

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E229 OF 2025

(Before D. K. N. Marete)

KENYA AIRWAYS PLC..... APPELLANT

VERSUS

VICTOR IKUMI GICHUHI..... RESPONDENT

RULING

This is an application dated 17th July, 2025 seeking the following orders of court;

- i. An expedited hearing date and directions issued in respect to the hearing and determination of this application.
- ii. Interim stay of proceedings in Nairobi MCELRC Cause No. E1924 of 2024, including the mention date of 4th August, 2025 pending hearing and determination of this application.
- iii. Stay of all further proceedings at the trial court pending the Applicant's intended appeal of the court's ruling and orders of 16th July, 2025.
- iv. That the costs of this application be provided for.

The application is grounded on the fact that the trial court continued to hear this matter to conclusion despite the Applicant's application for adjournment of the defence hearing. The Applicant is therefore aggrieved by the ruling of court and has filed a Notice of Appeal indicating their intention to appeal the ruling.

The Applicant's other case is that the dismissal of the application was a first time and this was the first hearing thereby denying them the right to a fair hearing as enshrined in Articles 25, 47 and 50 of the Constitution besides a denial to access to justice as per Article 48 of the said Constitution. As a consequence of this, the trial court closed the defence case without hearing its witness and directed parties to file submissions within seven (7) days (on or before 23 July, 2025), with a mention date on 4th August, 2025 for confirmation of compliance and taking of a judgment date.

This ruling in effect dismiss the Applicant's case without affording an opportunity to be heard thereby rendering the Respondent's Memorandum of Response a series of mere denials unsupported by evidence to rebut the Respondent's claim. The reliefs sought in this application shall be rendered otiose and there is a likelihood that the trial court will proceed to determine the case solely on the Respondent's evidence without hearing and considering the Applicant's case and evidence. Again, should judgment be delivered before the appeal is heard and determined, the Applicant's right of appeal will be irreparably prejudiced.

The Respondent in Grounds of Opposition dated 28th July, 2025 opposes the application. This is on the basis that the application is frivolous, vexatious and an abuse of the process of court. It does not meet the threshold laid down for the grant of prayers sought, stay of proceedings among others. It is their further case that the application offends the provisions of Article 159(2)(b) of the Constitution of Kenya, 2010 as read with Section 3 of the Employment and Labour Relations

Court Act, 2014 in that it is intended to unduly delay the hearing and determination of the claim which seeks *inter alia* an order for the reinstatement of the Claimant.

Other grounds of opposition to the application come out thus;

- i) That the Appellant's application is a waste of precious judicial time which is scarce and valuable resource. This is demonstrated by a filing of a witness statement for Moses Ombokh without seeking leave of court which the Respondent acceded to so as not to scuttle the hearing date of 16th July, 2025.
- ii) The Applicant has not set out any plausible grounds to warrant this court's intervention and should therefore be dismissed. Stay of proceedings is grave judicial action that seriously interferes with the right of a litigant to conduct his litigation and frustrate the right to access to justice and thereby the right to fair trial.
- iii) The test for stay of proceedings ought to be high and stringent. It should be exercised sparingly and only in exceptional cases.
- iv) The power to stay proceedings is exercised where the proceedings are shown to be frivolous, vexatious or harassing. This also applies where these are manifestly groundless or lacking in a cause of action in law or equity. This is not the case here.
- v) The Appellant has not come to equity with clean hands.

The Respondent further supports their case as follows;

- i) THAT the hearing date for the matter before the trial Court being 16th July 2025 had indeed been fixed by the Consent of both parties on 27th February 2025, nearly 5 months prior to the hearing date of 16th July 2025 and the availability of the Appellant's witness had therefore been confirmed.
- ii) THAT on the hearing date, the Appellant's witness was in Court and when parties took time allocation for 2:00 pm that day, the Appellant's Counsel did not object but rather confirmed availability at 2:00 pm for the hearing of the Respondent's case;
- iii) THAT it was only at 2:00 pm when the learned trial Magistrate called out the matter when the Appellant made an oral application for adjournment alleging unavailability of their witness with the explanation that Moses Ombokh was airborne from Maasai Mara to Nairobi at the time and that he required about 2 hours to arrive in Nairobi and to proceed with the matter as previously agreed;
- iv) THAT the Appellant's Application for adjournment to take another date was strenuously opposed by the Respondent herein as any adjournment would have meant that the matter would have been heard around April, 2026 which was gravely prejudicial to the Respondent who is the Claimant before the trial court;
- v) THAT in balancing the rights of the parties, the trial court granted the 2 hours sought, allowing the Respondent to proceed at 4:30 pm, which the Respondent's Counsel, like the hearing date, confirmed was convenient.
- vi) THAT despite having been granted time as sought and after even being granted extensions thereto, the Appellant's Advocates were unable to avail their witness, leading to the trial court's ruling closing the Appellant's case without calling their witness, which was reasonable under the circumstances as the court had provided

