



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT NAIROBI?**

**CAUSE NO. 38 OF 2013**

**ANTHONY THUO KANAI.....CLAIMANT/RESPONDENT**

**VERSUS**

**CANON ASSURANCE LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/Applicant sought through the application dated 27<sup>th</sup> April 2015 for a stay of the hearing of proceedings herein pending the hearing and determination of Court of Appeal Civil Appeal No. 177 of 2014 between Canon Assurance Limited and Anthony Thuo Kanai and in the alternative, that this Court do make a determination as to whether the Claimant is entitled to raise a claim of unlawful termination as an employee and a claim for fees for same services rendered to and on behalf of the Respondent between January 2007 and 13<sup>th</sup> November 2012. The application was supported by grounds on the face of it as well as the affidavit of John Ng'ang'a sworn on 27<sup>th</sup> April 2015. The Claimant/Respondent opposed the application and filed a Replying Affidavit sworn on 5<sup>th</sup> May 2015 by the Claimant.
2. The application was urged by Miss Ngonde who submitted that the applicant sought stay of hearing of the case pending the hearing of the appeal matter in Civil Appeal No. 177 of 2014 between Canon Assurance the Respondent herein and the Claimant. In the alternative the Respondent sought a determination as to whether the Claimant is entitled to raise a claim of unfair termination of employment and at the same time raise invoices for services rendered to the Respondent as an advocate for the period he was in employment of the Respondent. She submitted that the Claimant is an advocate of the High Court of Kenya and was engaged as such from January 2007 till 13<sup>th</sup> November 2012. He was a skilled employee who provided the services of a lawyer to the Respondent. The reason why she sought stay of the claim of wrongful termination was because the Claimant raised invoices after termination for his services rendered to the Respondent in spite of the fact that he had agreed to an annual salary which was adequate remuneration. The Respondent had not agreed at any time to pay him in dual capacity first as an employee and secondly fees under the Advocates Act. He had raised bills of costs which were subject of the Court of Appeal matter. She submitted that the Respondent was aware of the provisions of the Advocates Act and in particular the Advocates Practice Rules. Rule 4 provides that where the whole amount of fees payable to an advocate who is employed by a non-legal employer exceeds the advocates salary and office expenses that amount of fees must be paid by the employer. In the matter before the Court of Appeal the Claimant has not distinguished or given the estimate of fees that exceed what was paid as office expenses. She stated that the right to fair hearing under Article 50 had been infringed upon as the Respondent is faced with multiple suits

and until it is unclear what the Claimant is entitled to there should be a stay of these proceedings. She submitted that the Court has inherent jurisdiction and as well as Section 12 which allows the Court to grant the relief sought. She relied on the list of authorities filed by the Respondent and the extract from **Halisbury's Laws of England Fourth Edition Volume 37** that demonstrates that the court has power to grant the orders sought. She stated that the Claimant had in his Replying Affidavit alluded that by virtue of the provisions of Section 92 of the Employment Act he is entitled to raise the multiple claims. She submitted that the Section 92 is to be applied in addition to the other laws and not to the extent to use the same provision of the law as a shield and as a sword at the same time. She cited authorities from this Court that show who an employee is and who a professional is. She submitted that whereas the employer may not have had strict control over his performance of his duties he was an integral part of the Respondent's organization enjoying all the benefits of an employee which would not otherwise accrued to him as an independent professional under the banner of a person engaged in professional service. She relied on the case of **Stanley Mungai Muchai v National Oil Corporation [2012] eKLR** for the test to be applied. She submitted that the decision provided for the application of the control test, integration test and test of business reality. Lawyers and doctors are in the category of specialized workers who are employees but are not under control of an employer. The integration test applied as liability fell on the employer and not the advocate who is an employee. She submitted that the Respondent had in pursuance issued a professional indemnity cover to the Claimant at the Respondent's cost to facilitate the execution of his role as their advocate. She relied on the case of **Mwalimu Kalimu Gamumu & 35 Others v Coastline Safaris Limited & 2 Others [2013] eKLR** for the proposition that an advocate is bound by the provisions of the Advocates Act and cannot raise a claim of unlawful termination. She submitted that the Claimant had relied on documents which could only be responded to in a hearing. She stated the reliance on the documents at page 10 of the claim which were documents in respect of another former employee's case against the Respondent were due to urgency not responded to by way of an affidavit. She urged the Court to find in favour of the Respondent and grant the orders sought with costs to the Respondent.

