



REPUBLIC OF KENYA



KENYA LAW
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Kania v Kenya Commercial Bank Plc & another (Constitutional Petition E003 of 2023) [2025] KEELRC 571 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 571 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E003 OF 2023

BOM MANANI, J

FEBRUARY 27, 2025

**IN THE MATTER OF A PETITION SEEKING REDRESS FOR THE DENIAL,
VIOLATION AND INFRINGEMENT OF THE PROTECTION OF
FUNDAMENTAL RIGHT TO FAIR LABOUR PRACTISES AS GUARANTEED
IN ARTICLE 41(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF A PETITION SEEKING REDRESS FOR THE DENIAL,
VIOLATION AND INFRINGEMENT OF THE PROTECTION OF FUNDAMENTAL
RIGHT TO FAIR ADMINISTRATIVE ACTION AS GUARANTEED IN
ARTICLE 47(1) AND (2) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF A PETITION SEEKING REDRESS FOR THE DENIAL,
VIOLATION AND INFRINGEMENT OF THE PROTECTION OF THE
FUNDAMENTAL RIGHT TO FAIR DISPUTE RESOLUTION PROCESS AS
GUARANTEED IN ARTICLE 50(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES
UNDER RULES, 2013 ELRC CONSTITUTIONAL PETITION NO E003 OF 2023**

AND

**IN THE MATTER OF SECTIONS 3, 4, 5, 6, 7, 8, 9, 10, 11
AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS**

ACT

AND

**IN THE MATTER OF SECTIONS 4, 12 AND 20 OF THE
EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

AND



**IN THE MATTER OF SECTIONS 40, 43, 45, 47,
49 AND 50 OF THE EMPLOYMENT ACT, 2007**

BETWEEN

JOSEPH KAMAU KANIA PETITIONER

AND

KENYA COMMERCIAL BANK PLC 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

RULING

Background

1. The 1st Respondent (hereafter referred to as the Applicant) has moved this court through the application dated 11th November 2024 seeking the following orders:-
 - a. That the application be certified as urgent and be heard on priority basis.
 - b. That the court be pleased to stay proceedings in the suit pending determination of the application.
 - c. That the court be pleased to stay proceedings in the suit pending the hearing and determination of the appeal from its decision dated 26th September 2024.
 - d. That the court gives directions on costs of the application.
2. The Applicant moved the court based on section 3 of the *Employment and Labour Relations Court Act*, 2011, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 42 rule 6 of the Civil Procedure Rules, 2010. It further invoked “any other enabling provisions of law” that may support the application.
3. The Applicant relies on the grounds on the face of the application and the affidavits by Bonnie Okumu, its (the Applicant’s) Group General Counsel to urge for the orders sought. It is the Applicant’s case that it moved the court through its application dated 24th March 2023 to stay proceedings in the suit and refer the matter to arbitration in accordance with clause 22 of the employment contract between it (the Applicant) and the Petitioner. However, through its ruling dated 26th September 2024, the trial court declined the request and ordered the matter to proceed to trial before it.
4. The Applicant contends that it was unhappy with the aforesaid order. As a result, it instituted an appeal against it (the order) by filing and serving a Notice of Appeal on the other parties.
5. The Applicant avers that in the meanwhile, the trial court proceeded to list the matter for mention on 26th November 2024 for purposes of pretrial directions and directed it (the Applicant) to file its response to the Petition. The Applicant contends that the action by the court demonstrates that it intends to hear the matter despite the fact that the appeal against the order of 26th September 2024 is still pending for hearing and determination.



6. The Applicant contends that the refusal by the trial court to refer the matter to arbitration amounts to compelling it (the Applicant) to accede to the court's jurisdiction. Yet, the presence of the arbitration clause in the contract between the parties deprives the court of jurisdiction to entertain the dispute.
7. The Applicant contends that section 6 of the *Arbitration Act* forbids a party to a court case who desires to have it referred to arbitration from filing pleadings (other than a Memorandum of Appearance) in the suit. Otherwise, he/she will be deemed to have acceded to the jurisdiction of the court to hear the dispute.
8. As such, the Applicant contends that the trial court's order that it (the Applicant) files its reply to the Petition and participates in the pretrial conference will result in it (the Applicant) yielding to the court's jurisdiction to hear the case. In the Applicant's view, this eventuality will prejudice the intended appeal.
9. It is in this context that the Applicant prays that the court stays the instant proceedings to enable the Court of Appeal determine the pending appeal. In the Applicant's view, should the orders sought in the application not issue, the appeal will be rendered nugatory and a mere academic exercise.
10. The Petitioner has opposed the application. He filed grounds of opposition and affidavits in response to the motion.
11. The thrust of the opposition is threefold:-
 - a. That the application was filed outside the timelines that are set in law without leave of the court. As such, it is defective and inadmissible.
 - b. That the application has been filed in disregard and defiance of the directions by the court on filing of a response to the Petition. As such, the court ought not to entertain it.
 - c. That the Applicant has no arguable appeal before the Court of Appeal. As such, granting the order sought will not only be an exercise in futility but will prejudice the Petitioner since this will delay resolving the dispute between the parties.