- sufficient time and opportunity for the Appellant to avail their witness, which they failed to do and they cannot turn around to shift the blame to the court for closing their case based on their own failure to avail a witness on the hearing date.
- vii) THAT the reason advanced by the Appellant for seeking to adjourn the matter before the trial court to wit, that its witness was airborne, had dissipated within the 2 hours sought by the Advocates for the Appellants and granted by the court. It would therefore be reprehensible and demeaning to the status and authority of the court to continue using the said reason when it no longer existed.
 - viii) THAT further to the foregoing, it is trite that flight bookings are done based on a schedule and the Court ought to be considered and prioritized by litigants and their Advocates unless there exist proper reasons for a party to decide otherwise.
 - ix) THAT the Appellant's witness's alleged flight, if any, ought to have been brought to the attention of the trial court at the earliest opportunity when the trial court rose at 1:03 p.m. in preparation for the Respondent's case at 2:00 p.m. after the Claimant had closed its case. The said Witness and his counsel decided to be silent and to waste the Court's time, which they have come to perpetuate before the present Application, which ought to be dismissed.

In all, the Respondent posits that this application and appeal are intended at proliferating and elongating the Respondent's sufferdom at the behest of the Applicant in that the Respondent is no longer in employment and has a legitimate expectation that his claim would fast-tracked to final determination somehow.

The Appellant/Applicant in support of their application filed their written submissions dated 15th October, 2025 in which they reiterated their case as pleaded. It is their submission that they have a *prima facie* arguable appeal that raises arguable points of law and procedure. These mainly touch on the trial court closure of the Appellant's case thereby curtailing their constitutional right of access to justice and fair trial.

It is their further case that they have demonstrated that the trial court failed to appreciate that their witness was not available due to air travel constraints and therefore unable to attend court virtually bearing in mind that this was the first scheduled hearing date. This matter traverses the heart of procedural fairness and proper exercise of judicial discretion. They warrant interrogation on appeal.

The Respondent on the other hand also reiterates their case and submit that this application is a delay tactic and an abuse of the court process. It therefore does not meet the established principle governing a grant of stay of proceedings and if allowed, it would manifestly and unjustly delay the expeditious determination of the Respondent's claim before the trial court.

The Respondent further submits on this background information thus;

- i) That the matter before the trial court came up for hearing on 16th July, 2025 whereby both parties confirmed their readiness and presence of their witnesses. The Respondent adduced its evidence and closed their case.
- ii) When the Respondent was called upon to present their witness, they informed the court that their witness was airborne from Maasai Mara to Nairobi and would require

- two (2) hours to arrive. They were indulged and the matter set at 1630 hours which was agreed on by their counsel.
- iii) Despite this accommodation, the witness failed to appear and the court directed the Appellant to close its case and proceed onto filing of submissions.
 - iv) Both parties complied with the direction on filing of submissions.
 - v) This application is a consequence of the Appellant's dissatisfaction with these directions.

The Respondent further seeks to buttress their case by relying on the authority of **William Odhiambo Ramogi & 2 others v the Honourable Attorney-General & 3 others** where the court laid out the principles that court has established for issue of stay of proceedings pending hearing and determination of an appeal. These are as follows;

- i) First, there must be an appeal pending before the higher Court;
- ii) Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;

- iii) Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- iv) Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- v) Fifth, 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; and
- vi) Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p.330, thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue.”

The Respondent relies on the record and the trial court to demean this application. It is their case that the sequence of events and circumstances leading to the conduct of the trial court was born out of the indolence and insincerity of the Appellant/Applicant and the deliberate failure to prosecute their case despite being awarded adequate opportunity so to do. This also indicates disrespect for the court directions and also an intention to deliberately delay the proceedings.

Moreover, the Respondent submits that the Appellant/Applicant has not demonstrated any substantial loss or prejudice that would arise in the event that this proceedings continue. On the contrary, it is the Respondent who stands to suffer immense prejudice having been out of employment and awaiting expeditious disposal and determination of their claim. On this, the Respondent seeks to rely on the authority of **David Morton Silverstein v Atsango Chesoni (2002) eKLR** where the court observed that mere dissatisfaction with the court's ruling is insufficient and that the Applicant must demonstrate that the appeal raises serious, arguable issues that would be rendered nugatory by a continuation of the proceedings. In the circumstances of this case, the Appellant's appeal, which is founded on their failure to produce a witness despite the court's indulgence is unsustainable, not arguable and unlikely to succeed.

The Respondent in finality submits and sustains their case for upholding the right to an expeditious trial as espoused by Article 159 (2)(b) of the Constitution and Section 3 of the Employment and Labour Relations Court Act, 2014 that enjoin court to ascertain and ensure that justice is administered without delay.

Agreeably, the Respondent's overwhelms that of the Applicant. The conduct of the Appellant/Applicant before the trial court tells it all. They were afforded an opportunity to be heard but squandered it all in the guise of their witness being airborne. Despite being awarded time to present this witness and regardless of the mutuality of agreement on this, it was not done. They have themselves to blame.