3. The Claimant was opposed to the grant of the orders sought by the Respondent. Mr. Macharia submitted that the entire purpose of the application was two fold. First, to embarrass and frustrate the expeditious and fair adjudication of the claim and secondly, to hide and to suppress the truth that the Respondent does not want the Court to see. The Claimant had filed a Replying Affidavit in opposition to the application. He submitted that a cause of action founded on a contract of employment is in stark contrast and as different as day and night from retainer as advocate. The dispute before the Court is predicated on the letter of employment exhibited by the Claimant. The trigger for the cause of action is the termination letter and that is why the Claimant was before the Court. He submitted that the case before the appellate court did not cite this case anywhere in the pleadings and neither was the case mentioned in the notice of motion before the High Court. He submitted that in the decision of Majanja J. the arguments made by the Respondent were rejected and with good reason. He referred to the case of **Canon Assurance Limited v Anthony Thuo Kanai & Another [2014] eKLR** where Majanja J. made the findings based on statute – the Advocates Act Section 44 and Rule 4(ii) of the Advocates (Practice) Rules. He submitted that the case of **Muchai v National Oil** (supra) is not relevant to this case. He further submitted that the write up on a contract of service in Halisbury's Laws of England does not apply under our law as we have the Advocates Act that contemplates the scenario of employee who can claim costs. This was put beyond doubt by Radido J. in the case of **Gamumu v Coastline Safaris** (supra). He relied on the case of **Machira & Co. Advocates v Arthur Magugu & Another** where Ringera J. (as he then was) held that the Advocates Act is a complete code. He submitted that there is no purview of invoking the Employment Act under the statute. He relied on the case of **Uhuru Highway Development Limited v Central Bank & 2 Others [1995] eKLR**. He submitted that Article 162(2) grants exclusive jurisdiction on matters of employment to this Court. He also relied on the cases of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** and **R v Weisz and Another ex parte Hector MacDonald [1959] All ER vol. 2** for the legal propositions regarding the application before Court. He submitted that it is an abuse of the process of the Court to bring a feigned or fictitious pleading. He relied on the case of **Pop-In (Kenya) Ltd**

**& 3 Others & v Habib Bank AG Zurich [1990] eKLR** on issue estoppel. He thus urged the Court to dismiss the application by Respondent with costs.

4. Miss Ndonge in a brief reply submitted that the Court has the same status under Article 162 as the High Court and that the stay sought was because of the matter pending in the Court of Appeal. She submitted that the appeal is against the entire decision of Majanja J. and this case was mentioned in the judgment and the appeal addresses all the disputes in the matters before Court. She submitted that there was no ill motive in bringing the application and that the Respondent was ready to defend the suit and that Section 12 of the Industrial Court Act permitted the Court to grant the orders sought. ?
5. The application for stay of proceedings before a Court of law must meet the threshold in order to be granted. The case of **Global Tours & Travels Ltd Nairobi HC Winding Up Cause No. 43 of 2000** is instructive. Ringera J (as he then was) held as follows:- ?

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of ?proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

6. Githua J. on her part stated as follows:-?To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;?a) Whether the applicant has established that he/she has a prima facie arguable case.?b) Whether the application was filed expeditiously and?c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.
7. In the matter before me an appeal was filed on issues relating to taxation matters between the parties and the resultant High Court Constitutional Petition No. 433 of 2013 between the Respondent herein as petitioner against the Claimant and the Hon. Attorney General as Respondent. The instructive part of the Memorandum of Appeal is ground 3 which states as follows:- ?

3. The Learned Judge erred in law by failing to appreciate that the existence of multiple forums where the issues in the Petition could be ventilated and determined did not deprive the High Court of jurisdiction to deal with the issues raised in the Petition.

8. The Petition before the High Court was not on labour and employment issues per se. Majanja J. determined correctly that the labour issues were the exclusive preserve of this Court in line with the provisions of Article 162(2). That alone makes any attempt at a challenge against his decision on this aspect a no-brainer. I am in total agreement with Githua J. when she stated thus:

the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;?

a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and?

c) Whether the applicant has established sufficient cause to the satisfaction of the court

that it is in the interest of justice to grant the orders sought. (Emphasis added)

9. The ground raised in respect of the provisions of Article 162(2) is neither arguable nor one the Respondent can succeed in as the Constitution limits the jurisdiction of the High Court by excluding it from dealing with matters which are the preserve of the Courts under Article 162. The issues before the Court are labour issues and the Court has no mandate to deal with matters of taxation of costs between an advocate and his client in respect of cases filed in other Courts. In the premises no basis exists for the stay sought. I dismiss the application with costs to the Claimant. Parties will take dates before me immediately after this Ruling.

Orders accordingly.?

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of July 2015**

**Nzioki wa Makau**

**JUDGE**