



**Law Society of Kenya v Attorney General & another (Application 4 of 2019) [2019] KESC 30 (KLR) (Civ) (31 May 2019) (Ruling)**

*Law Society of Kenya v Attorney General & another [2019] eKLR*

Neutral citation: [2019] KESC 30 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**APPLICATION 4 OF 2019**

**MK IBRAHIM, SCJ, DK MARAGA, CJ, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**MAY 31, 2019**

**BETWEEN**

**LAW SOCIETY OF KENYA ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CENTRAL ORGANISATION OF TRADE UNIONS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for Stay of Execution of the Judgment and Orders of the Court of Appeal (Waki, Makhandia & Ouko JJA) at Nairobi delivered on 17th November, 2017 in Civil Appeal No. 133 of 2011)*

**Courts can consider public interest when deciding whether or not to grant stay of execution order**

*The application sought among other orders; stay of execution of the whole of Court of Appeal judgment dated November 17, 2019 and that the status quo prevailing before delivery of the judgment be restored. The court highlighted the principles that guide the Supreme Court when deciding whether or not to grant stay of execution order.*

Reported by Chelimo Eunice

**Jurisdiction** - jurisdiction of the Supreme Court - jurisdiction of the Supreme Court to make ancillary or interlocutory order - what were the principles that guide the Supreme Court when deciding whether or not to grant an order of stay of execution – Supreme Court Act, section 21(2) & (3); Court of Appeal Rules, 2012, rule 3(5).

**Brief facts**

The applicant filed an application dated February 1, 2019, seeking to; have the application certified urgent; stay the execution of the whole of Court of Appeal judgment dated November 17, 2019 and that the *status quo* prevailing before delivery of the judgment be restored. The applicant argued among other points, that the



effect of the Court of Appeal's judgment was to remove jurisdiction to hear Work Injury Benefits Cases arising from the Work Injury Benefits Act (the Act) from Magistrates' Courts, which had occasioned a major crisis in courts as all magistrates had refused to deal with any case falling under the Act resulting in such matters being stalled countrywide.

The respondents opposed the application arguing, *inter alia*, that the order sought would not serve the public interest as the filing of a claim for compensation was time sensitive and the Act specifically placed a 12-month period to bring such a claim after which the right to benefits would lapse and that to grant an order of stay for an indefinite period would deny claimants their right to institute claims within the statutory timeframes thus causing injustice.

### **Issues**

What were the principles that guided the Supreme Court when deciding whether or not to grant stay of execution order?

### **Held**

1. As provided under section 21(2) and (3) of the Supreme Court Act, the Supreme Court would make any ancillary or interlocutory orders. The said section had to be read with rule 3(5) of the Supreme Court Rules, 2012, which maintained the Supreme Court's inherent powers to make such orders or give such directions as would be necessary for the ends of justice or to prevent the abuse of the process of the court.
2. The Supreme Court had jurisdiction to grant declaratory orders, and more particularly, orders of stay of execution of decrees issued by other superior courts. The principles that guided the Supreme Court on whether or not to grant a stay of execution were:
  - a. The appeal or intended appeal was arguable and not frivolous;
  - b. Unless the order of stay sought was granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory;
  - c. In the context of the Constitution, 2010, a third condition would be added namely, that it was in the public interest that the order of stay be granted.
3. A grant of stay of existing orders could not be a matter of course. It rested upon genuine conditions of urgency, merit and dispatch.
4. The applicants in the instant application did not put forward sufficiently convincing evidence of genuine conditions of urgency, merit and dispatch and although the appeal was certainly arguable, the time lapse between the delivery of the Court of Appeal judgment, the issuing of the circular implementing the judgment and the date of filing the application was such that the grant of an order of stay would not serve public interest and would only serve to confuse the on-going adjudication process in Work Injury Benefits cases. It was instructive that litigation had been ongoing since delivery of the Court of Appeal judgment on November 17, 2017 and to stay any proceedings would unduly hamper the fair administration of justice.