Analysis

12. The first issue I wish to consider relates to whether the application was presented outside the timelines that are set in law and if so, whether this is fatal. The Petitioner contends that rule 32(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 obligates a party who wishes to apply for stay pending appeal to do so within 14 days of the order appealed from or within such time as the court may direct. He contends that the instant application was presented more than 14 days from the date of the impugned decision and without leave of the court. As such, it is defective and unconstitutional.
13. On the other hand, the Applicant posits that the application was presented without undue delay. It contends that even though the application was not presented within the timelines alluded to above, it was nevertheless presented timeously. It further contends that the Petitioner has not demonstrated that he has suffered any prejudice as a result of the purported delay in filing the motion.
14. The Applicant avers that the court should overlook procedural technicalities and uphold substantive justice. Relying on the Court of Appeal decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, it (the Applicant) argues that procedural infractions which have not resulted in injustice to the Petitioner should not be invoked to invalidate the application.



15. It is true that the instant proceedings being in the nature of a constitutional petition ought to be guided by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. In this respect, I agree with the Petitioner's contention that the Applicant ought to have taken into account the requirements of rule 32(2) of the aforesaid rules whilst presenting its application for stay of proceedings pending appeal.
16. That notwithstanding, the court notes that the above rule is couched in discretionary terms. As such, if the party applying for stay of execution or proceedings has moved the court outside the 14 days' window under it (the rule), the court retains the jurisdiction to validate the application. This is particularly when the aforesaid rule is read together with rule 3(8) thereof.
17. The court takes note of the fact that the overriding objective of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is to facilitate access to justice (see rule 3(2) thereof). In the court's view, this objective can only be achieved if it (the court) focuses on ensuring that substantive justice is not sacrificed on the altar of procedural technicalities.
18. As a matter of fact, Article 159(2) (d) of *the Constitution* of Kenya, 2010 which takes primacy over the aforesaid rules commands the court to ensure that justice is administered without undue regard to procedural technicalities. This obligation is reiterated by section 20(1) of the *Employment and Labour Relations Court Act* 2011.
19. It has been emphasized that although rules of procedure should not be overlooked as they play a pivotal role in the efficient administration of justice, they should nevertheless not be invoked to scuttle substantive justice. Underscoring this point, Maraga J in the case of *Shashikant C. Patel v Oriental Commercial Bank* [2005] eKLR, observed as follows:-

“We should never lose sight of the fact that rules of procedure, though they should be followed are hand maids of justice. They should not be given pedantic interpretations which at the end of the day denies parties justice.”
20. The instant application was filed on 13th November 2024 hardly two months after the court delivered its ruling of 26th September 2024. Although it was presented outside the 14 days period prescribed by rule 32(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, I do not think that it was presented after inordinate delay.
21. The Petitioner contends that because the motion was filed outside the timelines provided under rule 32(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, allowing it will cause him extreme prejudice. He contends that an order for stay of proceedings will essentially drive him away from the seat of justice as it will delay the timely resolution of the Petition.
22. To my mind, the prejudice which the Petitioner is likely to suffer if the application is allowed is one of delayed resolution of the dispute between the parties. In my view, this is an inconvenience which parties to litigation ought to reasonably accommodate whilst navigating the court process. Otherwise, it will be impossible to process interlocutory applications such as the one before me and appeals from one court to the other.
23. If the prejudice that a party suffers as a result of the actions of the other in the course of litigation can be reasonably compensated by an award of costs, the court will usually make an order for costs. Alluding to this fact, the court in *Kenya Power & Lighting Company Ltd v Mutunga (Environment and Land*



[Appeal E030 of 2022](#) [2023] KEELC 19074 (KLR) (24 July 2023) (Judgment) expressed itself on the matter as follows:-

“What constitutes prejudice? The Black’s law Dictionary defines “prejudice” as damage or detriment to one’s legal rights or claims. In my view, it is a disadvantage or an apparent injustice suffered by one party due to the actions of the opposing party. However, when in the court’s opinion, a party faces the risk of prejudice if the prayers sought by the opposite party are allowed, the court will usually consider whether the prejudice can be cured by an award of costs, for the sake of facilitating the interests of substantive justice. It is only where costs are not sufficient to compensate a party who has suffered prejudice, that such prejudice can be reason enough for the court to deny an applicant of a discretionary relief like extending time to appeal.”

