



Motaung v Semasource Kenya EPZ Limited t/a Sama & 2 others; Kenya National Human Rights and Equality Commission & 9 others (Interested Parties) (Petition E071 of 2022 & E052 of 2023 (Consolidated)) [2025] KEELRC 1599 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1599 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E071 OF 2022 & E052 OF 2023 (CONSOLIDATED)

MN NDUMA, J

MAY 26, 2025

BETWEEN

DANIEL MOTAUNG PETITIONER

AND

SEMASOURCE KENYA EPZ LIMITED T/A SAMA 1ST RESPONDENT

META PLATFORMS INC 2ND RESPONDENT

META PLATFORMS IRELAND LIMITED 3RD RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICE INTERESTED PARTY

EXPORT PROCESSING ZONE AUTHORITY INTERESTED PARTY

MINISTRY OF HEALTH INTERESTED PARTY

OFFICE OF THE DATA COMMISSIONER INTERESTED PARTY

MINISTRY OF FOREIGN AFFAIRS INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY



RULING

1. On 20th April 2023, the court determined an interlocutory matter. Dissatisfied with the decision, the Respondents filed a Notice of Appeal and challenged the decision at the Court of Appeal. The Court of Appeal dismissed the appeal on 20th September 2024. Dissatisfied with this decision, the Respondents filed a Notice of Appeal invoking the jurisdiction of the Supreme Court.
2. The Respondents have also filed an application seeking leave to have the appeal heard by the Supreme Court.
3. The Petitioners filed a Preliminary Objection to the application by Respondents dated 2/12/2024 stating that the Respondents while knocking at the doors of the Supreme Court with one leg at the Court of Appeal, the Respondents want to again spread another leg to this court and have this court stay the hearing of the petition on the merits pending grant of leave to file an appeal to the Supreme Court.
4. It is submitted by the Petitioner and Katiba Institute in limine that once the jurisdiction of the Court of Appeal and Supreme Court have been invoked, this court lacks jurisdiction to handle the application dated 15th October 2024 for stay of proceedings in the petition pending before this court, pending conclusion of the matters at the Court of Appeal and the Supreme Court.
5. The Respondents' application under certificate of urgency dated 15th October 2024 seeks for an order in the following terms:
 1. Spent
 2. Spent
 3. That pending the hearing and full determination of the Applicants' application for certification and leave of appeal in Civil Application Sup. No. E017 of 2004 – Meta Platforms Inc & Another versus Samasource, Kenya EPZ Limited T/A/ Sama and 188 others in the Court of Appeal and/or the Supreme Court of Kenya, this Honourable Court be pleased to grant an order for stay of proceedings in the petition herein.
 4. That pending the hearing and determination of the Applicants' intended appeal to the Supreme Court of Kenya, this Honourable Court be pleased to grant an order of stay of proceedings in the petition herein.
 5. That the costs of the instant application be awarded to the Applicants.
6. The application is supported by grounds 1 to 6 set out on the face of the Notice of Motion and buttressed in the supporting affidavit of Laura O'Hanlon the nub of which is that on 20th April 2023 this court delivered a ruling dismissing the Applicants' application challenging the court's jurisdiction to hear and determine this petition as against them.
7. The Applicants were dissatisfied with the decision of this court and appealed to the Court of Appeal in Civil Appeal No. E445 of 2023. On 20th September 2024, the Court of Appeal delivered its judgment and inter alia held that the matters raised by the Applicants on appeal including the issue of whether the court could continue with proceedings in the absence of jurisdiction was a factual point to be determined by this court. In effect, the Court of Appeal dismissed the Applicants' appeal and referred the matter to this court for determination on the merits.



8. The Applicants' being dissatisfied with the judgment of the Court of Appeal, have lodged a Notice of Appeal to the Supreme Court. In addition, the Applicants filed an application to the Court of Appeal being Civil Application Sup. No. E017 of 2024 – Meta Platforms Inc and another versus Samasource Kenya EPZ Limited T/A Sama and 188 others, seeking the court to certify that the intended appeal involves the interpretation and/or application of the Constitution and is in any event one that involves a significant and material general public importance and was necessary to grant the Applicants' leave to appeal to the Supreme Court of Kenya against the whole of the said judgment. The Applicants' application for certification was considered by a Court of Appeal Judge *exparte* and was certified as urgent application.
9. That Applicants have strong grounds of appeal and it is in the interest of justice that the proceedings before this court be stayed pending the hearing and determination of the Applicants' application for certification and for leave to appeal in the Court of Appeal and if allowed grant a further stay of proceedings in the petition, pending the hearing and determination of the Applicants' appeal to the Supreme Court of Kenya.

