



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1927 OF 2013

MICHAEL NJAI CLAIMANT

VERSUS

JUAN TORRES 1ST RESPONDENT

COSIMA WETENDE 2ND RESPONDENT

RULING

Appearance

Kamau Kuria (SC) – instructed by Messrs. Kamau Kuria & Co. Advocates, for the Claimant

Fred Ojiambo, (SC) together with Mrs C. Wetende - instructed by Kaplan & Stratton Advocates, for the Respondents.

1. On 11th February 2015 the Respondents filed application through Notice of Motion under the Provisions of order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B, 3A of the Civil Procedure Act and section 12(3)(1 and (viii) and Rules 16(1), (5), 27(g) of the Industrial Court (Procedure) Rules. The application is seeking for orders that;

1. *Spent*
2. *Spent*
3. *That pending the hearing and determination of this application there be a stay of any further proceedings in connection the application for contempt of Court dated 14th January 2014;*
4. *That pending the hearing and determination of the intended appeal from this court's orders issued on 3rd February 2015, there be a stay of any further proceedings in connection with the application for contempt of Court dated 14th January 2014;*
5. *That the costs of this application be in the cause.*

2. The application is supported by the annexed affidavit of Cosima Wetende and on the grounds that in an application dated 22nd December 2014 seeking to set aside of *ex parte* orders issued on 10th December 2014 directing summons to issue against the Respondents to appear in Court on 3rd February 2015 for hearing of a contempt application dated 14th January 2014 to be cross examined on their affidavit sworn on 15th July 2014. Following the Court ruling on 3rd February 2015, this application was granted and thus the Respondents were required to appear in Court for cross examination and the subsequent directions were to the effect that application dated 14th January 2014 would proceed for hearing on 20th February 2015 where the Respondents were to be present. These orders were made on the

same date the Court delivered its ruling and were without notice to the Respondents who were attending to other matters and there was a different counsel holding brief. The ruling had been deferred on 28th January 2015 to 3rd February 2015 and in issuing substantive orders against the Respondents in circumstances, it amounted to a violation of the right to fair hearing noting the seriousness of the allegations made against them and subject matter being contempt proceedings.

3. Other grounds in support of the application are that the Claimant has made serious allegations against the Respondents and he should prove the same. the Court has now exceeded its jurisdiction in determining on behalf of the Respondents how they should defend the said allegations and to that extent, to comply with the orders and cross examination proceeds, the right to fair trial will be seriously compromised.

4. In the supporting affidavit of Cosima Wetende she avers that when the matter came up for ruling on 3rd February 2014 the respondent's advocates were not in Court and had made an affidavit to this effect and hence the adverse orders made directing the appearance of the Respondents for cross examination on matters not stated were in essence a denial of fair trial right. Counsels were not in Court for good reason that was explained by counsel holding brief and could not take instruction to respondent as submitted by the Claimant on the 3rd February 2015. Being aggrieved by the orders of the Court now made, the Respondents wish to file an appeal as the Court is now *factus officio* on the matter of cross examination having made a ruling on the same. The Respondents seek the orders of stay pending the hearing of their intended appeal as to proceed as directed will cause grave violation of the Respondents right.

5. In reply, the Claimant filed Replying Affidavit on 23rd February 2015 together with a Notice of preliminary Objection and Grounds of Opposition on the basis that the application should be struck of as the Court is now *factus officio* having addressed a similar application as herein and made a finding. The Court has the power to prevent a party before it from delaying a hearing of an application as well as to prevent the conversion of its character as a Court of justice into an instrument of injustice by a litigant who comes before it.

6. Mr Njai thus avers that upon delivery of ruling on 3rd February 2015 Court issued directions to facilitate the hearing of a pending application on contempt and dated 14th January 2014. The Respondents had counsel representing them and were able to address the court. The Court allowed the Claimant to proceed with the hearing of his application but the Respondents sought leave to appeal against the ruling to which there were no objections. There have been efforts to frustrate the hearing of the contempt application dated 14th January 2014 and a delay for justice but this Court has power to give directions and set applications for hearing. The application for stay has already been addressed and to apply as herein, the respondents' application lack merit and should be dismissed with costs.

7. In submissions, the Respondents stated that noting the gap in the industrial Court (Procedure) Rules with regard to stay proceedings, the application herein is based on the provisions of order 42 of the Civil procedure Rules and section 1A, 1B, 3A of the Civil Procedure Act and the principles that an applicant must show they will suffer substantial loss if the order is not granted, there is no delay and there is adequate security for the due performance of such order as may be binding. Applications for stay invite the Court to exercise its inherent jurisdiction within unfettered discretion as held in **Global Tours and Travels Ltd, Winding Up Cause No.43 of 2000**. In **Standard Limited & Others versus Wilson Kalya, CA application 369 of 2001**, the Court of Appeal developed principles applicable in an application for stay of proceedings that the applicant must show there is an arguable appeal; and if the stay order is not granted the appeal will be rendered nugatory. That there are good grounds of appeal and when the Court gave direction upon ruling on 3rd February 2015 it lacked jurisdiction as by then Court was *factus officio*. The Respondents will suffer prejudice if stay is not granted as the intended appeal will be rendered nugatory as it will have been destroyed. The application is brought without delay. The Court has not made a determination on a stay of proceedings application and in the directions of the Court on 3rd February 2015, the Respondents were allowed to formally apply for stay of proceedings and thus there is no determination in this regard. In this regard the Court is not *factus officio*.

