Rika J. made on 19th July, 2013. The application was grounded on the grounds on the face of the motion and was supported by the affidavit of Henry Omino sworn in support. The grounds were, briefly, that the Respondent had lodged a notice of appeal, the outcome of the intended shall determine whether or not the Claimant shall be entitled to rely on various documents illegally obtained by the Claimant and thereby shall affect the outcome of the dispute herein, and that the Claimant's counsel have proceeded to obtain dates for hearing of the matter.
2. The Claimant filed a replying affidavit sworn on 17th May 2016 in opposition of the Respondent's motion. The Claimant averred that indeed the Respondent had filed an application dated 13th January 2013 seeking to strike out some documents in his list of documents and supplementary list of documents on grounds that the same were inadmissible for being illegally obtained and infringing on the Respondent's right to privacy. He conceded as true that the Hon. Justice James Rika had delivered a Ruling dismissing the application on 19th July 2013 and that the Respondent had lodged an appeal out of time with leave of the Court. He deponed that contrary to averments in the affidavit of Henry Omino, the impugned documents were not illegally obtained by him and that the Court had acted lawfully in dismissing the Respondent's application dated 13th July 2013. He deponed that the reason advanced by the Respondent to stay the proceedings and failing to comply with the Court order is a misconception of the law and is intended to delay the hearing and determination of the suit herein. He deponed that the motion is misconceived, frivolous and intended to defeat justice in the matter and in light of the provisions of Article 35 and 50 of the Constitution the Court should therefore deny the Respondent the orders it seeks.
3. The parties consented to have the application disposed of by way of written submissions and the submissions by the Respondent/Applicant were filed on 13th July 2013 and the Claimant's submissions were unfiled or if filed were not on the Court file on 12th July 2016 when the matter was mentioned. None are on the file at the time of penning this Ruling.
4. The Respondent/Applicant submitted that of necessity the Court should grant a stay of proceedings as it was in the interest of justice to stay the matter before me pending the determination of the appeal in the Court of Appeal. The Respondent/Applicant relied on the case of **Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited [2015] eKLR** and submitted that firstly, the documents were obtained illegally by violating the

Respondent/Applicant's constitutional right to privacy, and secondly that if the Court of Appeal does rule in favour of the Respondent/Applicant herein and order that the illegally admissible documents cannot be admitted into evidence and a hearing and judgment has taken place then the Respondent/Applicant would have been denied judicious and expeditious dispensation of justice as it would be forced to go through the rigours and incur the costs of appealing the judgment or seeking a review. The Respondent/Applicant further submitted that it was a matter of public policy that Courts cannot and should not perpetuate an illegality as espoused in the Latin maxim *ex turpi causa non oritur actio* restated by the Court in the case of **Countryside Broadcasting Co. Ltd v Go Communication Limited & Another [2010] eKLR** where Koome J. (as she then was) held that no court will lend its aid to a man who founds his case upon an illegal act which would disentitle the Plaintiff to the orders sought. The Respondent/Applicant submitted that if the proceedings herein were allowed to continue and the Court of Appeal rules that the documents were indeed illegally obtained then the Court would have implicitly lent its aid to a man who had founded his claim upon an illegal act. The Respondent/Applicant thus urged the Court not to inadvertently lend such aid to the Claimant/Respondent. The Respondent/Applicant submitted that balancing the interest of justice in the matter the scales tilted toward the grant of the orders of stay sought.

5. What is sought is the stay of the proceedings pending before this Court as the Respondent/Applicant seeks to overturn a Ruling by my brother Rika J. in the motion before me, the Claimant/Respondent asserts that the stay ought not be granted as Rika J. had lawfully acted in dismissing the Respondent/Applicant's previous motion dated 13th July 2013 and that the reason advanced by the Respondent/Applicant to stay the proceedings is a misconception of the law and is calculated to delay the hearing and determination of the suit herein. He argued that the application by the Respondent/Applicant is misconceived, frivolous and intended to defeat justice in the matter and in light of the provisions of Article 35 and 50 of the Constitution. Article 35 of the Constitution deals with access to information and Article 50 deals with fair hearing. The dispute between the Claimant/Respondent and the Respondent/Applicant regarding the access to the information subject of the Ruling of Rika J. is pending before the Court of Appeal. The matter before the Court of Appeal has a direct bearing on the suit and from the pleadings of party is a main bone of contention. The Respondent/Applicant asserts that the Latin maxim *ex turpi causa non oritur action* should be given effect as the continuation of the matter before the determination of the issue now pending in the Court of Appeal would be contrary to public policy. The maxim *ex turpi causa non oritur action* simply means that from a dishonourable conduct an action does not arise. In other words, the assertions by the Respondent/Applicant have a direct bearing on the suit before me. Should the Court of Appeal pronounce itself and overrule Rika J. and the matter has proceeded and a judgment given, what would be the import? In my mind, this would result in a miscarriage of justice in as far as the parties would have to reset their claims and begin afresh at considerable expense given that the recourse would be either an appeal or a review. In order to balance the scales of justice, the suit herein should be stayed pending the determination in the Court of Appeal. Application is granted and the suit is stayed pending the determination in the Court of Appeal in respect of the Ruling by Rika J. There is no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of July 2016

Nzioki wa Makau

JUDGE