Determination

10. The court is obliged to determine the Preliminary Objection raised by the Petitioners and supported by Katiba Institute at the first instance and has in this regard considered the submissions by the Petitioners' dated 21st February 2025, the submissions by Katiba Institute dated 25th February 2025 and the 1st and 2nd Respondents' Replying Submissions dated 10th March 2025 and has delineated the issues for determination to be: -
 - a. Whether this court has jurisdiction to entertain this application
 - b. Whether the import of the application before court is to countermand the decision by the Court of Appeal issued on 20th September 2024
11. The court will deal with the two issues together.
12. The Employment and Labour Relations Court (Procedure), Rules, 2024, does not provide for stay of proceedings pending appeal before Court of Appeal.
13. In the case of Adani versus Asprin Phamacare Holdings Limited (Cause E417 of 2024) [2024] KEELRC 13363 KLR (6 December 2024) Rutto J. opined in a ruling that where there is a lacuna in the ELRC Rules, this Honourable Court ought to borrow from the Civil Procedure Act and Rules in the interest of justice.
14. Article 165(3)(b) of the Constitution which is given effect by the Mutunga Rules, at Rule 32(1), the Rules only deal with stay pending appeal and does not offer clarity on the extent of this court's jurisdiction when dealing with an application for stay of proceedings.
16. In Kooba Kenya Limited versus County Government of Mombasa [2020] KEHC 6380 KLR, Ogola J. held, where there is a lacuna in Mutunga Rules, the Civil Procedure Rules must apply. Order 42 Rule 6, read together with Section 1 of the Civil Procedure Act grants jurisdiction to this court to hear application for stay of proceedings in two scenarios: -
 - i. As an appellate court when an appeal is coming in from the Magistrate's Court and
 - ii. As the court being appealed from when an appeal is being preferred against its decision at the Court of Appeal



17. It was submitted by the Petitioners and Katiba Institute that given the restriction under Section 1 of the [Civil Procedure Act](#), this court's jurisdiction under Order 42 Rule 6 does not extend to appeals from the Court of Appeal to the Supreme Court.
18. In this respect, Section 23A of the [Supreme Court Act](#), clothes the Supreme Court with exclusive jurisdiction to consider applications for stay of proceedings, pending an appeal before the Supreme Court.
19. It was submitted as per Section 23A (1)(b), and 23A (2) of the [Supreme Court Act](#), such an application can only be made after certification under Article 163(4)(b), has been obtained and a petition of appeal has been filed.
20. It was submitted that not even the Court of Appeal can entertain an application for stay pending an appeal to the Supreme Court as was held by Visram, Koome and Odeck JJA in Dickson Muricho Muriuki and 6 others [2013] KECA 543 (KLR).
21. In the present matter, the 1st and 2nd Respondents' application for certification is yet to be heard by the Court of Appeal. It follows that they have not filed a petition of appeal before the Supreme Court.
22. That as was held by Koome (J&P), Wanjala, Ndungu, Lenaola and Ouko SCJJ in Kenya Hotel Properties Limited, Attorney General and 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) Civ. (7 October 2022) judgment, the Supreme Court stated as follows on the principle of stare decisis that binds this court as it does all other superior courts: -

In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the [Constitution](#) itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts (sic)"
23. Moreover, under Article 164(3) of the [Constitution](#), this court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the Appellant sought as against a decision of this court to quash or annul them, or that it could purport to direct this court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the Appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.
24. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere."
25. The court is urged to dismiss this application for lack of jurisdiction.
26. Katiba Institute emphasized that a court of law cannot give the courts seal of approval to persons who wish to play lottery with judicial process as was stated by Odunga J (as he then was) in HA versus LB HCC No. 188 of 2021. That by invoking jurisdictions of this court and the Court of Appeal at the same time, the Applicants wish to play lottery with the judicial process and the court should decline that invitation and stop the Applicants in their tracks.
27. In Fesal Mohamed Alie alias Feisal Shahbal versus Republic [2015] eKLR, the Court of Appeal recently held that once a Notice of Appeal is filed, even without a substantive appeal, the lower court cannot



proceed. In *Otieno Ragot and Co. Advocates versus National Bank of Kenya Limited* [2020] eKLR, the Court of Appeal held.

The Appellant submitted that though no substantive appeal had been filed the Respondent had filed a Notice of Appeal. In effect, it was pursuing the relief of review while keeping open his option to appeal against the same ruling.”

28. It was submitted that Rule 5(2)(b) of the Court of Appeal clothes the Court of Appeal with jurisdiction to consider an application for a stay when an appeal is pending to the Court of Appeal or Supreme Court and this court lacks jurisdiction to entertain this application.

29. The Respondent relied on the decision of the Court of Appeal in *Water Resource Management Authority versus Kensalt Limited* [2018] eKLR in allowing an application for a stay of proceedings, pending appeal in the Supreme Court as follows:

---- is open to the Applicant to proceed to apply to the Supreme Court for a stay does not in the peculiar circumstances of this case preclude its right to make such an application before this court, quite apart from the fact that it is this court that is seized of the proceedings, the provisions of Order 42 Rule 6 of the Civil Procedure Rules expressly confers a right to apply for a stay in either this court, or notwithstanding any refusal by this court, to apply to the court to which such appeal is preferred. As it were, the court to which the appeal is preferred is the Supreme Court.”

30. The Respondents submit that section 23A of the *Supreme Court Act* contrary to the submissions by the Petitioners and Katiba Institute applies to the proceedings in the Supreme Court only. That Section 23A provides that an application for a stay of proceedings may only be lodged before the Supreme court where leave to appeal is granted and after filing a petition of appeal. That these provisions do not apply in the proceedings before this court.