8. The Claimant on his part submitted that the application by the Respondents is an abuse of the Court process; the Court lacks jurisdiction to grant it; application for a stay under Order 42 Rule 6 of the Civil Procedure Rules is devoid of merit and should be dismissed with costs. The Respondents being in contempt of Court and breach their duty to Court and counsels cannot control Court proceedings which duty is vested in the court. Counsel holding brief already made application for stay of proceedings pending appeal that was rejected and to thus apply here the Court would be acting *factus officio* as held in **Muri Coffee Estate Ltd versus KCB Milimani Commercial Court, HCCC No.505 of 2008** establishing the rule that a person who is vested with the adjudicative or decision making powers may as a general rule exercise those powers only once in relation to the same matter. The refusal to stay proceedings on 3rd February 2015 cannot be varied or revoked as the Respondents are seeking.

9. The Claimant also submitted that applications dated 23rd December 2014 and this application contest the inherent powers of the Court to control its procedures; it is an abuse of such process as the application is not made in good faith or proper purpose in meeting the objectives of the court. The Respondents have also not demonstrated the substantial loss that shall be suffered if the application is not granted for the Court to exercise discretion in their favour. The loss herein is due to the Claimant who has since lost his job and the balance of relative hardship is on him where stay of proceedings is granted for the Respondents as held in **African Safari Club versus Safe Rentals Ltd, Court of Appeal (Nairobi) Civil Application No.53 of 2010**.

10. Where the Industrial Court Act or the Rules thereto, the Industrial Court (Procedure) Rules, 2011 do not adequately address the procedure or manner of filing documents and the process of the court, parties have recourse to any other written law application to this jurisdiction especially the Civil Procedure Act and the Rules thereto, the Civil Procedure Rules, 2010. Where both remain inadequate for the purposes intended, the Court has the inherent power to direct the parties are requested or required. It is therefore not fatal for a party before this Court to apply the Civil Procedure Act and the Rules thereto.

11. The application herein is pegged on stay of proceeding herein to enable the Respondents file their intended appeal to the Court of Appeal. The principles that address such a scenario requires the Court to consider whether there is an arguable appeal and whether the intended appeal would be rendered nugatory and the onus is upon the applicant to prove both. In this regard consideration must be given to the fact that where the appeal is heard and determined it may have serious effects on the entire case so that that if stay proceedings is not granted the result of the appeal may well render the orders made negate the entire process and hence the stay of proceedings in the lower Court should be granted. This is well espoused by Justice Otieno-Onyango in **Niazons (Kenya) Ltd versus China Road and Bridge Corporation (Kenya) Ltd, HCCC No.126 of 1999, LLR 3159**.

12. In this regard, I find the outlined principles to follow set out in **UAP Provincial Insurance Company Limited versus Michael John Becket, Civil Application No.204 of 2004, Court of Appeal at Nairobi** useful when the Court held;

In order for the applicant to success in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise

It is not for the Court in this type of application to go deeply into the merits of the ending appeal but only to decide whether there is an arguable appeal, which is not frivolous.

13. A further principle is added in the case of **David Morton Silverstein versus Atsango Chesoni, Civil Application No. 189 of 2001 (Nairobi) (2002)1 KLR 867** that;

Where an intended appeal is against an order refusing stay of proceedings pending arbitration, say of proceedings pending appeal refused since if the applicants succeed against the said order they will certainly succeed against the appeal from the pending ruling while if they lose they would have not lost anything since they were going to lose whether or not a stay is granted.

14. In this case, the Court already addressed its mind with regard to the process of hearing of the pending application dated 14th January 2014 on contempt of Court and was subject of orders made on 3rd February 2015 with subsequent directions. The application by the Respondents is now that at this point the Court should stop and allow them to proceed at appeal as the directions given upon the ruling and directions affect their fundamental right to fair trial as contempt proceedings in their very nature challenge their liberty and without their presence to challenge the Court directions on 3rd February 2015 they were denied a chance to be heard. That the right to fair administrative action will be compromised if Respondents are not granted stay of proceedings herein and be allowed to proceed on appeal.

15. I find merit in allowing stay of proceedings herein. There is a draft memorandum of Appeal attached to the application. The Court having addressed its mind to the issues so far raised, to go back on similar issues would be to seat on its own appeal.

Proceedings herein shall be stayed pending the Respondents intended appeal. such stay shall not exist in oblivion noting the orders of 3rd February 2015. Where the intended appeal is not filed within 30 days from the date hereof, the Claimant shall be at liberty to move the Court as appropriate.

Delivered in open Court, dated and signed at Nairobi on this 28th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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