



**Muganda v Brookside Dairy Limited & 2 others (Petition
E002 of 2025) [2025] KEELRC 2242 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2242 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E002 OF 2025**

JK GAKERI, J

JULY 29, 2025

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 10, 19, 20(1), 22(1), 23(1), 28, 29, 31,
39, 41, 49, 50, 162(2), 258, 259(1)(B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 41, 44, 45, 49
OF THE EMPLOYMENT ACT NO. 11 OF 2007**

AND

**IN THE MATTER OF SECTIONS 4 AND 6 OF THE FAIR ADMINISTRATIVE
ACTIONS ACT, CHAPTER 71 OF THE LAWS OF KENYA**

BETWEEN

TITUS OWINO MUGANDA PETITIONER

AND

BROOKSIDE DAIRY LIMITED 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD
RESPONDENT**

RULING

1. Before the court for determination is the applicant’s Notice of Motion dated 27th June, 2025 filed under Certificate of Urgency seeking Orders that: -

1. Spent.

2. Spent.



3. This Honourable Court be pleased to arrest the Judgment scheduled for delivery on 8th July, 2025 in ELRC Petition No. E002 of 2025 pending the hearing and determination of the appeal filed in the Court of Appeal.
4. Costs of this application be provided for.
2. The Notice of Motion was expressed under Order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Titus Owino Muganda who deposed that 14th May, 2025 the court directed that the Petition be disposed of by way of written submissions and the parties adopted the directions and the Petitioner filed submissions on 24th May, 2025 and on 17th June, 2025, the respondent admitted that it had not filed submissions and made an oral application to amend their pleadings and introduce Replying Affidavits, which the court allowed objection notwithstanding and the respondent introduced affidavits of Anne Kariuki and Samuel Okich Omondi the 4th respondent and annexures that directly responded and rebutted the final submissions of the claimant, filed on 24th May, 2025.
3. That the respondent's filed a Letter of Authority dated 17th June, 2025 and exhibits stamps dealing with procedural objections raised in the final submissions filed on 24th May, 2025 and the Petitioner was not granted the opportunity to respond to the new pleadings and documents and the court had jurisdiction to arrest delivery of the judgment pending the hearing and determination of the appeal.

1st and 4th Respondents' response

4. Counsel contended that the Petitioner had not demonstrated any justification to warrant arrest of the judgment and had equally not demonstrated the existence of any appeal pending at the Court of Appeal and no Order of stay had been issued by the Court of Appeal of these proceedings.
5. The 1st and 4th respondents contended that the leave granted on 17th June, 2025 was in favour of all parties to file any outstanding documents and the Petitioner was not barred from filing any supplementary affidavit and/or supplementary submissions in response to the documents filed.
6. Counsel contended that the instant application was an abuse of the court process and was aimed at delaying in concluding the dispute at the expense of the respondent.

1st and 4th Respondent's submissions

7. Counsel submitted that the motion before the court had not met the threshold for stay of proceedings as the Petitioner had not demonstrated any prejudice or loss he will suffer in the event that judgment is delivered as scheduled.
8. Reliance was placed on the sentiments of the Court in Kenya Wildlife Service V James Mutembei [2019] KEHC 10478 KLR as well as Halsbury's Laws of England, 4th Edition Vol. 37 pages 330 and 332 on the high and stringent test on stay of proceedings owing to its impact on the right to access justice.
9. According to counsel, the instant application was precipitated by the leave granted to parties to file all outstanding documents in readiness for judgment and nothing prevented the applicant from filing a Supplementary Affidavit and supplementary submissions and no justification had been demonstrated to arrest the judgment nor had the applicant demonstrated the existence of an appeal pending before the Court of Appeal and no Memorandum of Appeal or draft had been availed or Notice of Appeal served or Orders issued by the Court of Appeal.



10. Counsel urged that the Petitioner's application was an abuse of the court process and was intended to delay conclusion of the dispute.
11. That the applicant's allegation that he was not granted an opportunity to respond to the new pleadings and documents was misleading as leave was granted to both parties.
Counsel urged the court to disallow the application.
12. On 8th July, 2025, parties were accorded 7 days a piece to file and exchange submissions and by 25th July, 2025 when the court retired to prepare this ruling, only the 1st and 4th Respondents had filed submissions.
13. The applicant's submissions were filed long after the 7 days accorded by the court on 8th July, 2025 had lapsed. They were filed on 27th July, 2025, thus late.

