



Dyer v Five Forty Aviation Limited (Employment and Labour Relations Cause E547 of 2022) [2025] KEELRC 1038 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 1038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E547 OF 2022**

**JW KELI, J
MARCH 28, 2025**

BETWEEN

STIRLING DYER CLAIMANT

AND

FIVE FORTY AVIATION LIMITED RESPONDENT

RULING

1. Following the ruling of the Honourable Court dated 18th December 2024, the Judgment Debtor herein, filed an application by way of Notice of Motion dated 29th day of January 2025 brought under the provisions of Section 3A of the *Civil Procedure Act* & Order 42 Rule 6 of the *Civil Procedure Rules* for Orders:-
 1. Spent
 2. Spent
 3. That the Applicant be granted leave to appeal the ruling of the Honourable Court dated 18th December 2024.
 4. That there be stay of the proceedings pending the Hearing and determination of Intended Appeal by the Applicant to the Court of Appeal as against orders issued herein on 18th December 2024.
 5. That the costs of this Application be provided for.
2. Grounds of the application
 - a) That the Applicant is aggrieved by the ruling dated 18th December 2024.
 - b) That the Applicant stands to the denied fair trial of this action unless the orders sought are granted.



- c) That it would be in the interest of Justice and the need for an efficient use of Judicial resources to grant the orders sought.
3. The application was supported by the annexed affidavit of Donald Earle Smith sworn on the behalf of the Applicant which the court discerned was to effect of supporting an appeal.
4. The application was opposed by the claimant vide his replying affidavit sworn on the 10th February 2025. The claimant stated that the application was a non-starter hinged on a non-existent appeal. That the said audited accounts allowed by the court were a prerequisite to issuance of license to the applicant hence no hardship. That there is no hardship occasioned to the applicant as they are in possession of the said documents. That the order for cross-examination of the director was to give accurate picture of the company, and the court would decide on allegations of fraud and lifting of corporate veil after that exercise.
5. The application was canvassed by way of written submissions. both parties filed.

Applicant's submissions

6. The Respondent, Five Forty Aviation Limited, now applicant, through its Director, Mr. Donald Earle Smith, sought a stay of proceedings in Employment and Labour Relations Court Cause No E547/2022, pending the hearing and determination of its appeal against the Orders issued by this Honourable Court on 18th December 2024.
7. The Respondent stated that it had filed a substantive appeal challenging the legality and propriety of the orders, which compel its director to appear for an examination and produce extensive financial records. The Respondent contended that the continuation of the proceedings will cause irreparable harm and render the appeal nugatory. This application was brought under 3A of the *Civil Procedure Act*, and Order 42 Rule 6 of the *Civil Procedure Rules*, which empower the Court to grant a stay of proceedings where the conditions set out are met. The Respondent submitted that it has met all the necessary conditions for the grant of the stay, and in the interests of justice, the orders sought should be granted.
8. The applicant submitted that the principles for granting a stay of proceedings are well-settled and have been reaffirmed in various decisions of this Honourable Court. In *Trust Bank Limited & another v Investech Bank Limited & 3 others* [2000] eKLR, the Court observed that: "The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary, and it is trite law that to succeed, an applicant has to show that his appeal or intended appeal is arguable, and that unless the stay is granted, the appeal will be rendered nugatory." These guiding principles must be considered in light of the facts and circumstances of each case. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, the Court further explained that: "An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous." Moreover, Civil Appeal No E092/2021, *Kenafic Matches Ltd & Anor v Anti-Counterfeit Agency* it was held that: "An arguable point is not necessarily one that must succeed, but merely one that deserves consideration by the Court, and warrants a response from the opposite party." In *William Odhiambo Ramogi & 2 others v The Honourable Attorney General & 3 others* [2019] eKLR, the High Court set out six principles for granting a stay of proceedings, which are critical in the present case:-
 - a. There must be an appeal pending before the higher Court.
 - b. The Applicant must explain why the stay has not been sought in the higher Court if there is no express provision of law.



