



**Co-operative Bank of Kenya Limited v Mwangi (Civil Application
E087 of 2023) [2023] KECA 590 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 590 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E087 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 26, 2023**

BETWEEN

THE CO-OPERATIVE BANK OF KENYA LIMITED APPLICANT

AND

KENNEDY WANJOHI MWANGI RESPONDENT

(Being an application for stay of further proceedings in the Employment and Labour Relations Court (ELRC) pending the filing, hearing and determination of the intended appeal against the order of L. Ndolo, J. given on 6th February 2023 in ELRC Cause No. 1480 of 2018)

RULING

1. The application before us is a Notice of Motion dated March 10, 2023 and is brought under Articles 48 and 50(1) of the *Constitution*, Sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and Rules 1(2), 5(2)(b) and 43 of the *Court of Appeal Rules*. The applicant, the Co-operative Bank of Kenya Limited, seeks a stay of any further proceedings in the Employment and Labour Relations Court (ELRC) Cause No 1480 of 2018- Kennedy Wanjohi Mwangi Vs The Co-operative Bank of Kenya Limited pending the filing, hearing and determination of the intended appeal against the order of ELRC (L= Ndolo, J) given on February 6, 2023.
2. Before we further detail the application, we think it is paramount to set out the brief background to the application. The respondent filed a suit against the applicant claiming to have been a casual employee with the applicant Bank, and who rose through the ranks to a Swift Authentication Officer and was subsequently appointed as the Chairman of the applicant's Central Staff Committee. He claimed that he was harassed by the applicant and eventually dismissed. His claim was for orders that his employment rights were violated; that the termination was wrongful, unfair, unjustifiable and illegal; severance pay; general damages; interests and cost of his claim.



3. In response, the applicant denied the claim and filed a counterclaim seeking a sum of Kshs 1,737,210; interests; a declaration that the termination was lawful; and costs of the suit.
4. The matter proceeded to trial, the respondent adduced his evidence and closed his case. On the day the suit was slated for defence hearing, the applicant's witness was not in court. The court ordered the defence to close its case and directed the parties to file submissions. It is this order that has prompted the applicant to move to this Court, decrying a denial of the right to be heard.
5. The application is supported by the grounds on the face of it and an affidavit of Leah Kerich, the applicant's Employee Relations Advisor sworn on March 10, 2023. She deposes that, indeed, the matter was allocated to proceed for defence hearing at 11:30am, but that, due to heavy traffic on the road, she got held up and she requested her counsel to have the hearing pushed to noon, that she arrived in the court premises on time but unfortunately went to Forodha House instead of Milimani Commercial Courts where the Magistrates' Court is located and the ELRC sits; and that, at 12:15pm, she met with her counsel who informed her that their case had been marked as closed due to her absence, and that the parties had been directed to file submissions. She argues that the failure to get to Court on time was not intentional, and that, if the judgment is delivered without the defence case being tendered, it will be prejudicial as the applicant will be denied its constitutional right to be heard. Thus, the applicant has an arguable appeal with good chances of success and that, if the orders sought are not granted, it stands to suffer substantial loss and irreparable damage which will render the appeal nugatory and an academic exercise. This was underscored, more so, if the judgment was delivered before the appeal was heard and determined. Finally, that the interests of justice incline towards allowing the application.
6. The application is opposed vide a replying affidavit sworn on March 17, 2023, by Apollo Mboya, learned counsel on record for the respondent. According to him, when the matter came up for defence hearing on October 31, 2022, the applicant's counsel sought an adjournment to 6th February 2023 on account that the witness had an emergency and could not appear in court. On the material day, the matter was to proceed at 11:00am and counsel for the applicant pushed for 11:30am to allow the witness to arrive in court. At the hour, he pushed it further to 12:00pm. When the Court reconvened at 12:05pm, the witness had not yet arrived and the Court ordered the defence to close its case and parties file submissions. Counsel alludes that the applicant's aim is to delay the conclusion of the matter, and that he has not approached the Court with clean hands. According to counsel, if the application is allowed, the respondent will suffer prejudice as he has been seeking justice for the last five years.
7. When the matter came up for hearing on April 13, 2023, learned counsel Mr Kiche appeared for the applicant while learned counsel Mr Mboya appeared for the respondent. Both counsel relied on written submissions dated March 20, 2023 and March 24, 2023 respectively. They also made brief oral highlights. The submissions are a replica of the averments contained in the respective affidavits in support of, and opposition to, the application and, therefore, we need not rehash them. We however add that Mr Kiche stated that the applicant has already filed a substantive appeal, being Civil Appeal No E162 of 2023 - *The Co-operative Bank of Kenya Limited Vs Kennedy Wanjohi Mwangi*. He relied, inter alia, on the cases of *David Morton Silverstein Vs Atsango Chesoni* (2002) eKLR; *Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 others* (2013) eKLR and *Hadiya Construction & Mineral Limited Vs Ajabu East Africa Limited* (2018) eKLR to demonstrate the threshold for grant of an order under rule 5(2) (b) of this Court's Rules. On the right to a fair hearing, counsel cited, inter alia, the case of *John Maritime Services Limited & another Vs. Cabinet Secretary for Transport & Infrastructure & 3 others* (Petition-No. 17 of 2015) [2021] KESC 39 (KLR) and on the threshold for grant of stay of proceedings, the case of *Gichuhi Macharia & another Vs Kiai Mbaki & 2 others* (2016) eKLR cited with approval by Ringera, J (as he then was) in the case of *Globa Towers & Travels Limited*: Nairobi



