



Teachers Service Commission v Simatei (Employment and Labour Relations Appeal E031 of 2022) [2024] KEELRC 653 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 653 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E031 OF 2022
MA ONYANGO, J
MARCH 14, 2024**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

ABRAHAM K. SIMATEI RESPONDENT

RULING

1. The Appellant/Applicant herein filed a Memorandum of Appeal dated 29th June 2022 and filed on 15th July 2022. Contemporaneously, it filed a Notice of Motion dated 14th July 2022 in which it seeks orders that:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the appeal herein, the Honourable court be pleased to order stay of execution of the Ruling of Hon. Charles Kutwa (SPM) delivered on 15th June 2022 in Iten SPMCC No. E005 of 2022.
 - iv. Spent
 - v. Spent
 - vi. That the costs of this Application be provided for.
2. The application is supported by the affidavit of Jane Irambu, the Deputy Director of the Appellant in charge of Field Services sworn on 14th July 2022.
3. The background to the application is that on 15th June 2022 the trial court delivered its ruling in Iten SPMCC No. E005 of 2022 on the Appellant's Preliminary Objection dated 3rd March 2022 wherein



the preliminary objection was dismissed with costs. The Appellant was dissatisfied with the entire ruling and in exercise of its right of Appeal, filed the instant Appeal against the said ruling.

4. The Appellant contends that the appeal raises substantial and weighty issues of law with high probability of success as demonstrated in the Memorandum of Appeal; that in the event the ruling is enforced in its present form the Appellant is likely to suffer irreparable loss and damage in that the trial court will proceed to hear and determine the suit to the detriment of the Appellant.
5. It is the Appellant's further deposition that by virtue of section 21 of the [Teachers Service Commission Act](#) and Article 260 of [the Constitution](#), the Appellant is exempted from depositing security for costs under Order 42, Rule 8 of the Civil Procedure Rules as it is capable of satisfying the decree should the appeal be unsuccessful.
6. According to the Appellant, unless this application is heard and determined urgently, the intended appeal shall be rendered nugatory and purely an academic exercise.
7. The Respondent opposed the application and filed a Replying Affidavit sworn by himself on 9th September 2022. He contends that the Appeal herein emanated from the Ruling of trial court in Iten SPMCC No. E005 of 2022 and not Employment and Labour Relations case and that as such, this Court does not have jurisdiction to hear and determine this appeal.
8. It is the Respondent's case that the Appellant has annexed pleadings of Iten SPMCC Employment and Labour Relation Case No. E004 of 2021 with the sole intention of misleading this court; that the trial court in its ruling in SPM Civil case No. E005 of 2022 was very clear that the issues raised in Iten SPM Civil Case No. E005 of 2022 were distinct from those raised in Employment and Labour Relations case No. E004 of 2021.
9. The Respondent further avers that the Appellant has not satisfied any of the requirements of Order 42 Rule 6 of the Civil Procedures Rules to warrant the grant of the orders sought and further, that it has not demonstrated that it has an arguable appeal with chances of success.
10. It is the Respondent's contention that even if the issue as to whether the Appeal is arguable or not was to be the condition to be satisfied for grant of the orders sought, the Appellant has not demonstrated that the Appeal has any chances of success and raises legal issues for determination by this court. That as such, the application ought to fail with costs.
11. On 11th July 2023, the court directed that the application be canvassed by way of written submissions. The Appellant complied and duly filed its submissions. I have perused the court file and it is apparent that the Respondent did not file his submissions.
12. Order 42 rule 6 of the Civil Procedure Rules states as follows:

(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.

(1) No order for stay of execution shall be made under sub rule (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.”
- 13. The first issue that the court ought to determine is whether the instant application has been brought timeously. The ruling in this suit was delivered on 15th June 2022. The instant application was lodged on 14th July 2022. I therefore find that the application was filed without any undue delay.
- 14. The second issue that falls for determination is whether the court is satisfied on the basis of the material on the record that substantial loss would result from the execution of the ruling if the orders sought do not issue.
- 15. The Appellant in its submissions has averred that if the trial court’s decision and proceedings are not temporarily halted, it will incur losses as the trial court will continue with the hearing and resolution of SPMCC No. E005 of 2022 Abraham K. Simatei V Kenya Commercial Bank and Teachers Service Commission which situation would amount to double jeopardy for the Appellant.
- 16. It is the Appellant’s case that it has preferred an appeal which has a high chance of success and it is apprehensive it will suffer substantially if the proceedings in Iten Civil Case No. E005 of 2022 are not stayed.
- 17. The Appellant’s averments that it has an appeal with high chances of success must be viewed in the light of whether in its appeal, it has raised at least a single bona fide arguable ground as was held in the case of Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.
- 18. In William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR, a 5-judge Bench of the High Court, after reviewing our jurisprudence on the question of stay of proceedings, authoritatively laid down the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal to a higher Court over an interlocutory application. See: Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR; Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000); David Morton Silverstein v Atsango Chesoni [2002] eKLR: The court laid down the following six principles:
 - a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Appellant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Appellant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Appellant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;



- e. Fifth, the Appellant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Appellant must demonstrate that the application for stay was filed expeditiously and without delay.
19. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330 which states:

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...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 Appellant 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 this case.

20. From the principles enumerated above, it is evident that a stay of proceedings is a remedy that is only granted in very exceptional circumstances. Ringera J. while dealing with the subject in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)* observed that:

“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 a 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.”

21. Ngugi J (as he then was) *Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022)* stated that:

“As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a Magistrate's Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”



22. The Judge further observed:

“Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals are not entertained piecemeal.” (Walhaus & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D; S. v Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D.”

23. In the instant case, the Appellant has stated that its preliminary objection which was an objection to the suit being heard by the trial Magistrate on grounds that there is a similar suit pending before the same court and is therefore sub judice was dismissed. It has submitted that if the proceedings in the trial court are not halted it will incur losses of Kshs. 164,565.35 and that its appeal has high chances of success.

24. In my view the sum of Kshs. 164,565.35 does not constitute a colossal sum as submitted by the Appellant. To me the more compelling reason is the waste of judicial time that would result if the orders of stay of proceedings is not granted. There is also a possibility of the trial court making a finding in favour of the Respondent herein and this court making a finding in favour of the Appellant, a situation that would cause great embarrassment to the court.

25. It is this situation that I find to be sufficiently exceptional to justify the stay of proceedings in the Magistrate’s Court. It is imperative that this court is given time to determine the question if the decision of the trial court was justified and thus give a go-ahead for the suit to proceed in the same court or if there was an error in the ruling, or if termination of the proceedings in the trial court is warranted as prayed by the Appellant in its preliminary objection that is the subject of the ruling it has appealed against.

26. For these reasons I find merit in the application and grant the orders sought in the application dated 29th June 2022. I accordingly order that the proceedings in Iten SPMCC No. E005 of 2022 Abraham K. Simatei V Kenya Commercial Bank and Teachers Service Commission be and are hereby stayed pending the hearing and determination of the instant appeal.

27. The Appellant is directed to move with speed in fixing the appeal for hearing to ensure a determination is made in the shortest possible time.

28. Costs of the Application shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF MARCH 2024

MAUREEN ONYANGO

JUDGE

