



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**PETITION NO. 63 OF 2014**

**PERIS NYAMBURA KIMANI .....PETITIONER**

**VERSUS**

**ALBIT PETROLIUM LIMITED ..... RESPONDENT**

**RULING**

**Onyony Advocate instructed by Onyony & Co. Advocates for the Petitioner**

**Gunju and Kibe Advocates instructed by Kinoti & Kibe Co. Advocates for the Respondents**

1. The Respondent through their application and Notice of Motion filed on 25<sup>th</sup> November 2014 brought under the provisions of Rule 16 (1) of the Industrial Court (Procedure) Rules are seeking for orders;

1. ....

2. *That pending hearing and determination of this application, the honourable court be pleased to grant an order to stay the trail herein in respect of the Petition dated 10<sup>th</sup> October 2014,*

3. *That this honourable court be pleased to grant an order of stay of proceedings herein pending the hearing and determination of the respondent's intended appeal in the Court of Appeal against the ruling delivered by the court Lady Justice Monica Mbaru on 18<sup>th</sup> November 2014,*

4. *Those costs of this application are awarded to the applicant.*

2. This application is supported by the annexed affidavit of Kimeu Kimeu and on the grounds that the respondents as the applicants herein has an arguable appeal against the ruling of the court delivered on 18<sup>th</sup> November 2014 and unless a stay of proceedings is granted, the Respondent shall highly be prejudiced as the intended appeal which raises triable issues will have been rendered nugatory. That the application has been made without any delay.

3. In the supporting affidavit of Kimeu Kimeu, he states that as the respondent's Group Human resource Manager he has authority to make the affidavit for and on behalf of the Respondent as he is conversant with the matters herein. The ruling of the court dated 18<sup>th</sup> November 2014 granted interlocutory orders pending hearing and determination of the Petitioner herein directing the Petitioner to resume here duties, to receive medical support as a full time employee of the Respondent and continue to enjoy her current salary pending trail of the petition herein. That the Respondent being aggrieved by this decision has filed a Notice of Appeal with a view to lodging an appeal against the whole of the ruling and

by a letter dated 18<sup>th</sup> November 2014 the Respondent applied for typed and certified proceedings herein for purposes of instituting the intended appeal. The intended appeal raises arguable issue and the Respondent herein stands to be seriously prejudiced unless the proceedings herein are stayed pending hearing and determination of the intended appeal. The respondent's right to equal protection of the law and fair hearing as under Article 27 and 50 of the Constitution will be violated and compromised if the trial of the petition commences as scheduled on 1<sup>st</sup> December 2014 because the hearing is likely to be concluded before the said intended appeal is heard and determined.

4. In reply the Petitioner filed Grounds of Opposition on 1<sup>st</sup> December 2014 noting that the application is fatally defective and devoid of substance as a Notice of Appeal does not stay proceedings and the application is sinister intended to forestall the hearing of the petition herein as the orders sought are untenable and would not stand at law and is an afterthought. The Respondent has not filed a draft memorandum of appeal to warrant the stay orders sought and the application should be dismissed with costs to the Petitioners.

5. Both parties attended court on 1<sup>st</sup> December 2014 and made their oral submissions, with the Respondent herein noting that the application for stay is premised on the fact that there is a right of appeal as the Respondent has substantial grievances with regard to the ruling of 18<sup>th</sup> November 2014. The appeal will ensure as far as possible that the Respondent is able to take advantage of the law to litigate before the appropriate court in view of the fact that the Petition was listed for hearing but the application for stay of proceedings was filed under Certificate of Urgency.

6. The appeal will raise three issues where the Respondent will be seeking the court to make a finding that the respondent's rights under the Constitution have been violated as there are serious procedure issues that have not been addressed. The Petitioner filed a Petitioner under articles 21, 23 and 24 of the constitution, where a Petitioner proceeds on a summary procedure by affidavit but the key questions before the court relate to wrongful dismissal of the Petitioner which is not a matter to be decided upon through the use of this summary procedure. The jurisdiction of the Court under article 162 and industrial Court Act and the Rules thereto are express that unfair dismissal or termination require a statement of claim where evidence must be called. A trial must be conducted. The questions in this case cannot be determined through a Petitioner as this process will prejudice the respondent. The court ruling has directed the Respondent to pay the Petitioner pending hearing and the Respondent is entitled to a counter-claim which right is lost through the summary procedure applied in this case.

7. The Respondent also submitted that the Employment Act require that parties to an employment contract to write their terms and parties become bound by it. The Petitioner had an appointment letter that made provision on termination. The role of the court was to uphold these terms and until there is a finding that the contract has been violated, the contract remain valid. The ruling that requires the Respondent to take back the Petitioner and effect payment is a substantive grievance that should be addressed as an issue of law based on the contract between the parties. That the Respondent should be allowed to challenge the validity of the procedure applied by the Petitioner and hence the need to stay the proceedings herein.

8. In response to the grounds filed by the petitioner, the Respondent submitted that in an application for stay it is not mandatory to file a draft memorandum of appeal. The Respondent relied on the case of **Usafi Services ltd versus Gelu Unicrafts Limited & Others; HCCC 658 of 2007** where the Court of Appeal allowed a stay of proceedings on the basis that the appellant's appeal should be given a chance for hearing as otherwise it would be rendered nugatory. The Respondent also relied on the case of **Chesilyot Enterprises Ltd versus The Co-operative Bank (K) Ltd and Kenya National Trading Corporation Ltd, HCCC 2020 of 1995** where the court granted a stay of proceedings since the appeal would have been rendered nugatory.