*Application dismissed.*

### **Orders**

- i. *Application dated February 1, 2019 dismissed.*
- ii. *The above order notwithstanding, the main appeal was to be set down for hearing on June 14, 2019 to enable the Supreme Court determine the issues in contestation.*
- iii. *The Deputy Registrar of the Supreme Court directed to ensure that all necessary documents were filed by the parties before the hearing.*
- iv. *Costs of the application were to abide the appeal.*

### **Citations**

### **Statutes**

None referred to



## Advocates

None mentioned

## RULING

### ARGUMENTS.

#### Ruling Of The Court

- 1 The Applicant, the Law Society of Kenya, filed an application dated 1<sup>st</sup> February, 2019 and filed on 4<sup>th</sup> February, 2019, seeking orders that this application be certified urgent, that the Court grant an order staying the execution of the whole of the Judgment of the Court of Appeal in Civil Appeal No. 133 of 2011: The Hon. Attorney General v Law Society of Kenya & Another and that the status quo prevailing before delivery of the judgment be restored. The application is brought under Articles 1, 41(1), 159, 163, 258, 259, of the Constitution, Sections 3, 21(2), 24(1) of the Supreme Court Act 2011; Rules 3, 23, 26 of the Supreme Court 2012 and all other enabling provisions of the law.
- 2 The Applicant sets out the grounds in support of the application in a Supporting affidavit sworn on 1<sup>st</sup> February, 2019 by Peter Mwaura Kamau and Supplementary Affidavit sworn on 19<sup>th</sup> February, 2019 and filed 20<sup>th</sup> February, 2019. It is its case that as a consequence of the Court of Appeal Judgment, thousands of Work Injury Benefits Cases pending before Magistrates' Courts were transferred to the Employment and Labour Relations Court (ELRC) which then referred them to the Director of Occupational Safety and Health Services (the Director) for adjudication in accordance with a Memo dated 11<sup>th</sup> July 2018 and titled "Handling of Work Injury Benefits Cases" circulated by the Principal Judge of the ELRC.
- 3 The Applicant submits in its written submissions dated 19<sup>th</sup> February, 2019 and filed on 20<sup>th</sup> February, 2019 that the effect of the Court of Appeal's decision is to remove jurisdiction to hear Work Injury Benefits Cases arising from the Work Injury Benefits Act 2007 from Magistrates' Courts. This has occasioned, it argues, a major crisis in the Courts as all Magistrates have refused to deal with any case falling under the Act resulting in such matters being stalled countrywide.
- 4 It was further submitted by the Applicant that an order of stay of execution and restoration of the status quo is merited since the appeal before this Court is arguable and not frivolous because it touches on grave violations of the Constitution. Particularly, it submits that the question who should wield judicial authority under Article 159(1) should be resolved as the Court of Appeal Judgment vests in the Director, jurisdiction to singlehandedly adjudicate on work injury claims, which is tantamount to denying claimants access to justice and a fair hearing as guaranteed by Articles 48 and 50(1) of the Constitution. Should the order of stay sought be refused, the Applicant has submitted that the appeal, were it to succeed, would be rendered nugatory since all files touching on the Act are being transferred to the Director for re-adjudication and damages would not suffice as a remedy to compensate legal practitioners and litigants.
- 5 In conclusion, the Applicant has submitted that an order of stay is in the public interest because the general welfare of the numerous claimants who instituted claims prior to the Act, and even after the impugned Sections of the said Act were declared unconstitutional by the High Court, is at stake, with some claims being part-heard while others would require re-adjudication upon transfer to the Director.
- 6 The 1<sup>st</sup> Respondent, in opposing the application, filed a Replying Affidavit dated 12<sup>th</sup> March, 2019 in which it claims that if the appeal were to succeed, then the pending claims will be referred to the



