



**Mbevi v Crystal Bay Resort (Cause E009 of 2022)
[2024] KEELRC 1494 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E009 OF 2022
M MBARŪ, J
FEBRUARY 2, 2024**

BETWEEN

VINCENT MICAH MBEVI CLAIMANT

AND

CRYSTAL BAY RESORT RESPONDENT

RULING

1. The respondent, Crystal Bay Resort filed application dated 27 October 2023 seeking for orders that there be stay of proceedings in this case, pending the hearing and determination of MCCR E754 of 2021 – *R. v Micah Mbevi*.
2. The application is supported by the affidavit of Roberto Lenzi the director of the respondent and on the grounds that that the matter had been fixed for hearing on 31 October 2023 which there is an ongoing criminal case against the claimant where he is charged with the offence of stealing by an officer of the company and the respondent is the complainant. In Criminal Case No. E754 of 2021, there is a hearing date for 13 December 2023 hence pending determination.
3. There are pertinent issues surrounding the claimant’s previous employment with the respondent which he failed to disclose when filing his claim herein. He is guilty of material non-disclosure. In the interests of justice and to allow the respondent complete the criminal case as a complainant, these proceedings be stayed and this will result in justice.
4. In reply, the claimant filed his Replying affidavit and aver that the respondent is asking this court to disregard its established jurisprudence on handling of employment matters in cases where an employee is facing criminal charge. As a basic principle of law, the court is not bound by the outcome of the criminal case. Issues before this court are different from those before the criminal court.
5. The claimant also avers in reply that he has filed his claim based on unfair termination of his employment contract, his withheld salaries, holiday pay, overtime, leave, gratuity and notice pay which



- should be addressed on the merits. The criminal court is dealing with criminal complaint and has not established if he is guilty or not.
6. The burden of proof in criminal cases is beyond reasonable doubt which claims before this court call for proof of claims on a balance of probabilities. To stay these proceedings and wait for the outcome of the criminal case will not achieve justice. The court enjoys independence to determine cases without being influenced by what happens in another forum. The criminal case is before a Magistrates court and this is a superior court and not of the same status to be bound by the outcome of a subordinate court.
 7. The respondent is in a ploy to buy time to delay justice and the application should be dismissed with costs.
 8. Both parties attended and agreed to address the subject application by way of written submissions.
 9. The respondent as the applicant submitted that there is an ongoing criminal case against the claimant where he is charged with the offence of altering cheques contrary to Section 356(1) of the Penal Code and stealing by officers of the company contrary to Section 282 of the Penal Code. The respondent is the victim and complainant.
 10. The general rule in Section 193A of the Criminal Procedure Code is that if a matter is in court and is subject to other proceedings, the court has a discretion to order a stay of proceedings to allow the other matter be concluded. The decision to dismiss the claimant from his employment was triggered by the criminal charges and his conduct and for the court to get the best results in this hearing, it is only fair to allow the criminal case to complete first by stay of proceedings herein.
 11. In the case of Amir Lodges Ltd & another v Mohammed Omar Shariff & another [2022] eKLR the court held that the general rule is to allow criminal proceedings to conclude before civil proceedings can commence unless it is demonstrated that the criminal proceedings are an infringement of the rights and freedoms of the accused person or it will to violation of constitutional rights. In Maina & 4 others v Director of Public Prosecutions & 4 others Petitions No. E106 and 160 of 2021 (consolidated) [2022] eKLR the court stayed civil proceedings to allow criminal proceedings to conclude as they were material to the civil suit.
 12. The claimant submitted that this court is not bound by the outcome of the criminal case as the threshold and burden of proof is different as held in Alphonse Shihalo Ngaira v Kenya Stationers Limited (Kensta Group) [2019] eKLR that criminal proceedings are distinct from disciplinary proceedings and that an employer is not bound by the outcome of a criminal case. In Ismail Hassan Abdullahi v Kenya Pots Authority [2013] eKLR the court held that the purpose of disciplinary process is to inquire into allegations relating to the breach of obligations between an employer and employees with a view to termination employment contract while criminal proceedings has its own different purpose and objectives.
 13. Nothing stops the court in adjudicating the matter while any criminal proceedings are ongoing. In any case, internal disciplinary process and criminal proceedings are distinct as held in Gladys Cheronu v Board of Trustees NSSF & others [2021] eKLR and the instant application should be dismissed.

