



Kiarie v UAP Holdings Limited; Wanjui (Applicant) (Employment and Labour Relations Cause 1091 of 2018) [2024] KEELRC 560 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 560 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1091 OF 2018**

K OCHARO, J

MARCH 8, 2024

BETWEEN

DOMINIC KIARIE CLAIMANT

AND

UAP HOLDINGS LIMITED RESPONDENT

AND

DR. JOSEPH BARRAGE WANJUI APPLICANT

RULING

Introduction

1. Through his application dated 22nd January 2024, the proposed Witness/Applicant has sought that this court grant; him leave to appeal to the Court of Appeal against the order herein dated 18th December 2023 and the notice of stay of appeal dated 15th January 2024 be deemed duly filed; and stay of further proceedings in this matter, pending the intended appeal.
2. The application is premised on the grounds set forth on the face of it and the supporting affidavit sworn by Joseph Wanjui, the Applicant.
3. The application is resisted by the Claimant/Respondent through a replying affidavit filed herein.

The Application

4. The Applicant states that on 18th December 2023, this court dismissed his application to lift the witness summons that were issued against him dated 24th May 2023.



5. The Applicant states that he is aggrieved by the ruling of this court and desires to assail the same by way of an appeal to the Court of Appeal. Further, leave of this Court is a pre-requisite for the exercise of his right of appeal, as the order he intends to appeal against is not appealable as of right.
6. The Applicant contends further that unless the orders of stay of proceedings sought are given, the proceedings herein shall have progressed substantively before the intended appeal is heard. The appeal shall be rendered nugatory and an academic exercise, as a result.
7. The Applicant argues that the intended appeal raises grounds of appeal that merit judicial consideration. The Applicant should be given a chance to ventilate the same.

The Response

8. In response to the application, the Claimant/Respondent contends that the Applicant has failed to satisfy the conditions precedent for a grant of an order for stay of proceedings pending appeal as provided for under order 42 Rule 6(1) of the Civil Procedure Rules.
9. The Respondent further asserts that this court has no jurisdiction to entertain the application as presented by the Applicant as there is no valid notice of appeal filed in this matter. The one on record herein was out of time without leave of the court. The law (section 77 of the Court of Appeal Rules) requires that a Notice of Appeal be filed within 14 days after the date of the decision appealed against. The ruling herein, that the Applicant intends to appeal against was delivered on 18th December 2023. Therefore, the Notice of Appeal ought to have been filed on or before 1st January 2024. However, the Notice of Appeal was filed on the 16th of January 2024.
10. The fact that the Applicant has sought the leave of this court to file an appeal, is an acknowledgement that the Notice of Appeal filed on the 15th of January 2024 is invalid, and of no legal effect, having been filed without leave of the court.
11. The Claimant/Respondent holds that this is an application that should be struck out in limine, for lack of jurisdiction.
12. The Claimant/Respondent argues that an application for a stay of proceedings can only be allowed in law, in very deserving cases. This principle is anchored on the ground that a stay of proceedings impacts the right to expeditious trial.
13. This court should consider that; the Applicant is not a party to the proceedings. He is only but a witness who has been summoned by the Claimant, through an order of the court; his capacity disentitles him from moving the court to stay the proceedings in the manner he has sought; the Applicant has advanced no good grounds for the order sought which will have the impact of preventing this matter from going on; and the Applicant will not be prejudiced at all if this matter proceeds for further hearing as scheduled.
14. Lastly, the application herein has not been filed timeously.

The Applicant's submissions

15. The Applicant's submissions focused on three issues; whether the applicant's Notice of Appeal and the application for leave to appeal were filed out of time; whether the prayer for leave is merited; and whether an order of stay of proceedings ought to issue.
16. The Applicant submits that the Respondent's assertion that the Notice of Appeal and the application for leave were filed out of time is misplaced. The assertion ignores the clear provisions of Order 50 Rule



- 4 which provides for the computation of time during the period 21st day of December in any year and the 13th day of January the year next following. In the computation of time, both days included shall be omitted. No doubt, the Notice of Appeal was filed in time.
17. It is further submitted that section 75 of the *Civil Procedure Act* as read together with Order 43 Rules 1, 2 and 3 of the Civil Procedure Rules provides that orders other than those specified under Order 43 (1), shall not be appealed against as of right. The Applicant's application dated 24th May 2023, was made under order 14 of the Civil Procedure Rules, therefore, any order emanating therefrom could not be appealable as of right. The Applicant requires leave to appeal.
 18. It is further submitted that an application for leave to appeal will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration. To support this submission, reliance was placed on the case of J. P. Macharia t/a Macharia & Company -vs. Wangethi Mwangi & another (2002) eKLR. The draft memorandum of appeal demonstrates that the Applicant has an arguable appeal.
 19. It was further submitted that the principles underpinning an application for a stay of proceedings are settled. They were elaborately brought out in the Court of Appeal decision in David Morton Silverstone vs. Otsango Chesoni (2002) eKLR, thus:

“It is trite law that an Applicant under Rule 5 (2) (b) must satisfy the court that;

