REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 2355 OF 2012

ONESMUS MUSYOKI KILONZO…….CLAIMANT/RESPONDENT

VERSUS

NATION MEDIA GROUP LIMITED…….RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant's Notice of Motion Application dated 26th May 2014 supported by the Affidavit of Sekou Owino Head of Legal for the Respondent/Applicant applies to stay the orders of this Court as the Respondent/Applicant seeks to appeal a decision of this Court that held that Section 45(3) of the Employment Act 2007 was unconstitutional on the strength of **Samuel Momanyi v SDV Transami and Anor [2012] eKLR**.

2. In a ruling I delivered on 24th March 2014 I dismissed the Respondent/Applicant's preliminary objection to the Claimant's suit. The objection was predicated on Section 45(3) and it was the Respondent/Applicant's contention that Section 45(3) barred the Claimant from bringing the action. I dismissed the preliminary objection on the basis that Section 45(3) is no longer a part of the statutes having been held as unconstitutional by the High Court and it is that dismissal which has precipitated the present application for stay pending appeal.

3. Miss Ngige for the Respondent/Applicant submitted that the intended appeal was arguable with good prospects of success and that if the Court does not grant the orders sought the intended appeal, if successful will be rendered nugatory.

4. The Claimant/Respondent was opposed and filed a Replying Affidavit sworn by the Claimant on 3rd June 2014. In his Replying Affidavit he deposed that he had been advised by his advocates on record that it was imperative that the Respondent/Applicant demonstrates that it had an arguable appeal with chances of success.

5. The factors to be considered before grant of stay pending appeal are well settled. They are aptly captured in the case of **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all then were) held that:-

   > The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the

applicant must furnish security. The application must of course be made without unreasonable delay.

In addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR** as follows:-

"In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other"

6. The Respondent/Applicant has sought to appeal against a decision that upheld the High Court's declaration of a section of an act of Parliament as unconstitutional.

7. Under Article 1 of the Constitution, the supremacy of the Constitution is recognized. The High Court has power under the law to declare Acts of Parliament unconstitutional. The rationale for this is obvious. Only the judiciary is clothed with the power to interpret statute and render decisions on that. Article 165 is amply clear. The jurisprudence in this area flows back to the 1800's in the case of **Marbury v Madison 5 U.S. 137 (1803)** which held that the Supreme Court of the United States had the authority to review acts of Congress and determine whether they are unconstitutional and therefore void.

8. In developing the law on judicial review, an American jurist Alexander Hamilton, who was one of the most influential interpreters and promoters of the Constitution of the United States, asserted that under the Constitution of the United States, the federal courts would have not just the power, but the duty, to examine the constitutionality of statutes and stated that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

9. The intended appeal by the Respondent/Applicant is not arguable and has absolutely no chance of success. Article 2(4) of the Constitution provides that any law including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency. Section 45(3) was found to be inconsistent with the Constitution of Kenya by the High Court. This was pursuant to the provisions of Article 165(3)(d)(i) and I upheld the finding. It is a fallacious argument to even suggest that the High Court has no jurisdiction to declare an act unconstitutional. I wish to refer counsel for the Respondent/Applicant to the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR**.

10. When an act of Parliament is in conflict with the Constitution, it is my duty and obligation to uphold the Constitution because it is the supreme law of the land. The Respondent/Applicant's Notice of Motion Application woefully fails to meet any of the thresholds for grant of stay pending appeal and is dismissed with costs which shall be paid **personally** by the advocates for the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of June 2014

Nzioki wa Makau

JUDGE