31. That the provisions of *Employment and Labour Relations Court Act* and Employment and Labour Relations Court (Procedure), Rules, 2024 are insufficient and so this court is to rely on Order 42 Rule 6 of Civil Procedure Rules, 2010 which expressly grants jurisdiction to this court to hear and determine an application for stay of proceedings, “as the court being appealed from and that this jurisdiction also lies in the court appealed to.”

32. The court notes that the application of Order 42 Rule 6 of Civil Procedure Rules, 2010 by this court in this matter is agreed by all the parties herein.

33. The Respondents further relied on the case of *Madhu Paper International Limited versus Keru* [1985] KLR 840, where the Court of Appeal explained as follows: -

It is preferable for the High Court to deal with an application pending an appeal from its decision not so much as to protect the Court of Appeal from inconvenience but more because the Court of Appeal would have the advantage of seeing what the High Court Judge, made of the application. The Judge of the High Court, should take note of the concurrent jurisdiction which the two courts have and exercise therein.”

34. The Respondents summarized in their submissions at paragraph 2-6 that: -

As illustrated in the above mentioned cases, it is preferable to apply for a stay of proceedings in the court appealed from as it is the court seized with the matter. It is proper to stay the trial court proceedings as prayed.”



35. In determining this matter, this court is guided by the principle enunciated by Ringera J. (as he then was) in *Global Tours and Travels Limited; Nairobi High Court winding up Cause No. 43 of 2000* where the Judge observed 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 court being seized with the matter is the appropriate court to grant a stay of proceedings before this court.”

36. The Respondents’ emphasised the decision in *Water Resource Management Authority versus Kensalt Limited [2018] eKLR* in allowing an application for a stay of proceedings, pending appeal in the Supreme Court as follows: -

In order to protect the sanctity of court proceedings and avoid parallel proceedings and indeed outcomes in both the trial court and this court and in light of Section 6 of the *Civil Procedure Act*, I find that it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether a stay is to be granted 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 factor 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.”

37. It is manifestly clear that the Applicants have applied for certification of the matter by the Court of Appeal as a matter that deserves to be litigated at the Supreme Court being a matter raising constitutional matters or being one of great public importance. This is the application pending before the Court of Appeal, being leave of appeal against a judgment of the Court of Appeal to the Supreme Court. Order 42 Rule 6 of the Civil Procedure Rules is clearly not in play here, since there is no appeal to this court from the lower court nor is there an appeal pending at the Court of Appeal from a decision of this court. Clearly, this court lacks capacity to weigh in on the matters decided by the Court of Appeal to exercise its judicial discretion guided by the principles enunciated by Ringera J. so as to determine whether to stay the proceedings before the trial court, pending certification of the matter in the Court of Appeal as one deserving hearing and determination by the Supreme Court.
38. The court respectively differs with the reasoning by J.O. Olole J. in his ruling in *Water Resources Management Authority versus Kensalt Limited [2018] eKLR*, in which the learned Judge granted stay of proceedings before the Environment and Land Court pending certification of an application of appeal to the Supreme Court from a judgment of the Court of Appeal.
39. It is this court’s finding that once the Court of Appeal has delivered a judgment on a matter as in this case, in which the Court of Appeal found that this court had jurisdiction to hear and determine the petition before it, the trial court lacked jurisdiction to countermand the judgment of the Court of Appeal by staying the proceedings before it pending certification application before the Court of Appeal for the Applicant to appeal to the Supreme Court. The court returns this finding in respect of the 1st and 2nd issues above.



40. This court will echo the words of Nyagaka J. in Sheila Kabole Mabwa versus Joshua Angatia and 4 others [2021] eKLR , that once the Court of Appeal has rendered its decision on an appeal before it from this court,

there is no “carcass” in it at this stage. It has moved to and is in the Court of Appeal. There, the vultures should gather relief of hewing the carcass. The call by the Applicant for a gathering in this court at this stage is misplaced.”

41. Accordingly, having considered the circumstances of this case, the application is misconceived and an attempt to clothe this court with a mandate it clearly does not have and whose only recourse from the judgment of the Court of Appeal is to hear and determine the petition pending before it.

42. It is indeed in the interest of justice and fair play to proceed expeditiously to dispose of this petition which was filed in the year of the Lord, 2023 and is pending determination two years later in the year 2025. It behoves this court to decline utilization of its judicial discretion to stay proceedings before the court pending determination of matters beyond the jurisdiction of this court.

43. The application is dismissed with costs in the cause.

DATED AT NAIROBI THIS 26TH DAY OF MAY 2025

MATHEWS NDUMA

JUDGE

Appearance:

Nzili and Simbi Advocates for the Petitioners’/Objectors

Kaplan & Stratton Advocates for 1st & 2nd Respondents/Applicants

Joshua; Mahidzo Nyawa for Katiba Institute

Walker Kontos Advocates

Munya Advocates

Kenya Human Rights Commission

Kituo cha Sheria

The Honorable Attorney General

Mr. Kemboi – Court Assistant

