

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAKURU

CAUSE NO. E056 OF 2024
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JAMES JEFF

JUMA.....CLAIMANT/RESPONDENT

VERSUS

**PETER NDIRITU WACHIRA T/A
CLUB EXCAPE.....1ST**

**RESPONDENT/APPLICANT
PEE & BEE INVESTMENT
LIMITED.....2ND
RESPONDENT/APPLICANT**

RULING

Introduction

1. The Respondents/Applicant filed a Notice of Motion dated 18th June 2025 seeking the following orders that:

1. The Honourable Court be pleased to issue an order of stay of proceedings in this matter pending the hearing and determination of Nakuru Civil Appeal No. E071 of 2024

2. This Honourable Court be pleased to grant any further orders it may deem fit in the circumstances.

3. The costs of this Application be in the cause.

2. The application is expressed to be brought **under Order 42 Rule 6 (1) of the Civil Procedure Rules, section 3 of the ELRC Act and Rule 17 of the ELRC Procedure Rules.**

Respondents/Applicants' supporting affidavit

3. The Respondents/Applicants application is supported by the affidavit of Peter Ndiritu Wachira dated the same date as the application.

4. The Respondents/Applicants aver that although the Claimant/Respondent initially filed the case in the magistrate's court, it was later determined that the claim's value warranted a transfer to the ELRC.

5. The Respondents/Applicants aver that the transfer was approved by Lady Justice H. Wasilwa in a ruling dated 20th December 2023.

6. Being dissatisfied with this decision, the Respondents/Applicants lodged Civil Appeal No. E071 of 2024 in the Court of Appeal, which is now ready for hearing. The same was filed on 22nd December 2023

and record of appeal was lodged in May 2024. The claim was registered on 9th September 2024.

7. The Respondents/Applicants avers that the appeal's outcome will significantly influence the current proceedings, as overturning the ruling would nullify the claim.
8. The Respondents/Applicants aver that proceedings in this case before the appeal is resolved could render the process futile.
9. The Respondent/Applicant argues that the appeal is substantial and risks being rendered nugatory if the proceedings are not paused.
10. Upon receiving a hearing notice on 14th May 2025, the Respondents/Applicants promptly filed this application, asserting that staying the suit is fair, just, and would not prejudice the Claimant/Respondent.

Claimant/Respondent's replying affidavit

11. In opposition to the application, the Claimant/Respondent filed a replying affidavit sworn by Paul Murimi Kiongo, which is undated.
12. The Claimant/Respondent avers that the Respondents/Applicants' request to stay proceedings

in this current suit, arguing that the appeal they rely on was filed without the necessary leave of court and is therefore invalid.

13. The Claimant/Respondent avers that the application fails to meet the legal criteria for granting a stay, including the existence of a valid appeal, demonstration of substantial grounds, urgency, and exceptional circumstances.

14. The Claimant/Respondent avers that the Respondents/Applicants have not justified why the stay was not sought in the appellate court and warns that granting it would unnecessarily delay the trial.

15. Ultimately, the Claimant/Respondent urges the court to dismiss the application as it is baseless and an abuse of judicial time.

Respondents/Applicants' supplementary affidavit

16. The Respondents/Applicants filed a supplementary affidavit dated 18th July 2025.

17. The Respondents/Applicants aver that the Claimant/Respondent's affidavit is overly argumentative and lacks factual substance, relying instead on legal opinion.

18. The Respondents/Applicants aver that the deponent is unfamiliar with the case details, noting that Justice Wasilwa granted leave to appeal immediately after her ruling.

19. The Respondents/Applicants further clarify that the notice of appeal was filed on 22nd December 2023, the record of appeal on 21st May 2024, and the claim was registered on 9th September 2024.

20. The Respondents/Applicants aver that, given that the Claimant/Respondent was aware of the pending appeal at the time of filing the claim, the Respondents/Applicants contend that staying the proceedings is necessary to prevent procedural confusion and uphold fairness.

21. Parties canvassed the application by way of written submissions.

Respondents/Applicants' submissions

22. The Respondents/Applicant submitted that paragraphs 4 to 32 of the Claimant/Respondent replying affidavit dated 15th July 2025 should be struck out for being argumentative and not confined to facts, contrary to **Order 19 Rule 3(2) and Rule 6 of the Civil Procedure Rules**, which prohibit hearsay, legal arguments, and scandalous or

oppressive content in affidavits. In the case of ***Rabote V Juma [2022] KEHC 13742 (KLR)***, where Aburili J struck out similar paragraphs of affidavit stating as follows:

“However, the said paragraphs which the respondent/applicant counsel takes issue with are fraught with verbose argumentative propositions, expression of opinion and law coupled with decided cases relied on. It would indeed be oppressive to allow such matters to masquerade as factual opinions, and therefore, I am enjoined to accept the submissions by counsel in support of the preliminary objection and the decisions cited. Accordingly, I proceed and hereby strike out the paragraphs 4,5, 9, 11, 13 and 14 of the replying affidavit by Mr. Kinyanjui Theuri advocate and declare them expunged from the record for being scandalous, offensive, irrelevant and oppressive to the adverse party.”

23. In ***Mwai V UAP Insurance Co Ltd & Another [2023] KEHC 25105 (KLR)***, where Majanja J (as he was then) emphasized that affidavits should not

contain submissions or arguments, stating as follows:

“An affidavit is not an opportunity for arguments and submissions as this tends to obscure the facts that are under inquiry.”