 - (i) his intended appeal is an arguable one or, put another way, the intended appeal is not frivolous;
 - (ii) unless the court grants an order of stay to him, his intended appeal, if successful, will be rendered nugatory, (see also decision in Global Tours & Travels cited in Gichuhi Macharia & Another vs. Kiai Mbaki & 2 others (2016) eKLR.”
 20. If the order of stay of proceedings is not issued, the Applicant shall be prejudiced by the witness summons issued on 18th March 2024. He faces the risk of arrest for contempt of court proceedings, despite his inability to honour summons. It is trite law that a court ought not to issue orders which are impractical or impossible to obey. To buttress these submissions, the decision of the Court of Appeal in Alfred Sagero Omweri vs. Kennedy Omweri Ondieki [2010] eKLR was cited.
 21. Lastly, it is submitted that if the proceedings are stayed to allow the Applicant to prosecute the appeal, no prejudice will be suffered by the Claimant. A slight delay in the prosecution of this case cannot be compared and comparable to a violation of one's right to liberty.

Claimant's Submissions

22. The Claimant/Respondent submitted that under the provisions of Rule 77 of the Court of Appeal Rules, a party desiring to assail a judgment or order by way of an appeal to the Court of Appeal, must lodge a Notice of Appeal within 14 days after the date of the decision appealed against.
23. The impugned ruling was delivered by this court on the 18th of December 2023. Consequently, under the provision of rule 77 of the Court of Appeal Rules, the Applicant was required to file his Notice of Appeal on or before the 1st of January 2024.
24. The Notice of Appeal was filed on the 16th of January 2024, out of time, therefore, without an order of enlargement of time from the court. The notice is therefore incompetent and cannot be the basis for an application for a stay of proceedings pending an intended appeal.



25. It was further submitted that a grant of stay of proceedings is a rare and radical remedy which is provided for under Order 42 rule 6(1) of the Civil Procedure Rules. An Order of stay of proceedings is only grantable where the party seeking the same has established (i) that it has an arguable appeal with high chances of success and (ii) that if the stay of proceedings is not granted, the Appeal will be rendered nugatory. To buttress this point reliance was placed on the decision in *Peter Kariuki Mburu & Another vs. Neema Shah (2021) eklr*.
26. The Claimant/Respondent contended that the Applicant has not established the four conditions for the reasons;
- i. The Applicant does not have the requisite legal standing to seek for a stay of proceedings as he is not a party to the suit. The only avenue he had if dissatisfied with the orders of the court was to seek to suspend/stay the witness summons pending the intended appeal. Fatally, he made no such application to the court.
 - ii. He has done nothing more than purposefully state ambiguously that he is old and medically unfit to testify, failing to explain how the two circumstances impact his memory and ability to communicate. Moreover, no document or comprehensive report has been tendered in evidence to support his assertions.
 - iii. Technological advancement in the court system has allowed witnesses to testify virtually, making it unreasonable for the Applicant to object to the court's order to testify in the current situation even without physically appearing in court.
 - iv. The application for stay of proceedings pending an intended appeal pre-supposes that there is a valid appeal pending for determination. The Notice of Appeal having been incompetently filed, there is no appeal against the impugned ruling. The application for a stay of proceedings, therefore, lacks a foundation.
27. The test for a stay of proceedings is high and stringent as it impinges on the right to access justice, the right to be heard without delay and the overall right to a fair trial. To support this point, reliance was placed on the case of *Kenya Wildlife Services vs. Jumez Mutembei (2019) eklr*.
28. The Claimant argued further that the Applicant was undeserving of the order of leave to appeal to the Court of Appeal. He did not have an automatic right of appeal under Order 43(1) of the Civil Procedure Rules as read with Section 75 of the *Civil Procedure Act* against the ruling of this court of 18th December 2023.
29. The Applicant was obligated under the provisions of Order 43 of Rule (1) (3) of the Civil Procedure Rules to make an application either orally at the time the decision was being rendered or within 14 days of the date of the decision/order. The Applicant did not make an oral application. Therefore, he was obliged to file an application on or before the 1st of January 2024. The application was filed on the 23rd of January 2024, out of time and without enlargement of time by the court.
30. Lastly, the Claimant/Respondent argues that leave should have been obtained first before the Notice of Appeal was filed. There is no evidence of whether the Applicant obtained the pre-requisite leave to appeal as provided under order 43 Rule 1 sub-rules 2 and 3 of the Civil Procedure Rules and section 75 of the *Civil Procedure Act*.
31. The application should be dismissed.