Analysis and determination

14. The singular issue for determination is whether the applicant's/Petitioner's Notice of Motion dated 27th June, 2025 is merited.
15. It is common ground that the Petitioner filed the instant Petition on 11th November, 2024 but it was not uploaded until 11th February, 2025 and entered in the register.
16. It is equally not in dispute that the respondent filed a Response to the Amended Petition on 9th May, 2025 to which it attached a witness statement of Anne Kariuki, its Human Resource Manager together with a List and Bundle of Documents dated on even date. The instant controversy emanated from the court's directions issued on 17th June, 2025.
17. On 14th May, 2025 the instant Petition was the 1st matter on the cause list and when called out, while the respondent's counsel was in court the Petitioner's counsel was not.
18. Counsel for the respondent proposed that the file be placed aside to enable him reach out to the Petitioner's counsel and the court placed the file aside at 9:01am.
19. At 9:48am both counsels were present in court and confirmed that both parties had complied. Mr. Owade for the Petitioner proposed that the Petition be canvassed by way of written submissions and prayed for 21 days. Mr. Njuguna for the respondents was in agreement and prayed for 14 days.
20. The court directed that parties would have 14 days a piece to file and exchange submissions, and the Petitioner had leave to file supplementary submissions.
21. The Petitioner was also directed to serve the mention notice to other parties, slated for 17th June, 2025.
22. On 17th June, 2025, both counsels were present and while the Petitioner had filed submissions the respondent had not and sought time to comply.
23. The respondent's advocate sought leave to replace the witness statement of Ann Kariuki with a Replying Affidavit and although Mr. Owade initially objected to the request, after the court weighed in on the issues, counsel were agreeable and leave was granted to both parties.
24. The court directed as follows:
 1. Parties to avail hard copies of the documents.
 2. Respondents to file within 7 days Replying Affidavit and Petitioner may respond as necessary.



3. Judgment on 8th July, 2025.
25. The instant application dated 27th June, 2025 came up on 30th June, 2025 and service was directed and a mention for further directions slated for 8th July, 2025.
26. On 8th July, 2025 Mr. Owade introduced the application on record, informing the court that he had put in a Notice of Appeal requested for typed proceedings and received the respondent's grounds of opposition. Counsel proposed that the application be allowed.
27. Mr. Njuguna confirmed the filing of Grounds of Opposition and proposed that the judgment be delivered and any party dissatisfied with the outcome appeals against the decision itself. In his view, the application had no merit as leave was granted to both parties.
28. Mr. Owade submitted that the respondents filed new documents and needed to respond but proposed that the Court of Appeal was a better forum as the right of appeal was enshrined in law. Counsels agreed that the application be canvassed by way of written submissions.
29. It is unclear to the court why counsel who was in agreement with the Orders issued on 17th June, 2025 changed his mind 10 days later and filed the instant Notice of Motion.
30. In the court's view, if the Petitioner's counsel had objected to the respondents' application for leave as vehemently as paragraph 6 of the Petitioner's Supporting Affidavit evinces, the court would have been forced to do a ruling on the issue and the directions issued would most likely have been different.
31. The ten (10) days the Petitioner's counsel took to file the instant application, would, in the court's supposition appear to suggest counsel was not enthusiastically opposed to the grant of leave to both parties to file documents as necessary.
32. It is trite law that the right of a party to amend pleadings is statutory. Both the Civil Procedure Rules and the Employment and Labour Relations Court (Procedure) Rules, 2024 provide for amendment of pleadings before and after close of pleadings.
33. Rule 34 of the Employment and Labour Relations Court (Procedure) Rules 2024 provide-

A party may amend pleadings before service or before the close of pleadings.
34. Provided that after the close of pleadings the party may only amend pleadings with leave of the court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.
35. Similarly, under Order 8 Rule 3(1) of the Civil Procedure Rules. Subject to Order 1 rule 9 and 10, Order 24 rules 34 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct allow any part to amend his pleadings.
36. In *Central Bank of Kenya V Trust Bank Ltd* [2000] EA 365 the Court of Appeal held that:

“That a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and the amendment can be allowed without injustice to the other side”.