24. Regarding the stay of proceedings, the Applicants/Respondents clarify that the appeal is against the ruling in ELRC Misc. E045 of 2023, not an interlocutory appeal in this matter, and relied on the principles outlined in ***William Odhiambo Ramogi & Others V Attorney General & Others [2020] eKLR*** as follows:

- a. There must be an appeal pending before the higher court;***
- b. The Applicant should explain why the stay has not been sought in the higher court;***
- c. The Appellant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable***
- d. The Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted;***
- e. The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted, as***

opposed to having the case concluded and all arising grievances taken up on a single appeal

f. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

25. The Applicants/Respondents submitted that the appeal is properly lodged and raises arguable grounds as set out in the case of ***Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] KECA 378 (KLR)***, where the Court of Appeal stated as follows:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.”

26. The Respondents/Applicants submitted that if proceedings are not stayed, the appeal risks being rendered nugatory. The Respondents/Applicants also submitted that exceptional circumstances exist, including the Applicant's late awareness of the suit on 15th May 2025, and the potential for conflicting decisions between this court and the appellate court, justifying a stay to prevent prejudice and academic litigation.
27. The Respondents/Applicants urged this Honourable Court to allow the application as prayed.

Claimant/Respondent's submissions

28. The Claimant/Respondent submitted that the application is incompetent and an abuse of court process. The Claimant/Respondent submitted that the Notice of Appeal filed on 21st December 2023 was lodged without leave, contrary to **Section 17(2) of the Employment and Labour Relations Court Act** and **Rule 75(1) of the Court of Appeal Rules**, rendering the appeal invalid.
29. The Claimant/Respondent relied on the cases of **Onyango V Okiambe & Another [2023] KEHC 27131** and **Jepkogei V Koech [2024] KEHC**

15364, which affirm that appeals from interlocutory rulings require leave.

30. The Claimant/Respondent submitted that the application also fails the six-part test for stay of proceedings outlined in ***Turbo Highway Eldoret Ltd V Muniu [2022] KEHC 10197*** and ***Waweru V Njenga & Another [2024] KEHC 6326***, including lack of arguable appeal, inordinate delay, and absence of exceptional circumstances.

31. In ***Global Tours & Travels Ltd (Winding Up Cause No. 43 of 2000)***, the Claimant/Respondent argues that granting a stay would prejudice the right to expeditious trial under ***Article 159(2)(b) of the Constitution*** and ***section 3 of the ELRC Act***.

32. Accordingly, the Claimant/Respondent urged that the application should be dismissed for failing to meet legal and procedural requirements.

Analysis and determination

33. The court has considered the application, supporting affidavit, replying affidavit, supplementary affidavit, together with the submissions by both counsels. The issue for determination is whether the application is merited.

34. In ***Asudi V Mworio DCIO, Central Division, Nairobi & 5 others [2024] KECA 49 (KLR)***, the Court of Appeal narrowed down to the twin principles for stayed proceedings as follows:

“.... the applicant must satisfy the Court first, that the intended appeal is arguable and not frivolous, and secondly, that, if the order is not granted, the appeal would be rendered nugatory if it eventually succeeds. (See Emirates Airline Limited vs Stephen Chase Kisaka [2015] eKLR; and David Morton Silverstein v Atsango Chesoni [2002] eKLR).

[14] Furthermore, as was stated by this Court in National Bank of Kenya Limited vs Leonard G. Kamweti [2015] eKLR:

“The object of the provisions of rule 5(2) (b) of this Court’s Rules to, inter alia, stay proceedings, is to preserve the substratum of the appeal so that the appeal is not rendered nugatory should it, once heard, succeed. The dual limbs of arguability of appeal and the nugatory aspect must be

shown to co-exist, in default of which an order under rule 5(2)(b) of the Court of Appeal rules shall be declined.”

35. In this instant case, the Claimant/Respondent had initially filed this suit in the magistrate's court in Nakuru CM ELRC No. 130 of 2022 and later filed an application before this Honourable Court seeking transfer of the suit to this court. Lady Justice H. Wasilwa gave her orders on 20th December 2023 to transfer the case to this court and the Respondents/Applicants were dissatisfied with the ruling and filed an appeal, which is pending hearing and determination. The Judge Hon. Lady Justice Hellen Wasilwa granted leave to appeal on 20th December 2023 and actually the notice of appeal was filed on 22nd December 2023.
36. The Claimant/Respondent claim the appeal was filed without the leave of the court. The court has evidence the court had given the Respondent/Applicant leave to appeal its application to transfer the suit from the subordinate court to this court. That is the appeal that is pending hearing and determination in the Apex court.

37. The court being persuaded by the requirements pertaining to stay of proceedings set out in various case laws among them **ASUDI -VS- MWORIO DCIO CENTRAL DIVISION NAIROBI & 5 OTHERS** (Supra) has these averasions.

(i) The intended appeal is not frivolous and is arguable.

(ii) Secondly, if the order is NOT granted the appeal would be rendered nugatory - if it finally succeeds.

38. Since there is a pending appeal in the court of appeal (071 of 2024) the court is obliged to issue an order of stay of proceedings in this matter pending the hearing and determination of the aforesaid appeal.

39. Costs will be in the cause.

Orders according.

Dated, Signed and Delivered virtually at Nakuru this 21st Day of November, 2025.

ANNA NGIBUINI MWAURE
JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE

ORIGINAL