- High Court Winding Up Cause No. 43 of 2000. Counsel urged us to allow the application so that the case is heard and determined on its merit, with the evidence of both parties on record.
8. On his part, Mr Mboya underscored the fact that a stay of proceedings is a grave interruption to a party's right to conduct his case, and which should not be entertained except in the most deserving of cases as it impacts negatively on the right to expeditious hearing. To this end, he relied on the cases of David Morton Silverstein Vs. Atsango Chesoni (*supra*) and [Muchanga Investments Limited Vs. Safaris Unlimited \(Africa\) Limited & 2 others](#) (2009) eKLR where it was held that:
“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
 9. We have considered the application, the affidavit in support of, and opposition to, the application, respective rival submissions and the law. The application before us is one under rule 5(2) (b), and the principles upon which such an application is granted are well known, having been laid out in numerous decisions by this Court. In [Housing Finance Company of Kenya Limited Vs. Sharock Kher Mohamed Ali Hirji & Anor](#) [2015] eKLR, this Court stated that:
“The principles governing the exercise of the court's jurisdiction under rule 5(2) (b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory....”
 10. The main prayer in this application is for stay of proceedings in ELRC Cause No 1480 of 2018- Kennedy Wanjohi Mwangi Vs The Co-operative Bank of Kenya Limited. Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed. In the case of [Gichubi Macharia & another Vs Kiai Mbaki & 2 others](#) (2016) eKLR cited with approval by Ringera, J (as he then was) in the case of [Globa Towers & Travels Limited](#): Nairobi High Court Winding Up Cause No 43 of 2000, the Court had this to say:
“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 for stay of proceedings and if it is, on what terms it should be granted.”
 11. And as was observed in the case of David Morton Silverstein Vs Atsango Chesoni (*supra*), in exercising its discretion to stay proceedings, each case must be considered on its own merit.
 12. The grant of stay of proceedings before this Court must be considered within the parameters of rule 5(2) (b) of this Court's Rules. On the first limb, which is whether the intended appeal is arguable, having considered the grounds set out in the Motion as well as the draft memorandum of appeal, we find that they are not frivolous. The appeal is arguable and raises the issue of whether or not the learned judge wrongly exercised her discretion, and whether the applicant was afforded a fair hearing before it was directed to close its case. We are persuaded that the intended appeal is arguable and are constrained at this stage not to say more, lest we embarrass the bench that ultimately hears the appeal. Accordingly, we cannot make any definitive pronouncements on the merits or otherwise of the intended appeal.
 13. On whether the appeal will be rendered nugatory if stay of proceedings is not granted, we are equally persuaded that it will. The ELRC is set to confirm that the parties have complied with its directions to file submissions and, automatically thereafter, a judgment date will be given. It suffices to state that,



we granted interim stay of proceedings on the date of the hearing of this application pending delivery of this ruling. It is factual to say that, if judgment is rendered only for the appeal to succeed, it would be a waste of this Court's time and would render this appeal nothing more than an academic exercise.

14. As stated above, stay of proceedings is a drastic judicial action that should be sparingly and rarely invoked as it may impede the right of access to justice, and should only be issued in the clearest of cases. From the circumstances of this case which we have highlighted elsewhere in this ruling, it is clear that the failure of the applicant's witness to arrive in court on time was inadvertent and not occasioned by a self-made excuse. She gave notice that she would be late to court due to traffic jam, then ended up in the wrong court, which can happen to anyone not too familiar with court houses. There was also no evidence that she had previously deliberately failed to attend court. Therefore, justice demands that the applicant be accorded an opportunity to ventilate the merit or otherwise of its appeal.
15. The upshot of the foregoing is that the applicant's Motion dated March 10, 2023 is merited. We allow it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