- c. The Applicant must demonstrate that the appeal raises substantial or arguable questions.
 - d. The Applicant must show that the appeal will be rendered nugatory if the stay is not granted.
 - e. The Applicant must demonstrate exceptional circumstances warranting the stay of proceedings.
 - f. The Applicant must file the application for stay expeditiously and without delay.
9. The applicant submitted that, additionally, as outlined in Halsbury’s Laws of England, 4th Edition, the stay of proceedings is a serious intervention, and should only be granted in exceptional cases. The court should exercise this power sparingly, where proceedings are manifestly frivolous or where there is no valid cause of action.
10. On the arguability of the appeal the Respondent submitted that the appeal raises serious and arguable points of law and fact, and it is not frivolous. The appeal challenges the legality and appropriateness of the orders issued by the Employment and Labour Relations Court on 18th December 2024. Specifically, the orders compelling the director to appear for an examination and produce extensive financial records are disproportionate and unnecessary. The Applicant raises the following arguable points:-
- i. **Improper Compulsion to Appear for Examination:** The order compelling the director of the Appellant to appear for examination about the company’s financial status is not based on any evidence of fraud or misconduct. There is no justifiable basis for compelling the director’s personal involvement in the financial matters of the company without credible allegations.
 - ii. **Excessive Orders for Financial Records:** The order demanding the production of financial records for a five-year period is excessive and disproportionate. Such records are not necessary for the determination of the issues in the case, especially given the ongoing efforts to restructure the company.
 - iii. **Infringement on the Corporate Veil:** The order to pierce the corporate veil without evidence of fraud or misconduct is improper. The principle of separate corporate personality should be respected, and the director should not be held personally liable for the company’s debts without sufficient cause. The Applicant contended that these grounds form the basis of the appeal and satisfy the requirement for an arguable appeal as outlined in *Stanley Kinyanjui v Tony Ketter & 5 others* (2013).
11. On whether the appeal will be rendered nugatory if stay is not granted .The applicant submitted that the appeal will be rendered nugatory if the stay of proceedings is not granted. The orders requiring the director to appear for an examination and produce extensive financial records will result in significant disruption to the operations of the company. This will have far-reaching consequences, including reputational damage and a potential loss of business opportunities. As was held in *Githunguri v Jimba Credit Corporation Ltd. & others (No 2)* [1988] KLR 838, the Court must ensure that the appeal, if successful, will not be rendered nugatory by allowing the proceedings to continue. In this case, if the orders are executed, it will be impossible to reverse the damage done to the company’s reputation and financial stability.
12. The Applicant submitted on exceptional circumstances warranting a stay of proceedings. That exceptional circumstances exist in this case which warrant the stay of proceedings. The Appellant is facing financial difficulties and is undergoing a recovery process, and the orders, if allowed to proceed, will only serve to derail these efforts. Given the ongoing restructuring of the company and the potential reputational damage, there are clear and exceptional circumstances that justify the stay. As highlighted



in Halsbury's Laws of England, stay of proceedings should only be granted in exceptional cases where the proceedings are manifestly groundless or oppressive.

13. That the balance of convenience favors the Respondent. If the stay is not granted, the Respondent will suffer irreparable harm to its business and reputation, which cannot be compensated by damages. The Respondent's continued pursuit of financial records and the examination of the director, despite the court having dismissed the fraud allegations, amounts to an unjustified fishing expedition. This not only imposes an undue burden on the Respondent's continued pursuit of financial records and the examination of the director, despite the court having dismissed the fraud allegations, amounts to an unjustified fishing expedition. This not only imposes an undue burden on the Applicant but also poses a significant risk of irreparable reputational damage. The very act of compelling disclosure of financial records in the absence of a credible fraud claim creates an unwarranted perception of financial impropriety, which can severely impact the Applicant's business relationships, investor confidence, and standing in the industry. Such reputational harm, once inflicted, is irreversible and cannot be remedied by damages or an eventual favorable ruling on appeal. Courts have consistently recognized that judicial processes should not be used as instruments of harassment. *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018]. The very act of compelling disclosure of financial records in the absence of a credible fraud claim creates an unwarranted perception of financial impropriety, which can severely impact the Respondent's business relationships, investor confidence, and standing in the industry. Such reputational harm, once inflicted, is irreversible and cannot be remedied by damages or an eventual favorable ruling on appeal. Courts have consistently recognized that judicial processes should not be used as instruments of harassment, and allowing these proceedings to continue would be prejudicial, oppressive, and contrary to the principles of fair administration of justice. On the other hand, the Claimant will not suffer prejudice if the stay is granted. The Claimant has other legal avenues to enforce the judgment, including seeking alternative methods of recovering the debt.