Analysis and determination

32. I have carefully considered the material placed before this court by the parties, and the following issues emerge for determination;
- a. Whether the Applicant's application dated 22nd January 2024 is competently filed.
 - b. If the answer to (a) above is in the affirmative, is the Applicant deserving of the order for leave to appeal against this court's order of 18th December, 2023.
 - c. Whether the order sought for stay of proceedings pending appeal can be granted.

a). Whether the application herein is competently filed

33. The Claimant/Respondent contended that the application herein is incompetently filed. I have carefully considered the reasons advanced by him and conclude that I am not persuaded that it is. The Claimant seems to have failed to distinguish between two jurisdictions of this court, the jurisdiction to be approached for leave to appeal against an order that is not applicable as of right under section 75 of the *Civil Procedure Act* as read with Order 43 of the Civil Procedure Rules, and the jurisdiction for enlargement of time to appeal to the Court of Appeal.
34. It is clear that the Claimant/Respondent dealt with the instant application as though it was an application for leave to file an appeal out of time to the Court of Appeal against the ruling of this court. It is only towards the tail end of his application that he briefly addressed the application as though he had realized its true character.
35. The Claimant/Applicant submitted that under the provisions of Order 43 Rule 1 (3) of the Civil Procedure Rules, an application for leave to file an appeal against an order that is not applicable as of right ought to be made orally at the time the decision is being rendered or within 14 days of the date of the decision. The instant application was filed on 23rd January 2024, a period of thirty-six (36) days after the decision sought to be impugned was rendered.
36. There is no dispute that the order that flowed from this court's ruling of 18th December 2023, was in nature one not appealable of right as contemplated under section 75 of the *Civil Procedure Act* as read together with Order 43 of the Civil Procedure Rules. Therefore, leave of this Court is a pre-condition to the exercise of a right of appeal to the Court of Appeal.

Order 43 of Rule 1(3) of the Civil Procedure Rules provide;

“An application for leave to appeal under section 75 of the Act, shall in the 1st instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within 14 days from the date of such order.”

37. It is common cause that the application for leave was not made orally on the 18th of December 2023. At this point, it then becomes this court's duty to consider whether, the formal application herein was filed within time, and is merited.
38. Considering the time of the year when the ruling of this court was delivered, one cannot correctly compute the time for filing of an application for leave to appeal against the order emanating therefrom, in ignorance of the stipulations of Order 50 rule 4 of the Civil Procedure Rules, which reads;

“when time does not run (Order 50, Rule 4)



Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included shall be omitted from any computation of time (whether under these rules or any order of the court) for amending, delivering or filing of any pleading or doing any other act; provided that this rule shall not apply to any application in respect of a temporary injunction.”

No doubt, the Claimant/Respondent did not consider this provision, hence the argument, that the application is incompetent as it was filed out of time.

39. Considering the provisions of Order 50 (4) of the Civil Procedure Rules, the application was filed within time. Therefore, it is competent before the court.

(b) If the answer to (a) above is in the affirmative, is the Claimant deserving of the order for leave to appeal against this court’s order of 18th December, 2023?

40. No doubt, for appeals against those orders not mentioned under Section 75 of the *Civil Procedure Act* as read with Order 43 of the Civil Procedure Rules, the right to appeal against them is not absolute and leave to appeal is a condition for the exercise of the right to appeal. As such, the requirement of leave to appeal is a jurisdictional prerequisite for hearing an appeal, the object of which in my view, is to protect courts exercising appellate jurisdiction from baseless appeals.
41. However, neither the Act nor the Rules have set up the conditions considerable in an application to appeal against an order that is not applicable as of right. Therefore, in this court’s view, that the court’s authority to grant an application for leave under section 75 of the *Civil Procedure Act* as read with Order 43 of the Civil Procedure Rules is discretionary. However, discretion must be exercised judiciously, not whimsically or capriciously. The demands of the justice of each case shall influence how the discretion shall be exercised.
42. However, I must say that in constitutional democracy as is ours, in considering an application for leave to appeal, the consideration must be in right of the provisions of *the Constitution*. In particular, Article 20(4) of *the Constitution* enjoins the courts, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom and, when interpreting the Bill of Rights adopt an interpretation that most favours the enforcement of a right or fundamental freedom.
43. Article 50 of *the Constitution* of Kenya, 2010 generally entrenches the right to a fair hearing. Article 50(1) bestows upon every person a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before the court. Or, if appropriate, another independent and impartial tribunal or body. In my view, the right contemplated under this sub-article includes the right to pursue resolution of a dispute to the highest forum possible, without impediments not unless there are serious compelling reasons for the impediment.
44. Considering that the order sought to be challenged emanates from the ruling of this court, I can only say in a few words that the application for leave to appeal is hereby allowed on the singular ground, promotion of his right to a fair hearing.

d. whether the order sought of stay of proceedings pending appeal can be granted.

45. I have carefully considered the circumstances of this matter, inclusive those under which the impugned ruling was given, and firmly state that the only proper application that the Applicant could have made for consideration was one for a stay of the orders herein in favour of the issuance of witness summons



against him. If there is any prejudicial impact that can flow against him, it shall be from the order, not the entire proceedings in this matter. It is the order that was specifically personal to the Applicant. As a result, the prayer for a stay of proceedings cannot be availed to the Applicant.

46. In the upshot;

- a. Leave to appeal against the ruling of this court is granted to the Applicant.
- b. I find no merit in the application for a stay of proceedings in this matter. The prayer of stay of proceedings is declined.

47. Consequently, this matter shall proceed on 18th March, 2024 as slated.

READ, DELIVERED AND SIGNED THIS 8th DAY OF MARCH, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Ms Kirimi for Respondent

Ms Cheptoo holding brief for Mr. Muthi for the Applicant

Mr. Nyaribo for Claimant

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