Determination

14. The sole question is whether the court should stay these proceedings to allow the conclusion of Criminal Case No. E754 of 2021 – *R. v Vincent Micah Mbevi* the claimant herein and the respondent as the complainant.



15. The claimant filed his claim on 25 May 2023 on the grounds that his employment was terminated unfairly by the respondent where he was employed as the Chief Accountant. His claim is that he was not paid his terminal dues and he is claiming the following;
- a. Holiday pay;
 - b. Overtime pay;
 - c. Annual leave pay;
 - d. Withheld salaries;
 - e. Notice pay;
 - f. Compensation for unfair termination of employment;
 - g. Gratuity pay;
 - h. Certificate of service; and
 - i. Costs.
16. The respondent filed its response and under paragraph (4) pleads that employment terminated fairly after it was discovered that the claimant was involved in fraudulent activities in altering cheques contrary to Section 356(a) of the [Penal Code](#) and stealing by servant contrary to Section 28 of the [Penal Code](#). The matter was reported to the police and he was charged in MCCR E754 of 2021 which is pending.
17. Employment and labour relations dispute unlike other claims before superior courts are distinct. The court proceedings and procedure are regulated under a different and separate regime of rules of procedure. It is a specialized court. Under Section 3 of the [Employment and Labour Relations Court Act, 2011](#) the court is regulated under its key objectives, one being to hear and expedite hearing of dispute before it.
18. First, stay of proceedings is not an ordinary request to the court and should only issue rarely. In seeking to stay any court proceedings, a party must be aware that once a matter is filed in court by a party, such judicial action must be protected and the litigant allowed a fair chance to urge his case. To stop the proceedings so as to allow a respondent to first urge its case before a different forum, even where such forum is the appellate court, good justification must be given as held in [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR that;
- 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 proceeding is high and stringent.
19. A 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 proceeding is high and stringent.
20. An internal disciplinary process by an employer is distinct from the criminal process and does not bar an employer from instituting disciplinary proceedings against his employee. In criminal proceedings, parties cannot settle issues of misconduct if any, against an employee. These are regulated under the [Employment Act, 2007](#) which sets the parameters within which to issue notice and conduct a hearing.



This is unlike procedures under the Penal Code and the Criminal Procedure Code. See Geoffrey Kiragu Njogu v the Public Service Commission Civil Appeal No. 57 of 2014.

21. The Court of Appeal in the case of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR held that;

..... the employer/employee internal disciplinary process is distinct from any possible criminal proceedings against any employee even if these arise from the same set of facts; the institution of the latter is not a bar to the institution of the former and vice versa, even if the latter is resolved in favour of the employee, and lastly that it is risky for a court of law to purport to rewrite a contract of employment based on an employee's acquittal in a criminal prosecution as the employer has no supervisory role or control over the criminal proceedings; and also the standard of proof in criminal proceedings is totally different from that pertaining either in an internal disciplinary proceeding or a civil litigation in a court of law

22. Therefore, in addressing internal disciplinary matters in employment, the employer is not bound by the criminal process in exercise of internal disciplinary machinery which arises from the contract of employment.

23. The foundation of the claim herein being drawn from the employment contract, to stay these proceedings to allow the criminal proceedings lodged against the claimant will not meet justice.

24. Indeed, this court is not bound by decisions of the lower court even where such relates to criminal proceedings arising out of the employment relationship.

25. Accordingly, application dated 27 October 2023 is without merit and is hereby dismissed. Costs shall abide the outcome of the main claim.

DELIVERED IN OPEN COURT AT MALINDI THIS 2ND DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:-

Court Assistant: Nasra

..... and