Respondent's Submissions

14. The Respondent submitted that after the Court reviews the facts and evidence applicable thereto, it will agree with him that this Application is a gross abuse of court process and should be dismissed with costs. The Respondent addressed the following issues:-
- i. Whether the Applicant should be granted leave to Appeal the Ruling dated 18th December 2024.
 - ii. Whether the said Application has met the threshold for granting the leave to Appeal.
 - iii. Who should bear the costs of this suit.
 - iv. Whether the intended Appeal is arguable.
15. The Respondent submitted that the issue of an Arguable Appeal can only be determined if there's an Appeal in the first place. It is not in doubt that the Respondent/Applicant has not filed a Notice of Appeal and therefore any intended Appeal is a non-starter. In the case of CA Civil Application No E088 of 2023 - *Kenjap Company Limited v Mutua Mulatya*, the Court of Appeal struck out an Appeal in which no Notice of Appeal had been filed. It held as follows:-
- “ 8. In addition to the foregoing, I must also add that the jurisdictional prerequisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of article 159(2) (d) of the *Constitution*, which mandates courts to administer justice without undue regard to technicalities of procedure, and which I have taken to mind. In this regard, the cases of



Jaldesa Tuke Dabelo v IEBC & another [2015] eKLR; *Raila Odinga and 5 others v IEBC & 3 others* [2013] eKLR; *Lemanken Arata v Harum Meita Mei Lempaka & 2 others* [2014] eKLR; *Patricia Cherotich Sawe v IEBC & 4 others* [2015] eKLR, among others, are a constant reminder that article 159(2) (d) is not a panacea for all procedural ills even though “the exercise of the jurisdiction under article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that article 159(2) (d) of the Constitution is not a panacea for all procedural ills ...” It matters not that the overriding objectives set out in sections 3A and 3B of the Appellate Jurisdiction Act (cap. 9) confer powers on this court to dispense justice with greater latitude (see *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited* Civil Appeal No Nai 302 of 2008 (UR No 199 of 2008) (Unreported).

9. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicant’s Motion or grant any of the orders sought. Accordingly, I find that the applicant’s Motion dated March 13, 2023 seeking extension of time in terms of prayer No 4 is incompetent and is hereby struck out.”

16. Furthermore, there was no annexed a draft memorandum of Appeal for the court to consider whether there was an arguable appeal. In view of the foregoing, the judgment holder contended it was clear that the Intended Appeal is a non-starter and not arguable at all.

Whether the Application was filed expeditiously

17. The Claimant submitted that the Ruling of which the Respondent/Applicant seeks to Appeal from was delivered on 18th December, 2024. This Application was filed on 29th January, 2025, being exactly 7 days before the Respondent/Applicant's director was to be cross-examined. Furthermore, it was not served. In the case of Adam Miller (supra), this court stated as follows:- "As was held by M’Inoti J.A in *Joseph Wanjohi Njau v Benson Maina Kabau* [2013] eKLR, the length of delay must be considered in the context of each case."

18. The judgment holder submitted that it was instructive to note that prayer 1 of the said motion seeks that it be certified urgent. However, the Respondent/Applicant mischievously and intentionally chose not to file a Certificate of Urgency with the Application. This clearly demonstrates that the Respondent/Applicant was not keen on the Application being heard and knew that if it was filed with a Certificate of Urgency, directions would have been given prior to the Hearing date. This is a well-known delay tactic purely meant to stifle the Hearing.

19. In the case of *Watu Credit v Geoffrey Aboki & Karen Chepkurui* (2022) eKLR, the Court dealt with the principles guiding issuance of Stay of Proceedings pending Appeal. It stated as follows:-

"In the *Kenya Wildlife Case* (supra), Gikonyo J quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“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 proceeding beyond all



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. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

20. Guided by the above-mentioned authorities and the principles that emanate therefrom, the Respondent/Applicant has failed to meet the requisite threshold and demonstrate to this Court to exercise its discretion in its favour. The Claimant submitted that the Respondent/Applicant had failed on this issue as well.

