



**Alubisia v Board of Management Fr Diaz Girls Secondary School (Cause 191 of 2018) [2024] KEELRC 1253 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1253 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 191 OF 2018  
MA ONYANGO, J  
MAY 8, 2024**

**BETWEEN**

**TOM SHITSAMO ALUBISIA ..... CLAIMANT**

**AND**

**THE BOARD OF MANAGEMENT FR DIAZ GIRLS SECONDARY  
SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. Before the court for determination is the application dated 5<sup>th</sup> December 2023 filed by the Respondent herein seeking the following orders: -
  - i. Spent
  - ii. Spent
  - iii. That the court be pleased to order a stay of proceedings and/or further proceedings and/or mention for submissions and/or writing of a judgment pending the hearing and determination of Eldoret Civil Appeal No. E090 of 2023, the Board of Management Fr. Diaz Girls Secondary Schools Vs. Tom Shitsamo Alubisia
  - iv. That the Honorable court be pleased to make any other or further orders as the ends of justice may demand.
  - v. Costs do abide the cause
2. The application is based on the grounds on the face of the motion namely that:-
  - i. This case is pending for mention on 6<sup>th</sup> December 2023 for purposes of filing submissions and fixing of a judgment date.



- ii. The Honorable court in its ruling and order of 17<sup>th</sup> October 2023 declined to extend time to the Respondent/Applicant to file its response to the Claim and refer the matter to mediation.
  - iii. The respondent is aggrieved by the order of 17<sup>th</sup> October 2023 to the effect that it has been declined a right to be heard on its response and an opportunity to have the matter referred to mediation for the parties to settle the same amicably.
  - iv. The Respondent/Applicant lodged a Notice of Appeal on 1<sup>st</sup> November 2023 and applied for certified copies of the proceedings, compiled the Record of Appeal and lodged the appeal on 5<sup>th</sup> December 2023.
  - v. It is in the interest of justice that this Honorable court considers granting orders of stay pending the hearing and determination of this application and thereafter the Appeal subject to such conditions on stay as shall be decided by the Honorable court.
  - vi. For the purposes of determining the issues raised in the appeal, it is necessary to stay the proceedings and/or further proceedings herein including the filing of submissions and the mention scheduled for 6<sup>th</sup> December 2023 be taken out of the cause list and the application be heard first.
  - vii. Staying the proceedings as proposed will assist the Court of Appeal in determining the real question in controversy between the parties and to effectually and completely adjudicate upon and settle all questions involved in the appeal.
  - viii. The Claimant does not stand to suffer any prejudice if the prayers sought are granted.
  - ix. It is in the interest of justice that this application be certified urgent and stay of proceedings be granted pending the hearing and determination of this application and thereafter the appeal.
3. The application is supported by the affidavit of Fr. Paul K. Chesir sworn on 5<sup>th</sup> December 2023 which affidavit reiterates the contents of the grounds on the face of the application.
  4. The Claimant opposed the application vide a Replying Affidavit sworn on 12<sup>th</sup> January 2024 where he deposes that the orders sought by the Respondent only aim at perpetuating an ancient and untenable injustice perpetrated by the Respondent by resorting to seemingly endless streams of legal maneuvers; that the Respondent has all through been aware of this matter in court and has never complied with order 11 of the Civil Procedure Rules to file their compliance documents; that the prayer sought for stay of proceedings does not meet the threshold established by law; that for this court to grant stay of proceedings, the Respondent ought to have shown that it has an arguable appeal with high chances of success such that if stay of proceedings is not granted, the Appeal will be rendered nugatory and the Respondent has not demonstrated so; that justice aids the vigilant and not the indolent: that the Respondent has not annexed any defence or documents to this application that they intend to file out of time if leave is granted; that the application before court is unmerited and a desperate bid by the Respondent to subvert justice.
  5. Directions were taken that the application be canvassed by way of written submissions. The Respondent's submissions were filed on 5<sup>th</sup> February 2024 while those of the Claimant were filed on 12<sup>th</sup> February 2024.

### ***The Respondent's submissions***

6. In its submissions, the Respondent stated that it met the threshold for the grant of the order for stay of proceedings as laid out in the cases of Global Tours and Travels Limited Nairobi HCC Winding



up cause No. 43 of 2000 as quoted with approval in the case of Gichuhi Macharia & Another vs. Kiai Mbaki & 2 others (2016)eKLR and Kenya Power and Lighting Co. Ltd vs. Esther Wanjiru Wokabi (2014) eKLR.

7. The Respondent contended that it is in the interest of justice that the orders of stay of proceedings be granted pending the hearing and determination of the appeal. The Respondent stated that it has lodged an appeal against the ruling of this court and that it should be granted an opportunity to prosecute the appeal and get a second opinion on the issues raised in the appeal.
8. It is the Respondent's further contention that should this matter proceed during the pendency of the appeal, and in the event the appeal succeeds, it will amount to wastage of judicial time considering the nature of the appeal which will go against the well laid down principles of optimum utilization of judicial time.
9. It is the Respondent's case that in the absence of orders for stay of proceedings, judgment will be delivered and adverse orders made against the Respondent who has approached the court of appeal in an attempt to be heard on its case. Reliance was placed on the case of Port Florence Community Health care vs. Crown Health Care Limited (2022) eKLR.
10. In the end, the court was urged to exercise its discretion and grant the orders sought in the instant application.

