



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 350 OF 2015

SUSAN MUMBUA.....1ST CLAIMANT/RESPONDENT

LORNA TSISIGA.....2ND CLAIMANT/RESPONDENT

TIVENDER KAUR JUTTLA.....3RD CLAIMANT/RESPONDENT

JOHANNES OLUOCH.....4TH CLAIMANT/RESPONDENT

JOAN WANGUI KARIUKI.....5TH CLAIMANT/RESPONDENT

HARISSON NDWIGA MURIITHI...6TH CLAIMANT/RESPONDENT

DANIEL MUEMA MUTANGILI.....7TH CLAIMANT/RESPONDENT

VERSUS

NAVITAS LIMITED.....1ST RESPONDENT/APPLICANT

AUSTRALIAN UNIVERSITY STUDIES

INSTITUTE (AUSI).....2ND RESPONDENT/APPLICANT

AUSEDKEN.....3RD RESPONDENT

RULING

1. The Application before me for determination is the Notice of Motion application by the 1st and 2nd Respondents/Applicants dated 30th March 2015. The application is supported by Affidavit of Rodney Malcolm Jones sworn on 30th March 2015. Mr. Mituga appeared for the 1st and 2nd Respondents/Applicants while Mr. Kirimi appeared for the Claimants/Respondents in the application for stay pending appeal.
2. Mr. Mituga submitted on the application of stay of proceedings pending appeal of the order of Court dated 23rd March 2015 but issued on 24th March 2015. He relied on the case of **In the matter of Global Tours & Travel Ltd. Winding Up Cause No. 43 of 2000**. He submitted that the grounds of stay are as follows:- First, the stay application should be made expeditiously. He

submitted that the 1st and 2nd Respondents had filed the application barely a week after the Ruling and thus filed the application expeditiously. The second ground is that intended appeal should demonstrate *prima facie* merit and the appeal should be arguable and not frivolous. As to whether the grounds suffice it is not for the court to consider but for the Court of Appeal. He submitted that there are *prima facie* merits on the appeal and he referred to the draft memo of appeal which sets out the grounds of appeal. He submitted that the Court ruling given on 23rd March 2015 was pursuant to preliminary objection raised by the 1st Respondent who was sued as shareholder of 3rd Respondent and 2nd Respondent who was brought into the suit by virtue of being a college or business of the 3rd Respondent. He submitted that the substance of the objection was that the 1st Respondent as shareholder would not be sued for liabilities of the 3rd Respondent. The objection was based on paragraph 2 of the statement of claim in which Claimants had pleaded the 1st Respondent was sued as shareholder of 3rd Respondent. The second paragraph also indicated the 2nd Respondent was a college. He submitted that the pleadings are statement of claim as per Section 2 of the Civil Procedure Act. He stated that the second ground of intended appeal is that 2nd Respondent being a college or business has pleaded that it was neither a juridical or natural person capable of being sued. The other ground is that the 1st Respondent was a mere shareholder who could not be sued for the acts of the 3rd Respondent and that these facts demonstrate the *prima facie* merits of appeal. He submitted that the third ground is that of optimum utilization of judicial time and stated that if these proceedings are allowed to go on and the intended appeal succeeds, they will in the end be a nullity. He sought that in interest of optimum judicial time the proceedings herein be stayed pending appeal. On the third limb on likely damage he submitted that the court order for the deposit of the sum of Kshs. 75 million in Court has the potential of winding up the 1st Respondent. He submitted that the deposit of this large sum has the potential of winding up the company should there not be a stay even if the appeal does not succeed and in the end there would be irreparable damage as a result of the order. In those premises he sought grant of the orders in his motion.