24. In my view, the inconvenience which the Petitioner has suffered as a result of filing the instant application outside the prescribed timelines can be remedied by an award of costs in his favour. As such, I decline to strike out the application solely on the basis that it was filed outside the 14 days window proclaimed by rule 32(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Instead and in order to ensure that the ends of justice are met, I invoke the inherent powers granted to the court under rule 3(8) of the aforesaid rules to deem the motion as having been properly filed subject to the order for costs that will issue at the tail end of the ruling.
25. The next issue to consider is whether the application is merited. In determining applications of this nature, the court ought to bear in mind that stay of proceedings impedes the right to access justice. As such, an order staying proceedings should not issue except for cogent reasons.
26. The foregoing was alluded to in the case of Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) when the learned Judge, quoting with approval from the Halsbury’s Laws of England observed as follows:-

“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...This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases....”

27. At the same time, it ought to be appreciated that whether or not to grant an order for stay of proceedings is a matter of the court’s discretion which must be guided by the justice of the case. As such, if the interests of justice lean in favour of issuing the order, the court should exercise its discretion in favour of issuing it (the order).
28. The foregoing was affirmed by Ringera J in the case of Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000 when he expressed himself on the matter 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 for 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 cases, 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.”

29. Although the parties have both referred to Order 42 rule 6(2) of the Civil Procedure Rules, it is doubtful (and the Petitioner points out this fact in his submissions) that this provision was intended for applications for stay of proceedings pending appeals from interlocutory applications. It appears that it (the provision) was intended for stay of execution of court decrees and orders pending appeal. As such, it is doubtful that the conditions for stay of execution under the provision are a prerequisite for granting an order for stay of proceedings.
30. Alluding to the foregoing, Ngugi J observed as follows in the case of Turbo Highway Eldoret Ltd v Muniu (supra):-

“ Both parties cited the conditions set out under order 42 Rule 6 of the Civil Procedure Code. Although the Sub-rule 1 mentions both the stay of execution and stay [of] proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.”
31. Further, it is usually desirable that applications of this nature be lodged in the court to which the appeal has been filed as opposed to the trial court. This is essentially because the appellate court is presumed to be in charge of its schedule. Therefore, having regard to the fact that an order for stay of proceedings disrupts progress of litigation before the trial court, it is desirable that the appellate court determines the request for stay of proceedings as it is best placed to determine how long it will require to determine the appeal and therefore project how long the stay order will remain in force. This fact is alluded to in the case of Turbo Highway Eldoret Ltd v Muniu (supra).
32. In the instant case, the Applicant contends that the employment contract it had with the Petitioner has an arbitration clause which requires the parties to refer disputes that may arise from it (the contract) to arbitration and not the court. The Applicant contends that the arbitration agreement is binding on them and the Petitioner is not entitled to overlook it and insist on the instant dispute being resolved by this court.
33. The Applicant contends that section 6 of the *Arbitration Act* obligates it not to take further steps in the suit beyond entering appearance if it wishes to enforce the arbitration clause. As such, it contends that filing of a response to the Petition will effectively take away its right to refer the dispute to arbitration as this will imply that it has ceded to the trial court’s jurisdiction to hear the matter.
34. The position expressed by the Applicant in relation to the import of section 6 of the *Arbitration Act* is correct. The court is alive to the fact that after it dismissed the request to refer the matter to arbitration on 26th September 2024, it directed the Applicant to file its response to the Petition to enable hearing of the dispute. It is correct as the Applicant contends that should it comply with the aforesaid directions, it will lose the option of having the matter heard through arbitration.
35. The Applicant subsequently appealed against the trial court’s order refusing to refer the matter to arbitration. There is evidence (and the Petitioner concedes this fact) that a Notice of Appeal was lodged on 1st October 2024 to signify the intention to appeal against the decision.
36. What will be the consequence of conducting the trial in the face of the pending appeal? As the Applicant contends, trial of the matter at this stage will place it in a difficult position. This will force it to either abandon its quest to refer the matter to arbitration by filing a response to the Petition or to