### ***The Claimant's submissions***

11. On his part, the Claimant identified the issues for determination to be:
  - i. Whether the court should allow the application and stay of proceedings and/or hearing of judgment pending the hearing of the application and appeal No. E090 of 2023 or not
  - ii. Who should pay the costs of the application
12. On the first issue, the Claimant cited the case of William Odhiambo Ramogi & 3 others vs. Attorney General & 6 others: Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR in submitting that the Respondent has not satisfied any of the principles laid down in the case and further, that it has not availed to court any response to the Statement of Claim and the documents it wishes to rely on to demonstrate the seriousness in defending the matter.
13. The Claimant further submitted that from the record, the Respondent appointed an advocate who filed a Notice of Appointment on 23<sup>rd</sup> September 2022. That the matter came up before court on several occasions for pretrial directions before the matter was certified ready for hearing. According to the Claimant, the Respondent cannot therefore claim that it was denied a right to be heard while in real sense it was given the chance to comply and to be heard but choose to squander the opportunity.
14. The Claimant urged the court not to consider the allegation that parties intend to negotiate out of court for reason that the Respondent had the time to approach the Claimant for negotiations but never did so.
15. It is the Claimant's case that the Respondent will not suffer any prejudice if the matter proceeds for judgment since the Respondent's counsel on record participated during the hearing, cross-examined the Claimant and even filed submissions on the main suit. It is further submitted that the Respondent will have a chance to appeal against the decision of this court if need be once judgment is delivered.
16. The court was urged to disallow the application for stay of proceedings.



17. On the second issue for determination, the Claimant submitted that the Respondent should be condemned to pay costs.

### **Determination**

18. I have considered all the pleadings, the rival submissions of the parties together with the cited case laws. In my view, the issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to grant the orders of stay of proceedings as sought by the Respondent.
19. The Principal objective of the *Employment and Labour Relations Court Act* enjoin the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by the Act.
20. The court's exercise of judicial discretion was stated in the classical case of *Shah -vs- Mbogo & Another (1967) EA 1116*, as follows:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
21. In the case cited by the Respondent of *Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J* (as he then was) observed 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 case, 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...”
22. For this court to grant stay of proceedings, the Respondent ought to show that it has a defence to the suit herein.
23. According to the record of the Court, The Claimant filed this suit on 15<sup>th</sup> May 2018. The Respondent's counsel Mangerere J. & Co. Advocates, filed a Notice of Appointment on 19<sup>th</sup> November 2021, over three years later. No defence was filed by the Respondent.
24. The matter was mentioned on several occasions in the absence of the Respondent and on 5<sup>th</sup> June 2023, Counsel Onduso appeared before the court holding brief for Mangerere counsel on record for the Respondent and informed the court the Claimant's counsel had filed an application to cease acting for the Respondent. This application was allowed as prayed as there was no opposition.
25. Kalya & Co. Advocates filed notice of appointment dated and filed on 13<sup>th</sup> July 2023, when the matter was in court for hearing, Counsel Kesei sought to take out the matter stating that she had just been instructed by the Respondent. The court noted that there was no defence on record and directed the Respondent to comply within 30 days. The suit was fixed for hearing on 17<sup>th</sup> October 2023.



26. On the hearing date, the court was informed that parties intended to negotiate in a bid to settle the matter out of court. It is worth noting that even at this point there were no defence filed on behalf of the Respondent. The court declined and directed that the hearing proceeds.
27. From that analysis, I find that the facts before the Court do not favour the Respondent. No explanation has been given as to why the Respondent never filed a defence to the suit. In fact, even in the instant application, I have not seen a draft response to the Statement of Claim for the court to satisfy itself that indeed the Respondent is keen on defending the suit. The Respondent cannot therefore say that it has an arguable appeal with chances of success when it does not even have a defence on record. In the case of Kenya Wildlife Service –vs- James Mutembei [2019] eKLR the court observed as follows:-
- “...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”
28. Further, Article 159(2)(a)(b)(c) and (d) of *the Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.
29. In the instant case, I am convinced that the Respondent is keen on hiding its indolence in the guise of an Appeal after squandering the chance it was given by the court to file the requisite documents in its defence.
30. Consequently, I find and hold that it would not be in the interest of justice to exercise the court’s discretion in favour of the Respondent to grant stay of proceedings as the same will only serve the purpose of delaying this matter further. It is evident that the stay of proceedings as sought will only delay tactic the conclusion of this suit which has been in court since 15<sup>th</sup> May, 2018.
31. In the end, the application dated 5<sup>th</sup> December 2023 is without merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 8<sup>TH</sup> DAY OF MAY, 2024

**MAUREEN ONYANGO**

**JUDGE**

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**ELD ELRC NO. 191 OF 2018 RULING**