3. Mr. Kirimi for the Claimants opposed the application and stated that the 3rd Claimant on behalf of the other Claimants had filed a replying affidavit on 16th April 2015. He relied on the case of **Aloo Ageka & 6 Others (As interim officials of Kenya National Union of Cooperative Staff) v Registrar of Trade Unions and 2 Others [2014] eKLR** which espouses the grounds of stay pending appeal. He submitted that first, there should be an arguable appeal, secondly that the appeal will be rendered nugatory. He submitted that even if the appeal succeeds, the money would be here in Court and the 1st and 2nd Respondent will access the funds if they succeed and as to irreparable harm the Respondents have been asked to avail security and if they succeed they will have their money. He submitted that the Rules of the Court make provision that a party can only take to the Court of Appeal matters of the law. He stated that the draft memorandum of appeal has 6 grounds and of all these grounds there is not a single ground that states the Court contravened any specific law. The grounds are all on issues of facts. In his view grounds 5 and 6 appear to raise a legal issue which are not founded on the Ruling of 23rd March 2015. He submitted that there is no finding of the nature in Ground 6 in this Court's Ruling and submitted that there is no arguable appeal. He relied on the TAWU case where Rika J. held that in labour cases legal separation counts for nothing and that even if the court is alleged to have ignored the provision of separate legal entity the Court held it can pierce the veil. He also relied on the decision by Gikonyo J. in **Arun C. Sharma v Ashana Raikundalia & 2 Others HCCC 802 of 2010 (unreported)** where he stated when a court can pierce in respect of corporation. He submitted that if that is the ground for appeal then appeal is non-starter. He submitted that the 1st Respondent sacked the Claimants, the 2nd Respondent employed 5 of the 6 Claimants and the 3rd Respondent employed the 3rd Claimant and they thus are inseparable. He submitted on the strength of the decision of the Industrial Court in the case **Patrick Njuguna Kariuki v. Del Monte (K) Ltd [2013] eKLR** that what the Respondent is trying to do is sneak an appeal before court as no proper memorandum of appeal has been availed. He submitted that the Respondents want the Court to sit on appeal and the Court should disallow the same. He submitted that there was indication the 3rd Respondent withdrew from the appeal and stated that it is incumbent on the other Respondents to seek an

amendment of the application. He submitted that the 3 seek stay while one of them seeks to review and stated that is *locus classicus* of abuse of court process. He thus sought the dismissal of the application.

4. In a brief reply, Mr. Mituga submitted that the authorities on his list were for stay of execution pending appeal. He stated there is a distinction in the **Global Forwarders** case on stay of proceedings and stay pending appeal. He submitted the authorities are for stay pending execution which are different consideration from stay of proceedings. He submitted that the 1st and 2nd Respondents appeal is on points of law - the name and style of trading is an issue of law, whether director or shareholder can be sued as an issue of law, the determination that objection should arise from proceeding is a point of law. He submitted that it does not have to be a section of statute for it to be a point of law. He submitted that under Section 75 of Appellate Jurisdiction Act, a notice of appeal is filed first and Section 82 of the Act provides that a memorandum of appeal is to be filed within 60 days of the order and the days taken for typing and providing proceedings are excluded. He stated that he had filed the notice of appeal and requested proceedings and submitted that it is not ripe to file memorandum of appeal. He distinguished the decision of Gikonyo J. in case 802 of 2010 on piercing/lifting the veil as a case of lifting a corporate veil in execution. He submitted that in this case the Claimant is suing the company as a shareholder.

5. The grounds for obtaining stay pending appeal are set out in precedent and Section 17 of the Industrial Court Act 2011. Section 17 provides as follows:-

17. (1) Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.

(2) An appeal from a judgement, award, decision, decree or order of the Court shall lie only on matters of law.

6. It is clear that an appeal can only lie on matters of the law. The draft memorandum of appeal lists 6 grounds. I have perused the grounds listed and I find that there is no merit in grounds 5 and 6 as the Court did not make any determination of the issues subject of those grounds. The other 4 grounds are not on issues of the law and thus would not fit within Section 17(2) of the Industrial Court Act. I thus find no merit in the stay application and accordingly dismiss it with costs to the Claimants.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of June 2015

Nzioki wa Makau

JUDGE