- sacrifice its right to fair trial by electing not file a response to the Petition as it pursues the appeal with the hope that the Court of Appeal will eventually reverse the trial court's order and refer the matter to arbitration.
37. These are not desirable outcomes. Either option may result in considerable deprivation being visited on the Applicant. In the premises, the court considers that the interests of justice dictate that the proceedings be stayed as the Court of Appeal determines the pending appeal.
 38. The court is alive to the fact that in order to grant the order sought, it is desirable that the Applicant demonstrates that it has an arguable appeal. In the court's view, this requirement must have been one of the reasons why it was considered desirable for such applications to be presented to the appellate as opposed to the trial court. I say so because it is quite discomfoting to require a trial court to consider whether an appeal against its decision has merit. It is for this reason that I do not consider it either desirable or open to me to determine whether the pending appeal at the Court of Appeal is guaranteed to fail as submitted by the Petitioner.
 39. That said, the above condition does not obligate the court to determine whether the pending appeal is bound to succeed. All that is required is for it (the court) to consider whether the issues raised in the appeal are arguable (*Turbo Highway Eldoret Ltd v Muniu* (supra)).
 40. I have considered this requirement against the aforesaid principle. The Applicant wishes to have the Court of Appeal determine the legitimacy of the position expressed by this court (variously constituted) that employment disputes are generally not suitable for arbitration. I think that this is a significant matter not just in the context of the instant dispute but generally. To my mind, it raises an issue which deserves consideration in the proposed appeal.
 41. As mentioned earlier, section 6 of the *Arbitration Act* bars a party who wishes to refer a matter that is before court to arbitration from filing a defense in the matter. As such, should the Applicant file a response to the Petition, the appeal before the Court of Appeal will, if successful, be rendered nugatory. This is because at the time the appeal will be determined, the parties will already have taken steps that constitute a waiver of their right to pursue arbitration.
 42. The Petitioner contends that since the Applicant has not complied with the court's directions on filing of a response to the Petition, its request to stay proceedings should be declined. I do not think so.
 43. The Applicant is entitled to pursue its quest to have the matter referred to arbitration. The court appreciates that compliance with the aforesaid directions has the potential of scuttling this quest.
 44. It should be noted that at the time the aforesaid directions were issued, the Applicant was yet to affirm its intention to appeal the court's decision of 26th September 2024 by filing a Notice of Appeal. As such, there was nothing on record to suggest that the parties will not be embarking on the next logical step in the proceedings: preparing the matter for trial.
 45. The court should not clog the Applicant's quest to reverse its (the court's) order and have the matter referred to arbitration by insisting that it (the Applicant) files a response to the Petition. As such, the failure to comply with the aforesaid directions does not justify denial of the orders sought in the application.
 46. Finally as I pen off, I note that the Petitioner has taken issue with the further affidavit by the Applicant's Group General Counsel dated 17th January 2025. He contends that the affidavit was filed without leave of the court and seeks to sneak new matters onto the court record. He avers that he will have no chance to react to these matters through a further affidavit.



47. The Petitioner further contends that the impugned affidavit is an attempt by the Respondent to repair and bolster its case after he flagged the deficiencies in the application under consideration. As such, it (the further affidavit) should be expunged from the court record.
48. It is true that the impugned affidavit was filed without leave of the court. As such, it is expunged from the court's record.
49. However, it is necessary to point out that despite expunging the said affidavit from the court record, the court was still able to discern the fact that the Applicant has filed an appeal to challenge its decision from the Notice of Appeal which is annexed to the affidavit dated 11th November 2024. Further, notwithstanding that the Applicant did not attach the draft Memorandum of Appeal to the affidavit dated 11th November 2024, the court was still able to discern the grievance that it (the Applicant) has presented before the Court of Appeal from paragraphs 4 and 5 of the affidavit. It is also noteworthy that the question whether the instant application was filed without inordinate delay had been alluded to by the Applicant in paragraph 10 of the said affidavit.

Determination

50. The upshot is that I arrive at the conclusion that the application dated 11th November 2024 is merited.
51. As such, I allow the Applicant's request and hereby stay proceedings in the Petition pending the hearing and determination of the appeal against this court's order of 26th September 2024 to the Court of Appeal.
52. Costs of the application are granted to the Petitioner.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF FEBRUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Petitioner

....for the 1st Respondent/Applicant

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