- Courts and the slight delay or inconvenience caused can be compensated with an award of damages or costs and interest. It adds that decisions made by the Director will not prejudice claimants as Section 52(2) of the Act provides for an appeal mechanism whereas prejudice will be caused by an order of stay as the claims already transferred to the Director would have to be transferred back to the Courts and then back to the Director again should the appeal fail and such an absurdity points to the balance of convenience tilting in favor of not granting a stay order.
- 7 Lastly, it has been argued by the 1<sup>st</sup> Respondent that prejudice would be caused by the Applicant's failure to act expeditiously since the Judgment sought to be stayed was rendered on 17<sup>th</sup> November, 2017, the circular implementing the Judgment being issued on 11<sup>th</sup> July, 2018 and this application being filed on 1<sup>st</sup> February 2019 thus causing inordinate delay.
  - 8 The 2<sup>nd</sup> Respondent in a Replying Affidavit dated 6<sup>th</sup> March, 2019 and filed on 7<sup>th</sup> March, 2019 opposes the application stating that the appeal will not be rendered nugatory if the stay order is not granted as the impugned Act remains in place and continues to provide an avenue for workers and the general public to seek redress and to grant stay would be to deny such opportunity. Further, that the Applicant is effectively giving evidence from the Bar as it has not provided any evidence from any litigant that its members would prefer to go to the Magistrate's Court and not follow the dispute resolution channels provided in the Act.
  - 9 In its written submissions dated 6<sup>th</sup> March, 2019 and filed on 7<sup>th</sup> March, 2019 the 2<sup>nd</sup> Respondent added that there is no arguable appeal before this Court as there are no special facts that the Court of Appeal failed to take into account and the subject law is in force and has been operational for the last 12 years. It also submitted that the appeal will not be rendered nugatory since claims for compensation continue to be brought before the Director under Sections 26 and 52 of the Act and if a stay of execution is granted, this would be a denial of the rights to access to justice and fair hearing as enshrined in the Constitution.
  10. In conclusion, the 2<sup>nd</sup> Respondent has submitted that the order sought would not serve the public interest as the filing of a claim for compensation is time sensitive and Section 27(1) of the Act specifically places a 12 month period to bring such a claim after which the right to benefits would lapse. To grant an order of stay for an indefinite period would therefore deny claimants their right to institute claims within the statutory timeframes thus causing injustice
  11. On our part, taking into account the above submissions, WE NOTE as follows;
    - (a) As provided under Section 21(2) & (3) of the Supreme Court Act 2011 the Court may make any ancillary or interlocutory orders. That Section must be read with Rule 3(5) of the Supreme Court Rules, 2012, which maintains the Court's inherent powers to make such orders or give such directions as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.
    - (b) In *Board of Governors, Moi High School, Kabarak & Another v Melcom Bell* [2013] eKLR this Court held (and later confirmed in *Teachers Service Commission v Kenya National Union of Teachers & 3 Others* [2015] eKLR) that it has jurisdiction to grant declaratory orders, and more particularly, orders of stay of execution of decrees issued by other superior Courts.
    - (c) In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR the principles the Court on whether or not to grant a stay of execution were set out thus: "(i) The Appeal or intended appeal is arguable and not frivolous and that; (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually



succeed, would be rendered nugatory. (iii) These principles continue to hold sway not only at the lower courts but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added namely; (iv) That it is in the public interest that the order of stay be granted.”

(d) The Court was also instructive in *Malindi Law Society v Law Society of Kenya of Kenya, Nairobi Branch & 5 others* [2018] eKLR where it said that “a grant of stay of existing orders cannot be a matter of course. It rests upon genuine conditions of urgency, merit and dispatch - which in this case are missing.”

12. In the above context, the Applicants in the present Application do not put forward sufficiently convincing evidence of “genuine conditions of urgency, merit and dispatch” and although the appeal is certainly arguable, we agree with the Respondents that the time lapse between the delivery of the Court of Appeal Judgment, the issuing of the circular implementing the Judgment and the date of filing this application is such that the grant of an order of stay at this late hour would not serve the public interest and would only serve to confuse the on-going adjudication process in Work Injury Benefits cases. It is indeed instructive that litigation has been ongoing since delivery of the Court of Appeal Judgment on 17<sup>th</sup> November 2017 and to stay any proceedings at this late hour would unduly hamper the fair administration of justice.

13 Having therefore considered the application and affidavit in support thereto and the written submissions of the respective parties, by a unanimous decision of this Bench, we make the following orders under section 21(2) & (3) of the Supreme Court Act, 2011 and Rule 3(5) of the Supreme Court Rules, 2012;

#### **Orders**

- (a) The application dated 1<sup>st</sup> February, 2019 is hereby dismissed;
  - (b) The above orders notwithstanding, the appeal herein shall be set down for hearing on 14<sup>th</sup> June 2019 to enable the Court determine the issues in contestation.
  - (c) The Deputy Registrar of this Court is directed to ensure that all necessary documents are filed by the parties before the hearing.
  - (d) Costs of the application shall abide the Appeal.
- (14) Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2019**

**D. K. MARAGA M. K. IBRAHIM**

**CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME COURT OF THE SUPREME COURT**

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**S. C. WANJALA NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true**



**copy of the original.**

**REGISTRAR**

**SUPREME COURT OF KENYA**