37. Similarly, in *Eastern Bakery V Castellino* [1958] EA 461 (AK) the court held that: -

“Generally speaking this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle”.

38. Finally, the principles in which the court may grant leave to amend pleadings were laid down by the Court of Appeal in *Joseph Ochieng & 2 Others V First National Bank of Chicago Civil Appeal No. 149 of 1991*, as follows:

- a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b. the amendment should be timeously applied for;
- c. power to amend can be exercised by the court at any stage of the proceedings (including appeals stage);
- d. that as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side;
- e. the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint, the defendant would be deprived of his right to rely on Limitations Act but subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation;
- f. that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment”.

39. In sum, and as held by R. Wendoh J. in *Peter Odede Okwombo V South Nyanza Sugar Company* [2021] eKLR.

“The bottom line is that an amendment can be done any time before delivery of judgment...”

40. At the risk of repetition, in this case, and as admitted by the Petitioner in his Supporting Affidavit, the respondent’s counsel sought to replace the witness statement on record with a Replying Affidavit as it is the manner in which documentary evidence is adduced in Petitions.

41. What appears to have unsettled the Petitioner’s counsel was the fact that the respondents counsel attached some documents not availed earlier and which on the face of it appeared to reinforce the respondents case.

42. However, having accorded both parties leave to file such documents as were necessary for purposes of determination of the Petition on merit, the court had done its part and in good faith.

43. Significantly, the Petitioner’s right to respond is enshrined in law and he was entitled to do so.

44. The court, in the circumstance was satisfied that permitting the parties to avail all relevant documents at their disposal would enable it determine all issues arising comprehensively and conclusively, and most importantly administer substantive justice.



45. The importance of and place of substantive justice is underlined in Article 159(2)(c) of *the Constitution* of Kenya which requires courts to administer justice without undue regard to technicalities of Procedure.
46. In other words, courts are discouraged from sacrificing substantive just at the altar of procedure.
47. The foregoing was exquisitely captured by Ringera J in *Microsoft Corporation V Mitsumi Garage Ltd & Another Nairobi HCC 810 of 2001 [2001] EA 460* as follows:
- “Rules of Procedure are the hand maiden and not mistresses of justice and should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rules requiring verification of a plaint but he has fallen short of the presented standards, it would be to elevate form and precedent to fetish to strike out the suit. Deviations from or lapses on form and procedure which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments, thus affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the court nor prejudices the defendants in any fundamental respect. Indeed, no prejudice has been alleged”.
48. In the instant case, counsel for the Petitioner admitted that in light of the Replying Affidavits filed and served by the respondent’s counsel he needed to respond.
49. The court is left wondering why counsel did not respond and proceed to file supplementary submissions as advocates faced with similar circumstances do, bearing in mind he had been accorded leave to do so.
50. In the court’s view, the other option available to counsel was to identify the documents, if any, which he had concerns about and seek their expunction from the record.
51. Having failed to exercise his right to respond as required of him the Petitioner surrendered a potent opportunity.
52. Significantly, the applicant sought stay of proceedings. Section 6 of the *Civil Procedure Act* alludes to stay of proceedings generally, and an application for stay of proceedings involves the exercise of judicial discretion.
53. The salient guiding principle being interests of justice, which applies to all parties.
54. The court is obligated to consider the several factors including the appeal being rendered nugatory, exceptional circumstances, application was filed without undue delay, the appeal, why the stay was not sought in the higher court, and appeal raises substantial issues among others.
55. See in this regard, *William Odhiambo Ramogi & 2 Others V Attorney General & 2 Others [2019] eKLR*, *Kenya Wildlife Service V James Mulembi [2019] eKLR* where the court underscored the seriousness with which an application for stay of proceedings must be handled as follows:
- “... Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice right to be heard without



delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”

56. See in this regard Halsbury’s Law of England 4th Edition Vo. 37 page 330.
57. However, an appeal perse is not sufficient to stay proceedings as Order 42 Rule 6 of the Civil Procedure Rules provide:
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
58. In light of the foregoing, it is the finding of the court that the applicant has failed to demonstrate any exceptional circumstances or that the intended appeal will be rendered nugatory among other factors, if a stay of proceedings is not or the Judgment arrested.
59. The application dated 27th June, 2025 is disallowed.
- Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JULY, 2025.

DR. JACOB GAKERI

JUDGE

order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