Whether the Respondent/Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

21. The Claimant submitted that in paragraphs 3 to 7 of his Supporting Affidavit, the Respondent/Applicant's Director argues that the Order directing his cross-examination and producing books of Accounts, imposes an undue burden on him, is intrusive, will negatively affect his reputation and jeopardizes the company's recovery efforts. In paragraphs 6 to 8 of his Replying Affidavit the Claimant dismissed the said averments and stated that they are misguided as Audited Accounts were a mandatory statutory requirement prior to the renewal of all relevant operational licenses and air operating certificates as per the *Civil Aviation Act* Cap 394 Laws of Kenya. The Claimant relied on Section 5,12,19(4) of the *Civil Aviation Act*.
22. As regards the issue of mismanagement and fraud it is trite law that cross-examination is necessary, and the court can only determine the same once it is conducted. In the case of *Ogare v Herne* this Court held that the issue of lifting the corporate veil will be revisited after the examination of the directors as ordered above. The Court held a similar position in *Koninklijke Luchvaart v Africair Management and Logistics Limited* and in the case of *Ameer Shaker HaEsnad General Trading Limited v Pundbeny Limited*. The Respondent/Applicant failed to warrant cause to grant the Orders sought.

Decision

23. The Court on the 18th December delivered a ruling as follows:-

‘In the instant case I find no prove of fraud or misconduct on party of Don Smith proved to justify the deviation of the principle of legal entity of company separate from Directors by exercise the restricted power of lifting the company veil. The court holds it is not illegal to be a Director or Shareholder of more than one company. The prayer of lifting the veil is disallowed. In the upshot the Notice of Motion is allowed by Issuance of Order of a Notice to Show Cause and Summons compelling the Director of the Judgment- Debtor/ Respondent namely Donald Earle Smith to personally appear in Court physically on the 6th February 2025 to be examined on oath as to the Judgement Debtor's means and assets and to produce the books of the accounts of the Judgment-Debtor/ Respondent herein and more specifically the audited accounts covering the period between 1st January, 2018 to 31st December, 2023.’
24. The applicant's Director, namely Donald Earle Smith, was due for cross –examination before the Court on the 6th February 2025. On that date, the applicant informed the court of the instant application.



The application was filed under section 42(6) of the Civil Procedure Act to wit :- Rule 6 (2) of the Civil Procedure Rules to wit:- ‘(2) No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

25. The applicant relied on the decision in William Odiambo Ramogi & 2 others v The Honourable Attorney General & 3 others [2019] eKLR, where the High Court set out six principles for granting a stay of proceedings, which are critical in the present case:-

- a. There must be an appeal pending before the higher Court.
- b. The Applicant must explain why the stay has not been sought in the higher Court if there is no express provision of law.
- c. The Applicant must demonstrate that the appeal raises substantial or arguable questions. 4. The Applicant must show that the appeal will be rendered nugatory if the stay is not granted.
- d. The Applicant must demonstrate exceptional circumstances warranting the stay of proceedings.
- e. The Applicant must file the application for stay expeditiously and without delay. Additionally, as outlined in Halsbury’s Laws of England, 4th Edition, the stay of proceedings is a serious intervention, and should only be granted in exceptional cases. The court should exercise this power sparingly, where proceedings are manifestly frivolous or where there is no valid cause of action.” This court found two of the above principles to be critical:- ‘1. There must be an appeal pending before the higher Court. 2. The Applicant must explain why the stay has not been sought in the higher Court if there is no express provision of law.’ In the instant case there is no appeal to the higher court or even Notice of Appeal . Indeed, the applicant seeks leave to appeal ruling of the court. There is no draft memorandum of appeal annexed.

26. The court holds that the leave of the court is not required to lodge appeal at the Court of Appeal according to section 17 of the Employment And Labour Relations Court Act, No 20 of 2011 which states:-

“ 17. Appeals

1. Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.”

27. The applicant has not filed a notice of appeal and has not explained why the stay was not sought before the Curt of Appeal. The application was brought under Order 42(6) of the Civil Procedure Rules but there was no compliance with security for performance of the decree sought to be stayed. The court in its ruling disallowed lifting of the corporate veil and gave the reasons.

28. In a nutshell, the court found no merit in the application. The application in the opinion of the court was meant to frustrate the claimant’s efforts to get payment of the decretal amount. The application is dismissed with costs to the claimant. The court Orders the said Director Donald Earle Smith to comply



with the Orders of the court in the ruling dated 18th December 2024 and appear for cross-examination on the 20th of May 2025.

29. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Applicant:- Owala

Respondent/Claimant: Gomba