9. The Petitioner on the other part submitted that article 41 of the Constitution relate to fair labour practices and the cases that the Respondent has relied upon in support of the application are based on commercial disputes which do not apply in cases of labour disputes. There is no prejudice to be suffered by the Respondent if the application is not granted as no rights have been compromised. An application

for stay is discretionary and the court is not mandated to grant where the character of a party comes into question. Since the cited ruling of 18<sup>th</sup> November 2014, the Respondent has since moved the Petitioner from her place of work and made changes to her position changing the terms of the contract. The Respondent cannot therefore seek equity.

10. The Petitioner also submitted that the nature of claims in the Petitioner relate to constitutional violations where the Petitioner required to move the court with haste to protect her rights. The court should not rely on undue technicalities as where a memorandum of claim is not filed; this form does not undermine the claim. Where the Petitioner moved the court by way of petition, the Chief Justice Rules apply. Section 20 of the Industrial Court Act gives power to the Court to determine the process parties can apply in proceedings.

11. At this point, the court established from the Petitioner that she has been moved from her office in Kileleshwa where she was based at the Respondent head office. She has since 19<sup>th</sup> November 2014 been moved to an office of the Respondent in Industrial Area and no work has been allocated to her. That she reports in the morning on time and has to keep occupied by reading a book as no work is allocated to her until evening at close of day.

13. The test as to whether the court can grant orders of stay of proceedings are first, that the applicant has an arguable appeal. This is followed by an examination as to whether if the appeal raises legal issues in a technical area of the law the court cannot make pre-emptory order at the stage of the application for stay of proceedings as where it is probable that the suit is not stayed pending appeal the Respondent as the applicant would make an adverse application to defeat the suit for example that the suit should be struck out as it has been filed under the wrong form. Such technical issues are not to be raised at the court of first instance and not stay proceedings for the purpose of moving the Court in Appeal in that regard. These are not therefore new matters for the court as held in 2004 by the Court of Appeal in **UAP Provincial Insurance Company Ltd versus Michael John Beckett, Civil Application No. 204 of 2004** that in order to succeed 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 proceedings is not granted the appeal when ultimately heard will be a futile exercise. It is therefore not for the court in such an application to go deeply into the merits of the appeal but to decide if there is an arguable appeal.

14. The affidavit of Kimeu Kimeu does outline that the Respondent is aggrieved by the ruling of the court dated 18<sup>th</sup> November 2014. In submissions, the counsel for the Respondent submitted that there are three questions that the Respondent wishes to address before the court of appeal. Such are grounds and reasons that form the basis of their intended appeal. A party in such a scenario already has draft thoughts about their intended appeal. This is not the case here. Apart from averments from the Bar, the affidavit lacks in a material way to show what arguable appeal exists that will be rendered nugatory if the orders sought herein are not granted.

15. The Petitioner already enjoys a valid ruling of this Court. To disturb such a legitimate process where a party has come to court to assert their right and enjoy interim orders, an applicant must go beyond the basics of simply making an application for stay on the grounds that they enjoy a right to be heard. A stay of proceedings must be justified where rights are contested and the court will not automatically grant such a stay simply on the basis that an applicant's constitutional rights under Article 27 and 50 have been violated. Such are serious allegations that require strict adherence to the law for a party so alleging to benefit from the discretion of the court.

16. The Respondent herein has relied on the cases of **Usafi Services Ltd versus Gelu Unicrafts Limited & Others, HCCC 658 of 2007** and **Chesilyot Enterprises Ltd versus The Co-operative Bank (K) Ltd and Kenya National Trading Corporation Ltd, HCCC 2020 of 1995**. My reading of these authorities is that the orders of stay were granted as there already existed an appeal. **Usafi Services Ltd case** the matter was already before the Court of Appeal while in the case of **Chesilyot Enterprises Ltd**, the applicant in seeking the stay at the high Court had already filed their memorandum of Appeal. This is not the case here. There is no appeal filed nor is there a draft of the same or none is outlined in the

supporting affidavit of Kimeu Kimeu.

17. Orders of the court are not issued in vain. Where the Petitioner has valid orders of this court, such orders are to be enforced until they are vacated, varied or set aside. To disobey such orders and such matters come to the attention of the court, the court must act with haste to ensure the dignity and honour of the court is not put into ridicule. The fact that pending the hearing of the Petition the Respondent has reinstated the Petitioner but made changes so as to frustrate the very orders that the court sought to have enforced is not to be encouraged even on the face of the current stay of proceedings orders the Respondent is seeking.

**In view of the above, the respondents application dated 25<sup>th</sup> November 2014 is dismissed; orders made on 18<sup>th</sup> November 2014 are to remain in force; the Petitioner will remain out of her place of work until the Respondent is able to allocate here specific duties that will be confirmed by the court based on her contract of employment and in view of the obtaining orders herein; due to the nature of interim orders, the parties are to be allocated a hearing date within the next 14 days.**

Delivered, dated and signed in open Court at Nairobi this 16<sup>th</sup> day of December 2014.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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