



**Wachira v Proshade Kenya Limited (Cause E885 of 2021)
[2024] KEELRC 1078 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1078 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E885 OF 2021
NZIOKI WA MAKAU, J
APRIL 4, 2024**

BETWEEN

FAHAD KENNEDY WACHIRA CLAIMANT

AND

PROSHADE KENYA LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 26th February 2024 seeking for Orders that this Honourable Court be pleased to grant leave to the Respondent to cross-examine the Claimant. That in the alternative, the Court be pleased to stay the proceedings in this matter pending hearing and determination of both this Application and the intended Appeal against the Ruling delivered on 6th February 2024. The Applicant further sought that costs of this Application be provided for.
2. The Application was based on the grounds set out therein and supported by the Affidavit of Mr. Lemi Mwendar, who averred that the Respondent denied the authenticity of the facts alleged in the Statement of Claim and wishes to draw the attention of this Court to the same before Judgment is delivered in the matter. He stated that the Respondent has a right to defend itself and have a suit determined on merit in any judicial proceedings as guaranteed under *the Constitution* of Kenya. That allowing the Respondent to cross-examine the Claimant will enable the Court effectively determine the issues between the parties, while denying the Respondent that opportunity will be in breach of the Rules of Natural Justice. Mr. Mwendar further stated that the Respondent has filed a Notice of Appeal dated 8th February 2024 and the appeal has a high probability of success and that it is in the interest of justice that this Application is allowed.
3. In response to the Application herein, the Claimant/Respondent filed a Preliminary Objection dated 1st March 2024 asserting that the Respondent's Application is res judicata as some of Orders sought and issues raised therein are similar in nature to the Application dated 27th November 2023, which



this Court already determined vide the Ruling of 6th February 2024. The Claimant argued that the current Application is a gross abuse of the process of the Court and ought to be struck out in limine under the Court's inherent jurisdiction as preserved under section 3A of the *Civil Procedure Act*. He argued that additionally, the current Application is a disguised appeal against this Court's Ruling of 6th February 2024.

4. The Claimant/Respondent also swore a Replying Affidavit averring that the Application herein is a ploy to unjustifiably delay and/or forestall the determination of the suit. That this Court while dismissing the said Respondent's Application dated 27th November 2023, gave a well-reasoned decision on 6th February 2024 that is yet to be set aside or quashed. He stated that the Respondent has formed a habit of filing applications on the brink of the date of judgment in an effort to delay the determination of the suit. That this Court, in exercising its discretion, ought to look at the conduct of the Respondent from the moment it was notified of the existence of this suit to the date of filing the instant Application. That it should be noted that there has been unreasonable delay in the filing of the Application and the Applicant has been availed sufficient concessions since it was initially served with pleadings on 1st December 2021. The Claimant further averred that the general practice is that a stay of proceedings should not be imposed unless the proceedings ought not be allowed to continue beyond reasonable doubt. He also noted that the Respondent had not attached the purported notice of appeal and has not demonstrated on a prima facie basis that the intended appeal has merit and is arguable. That the Respondent has also not shown that the appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given and has further not shown why the stay has not been sought in the higher Court where the alleged appeal is preferred. That the Respondent has not submitted what damages it would suffer, if any, that would not be compensated by an award of damages if the stay orders are not granted vis-à-vis staying the proceedings to await the hearing and determination of the intended Appeal. It was the Claimant's stance that he is being gravely prejudiced by the Respondent/Applicant and there is need to balance the rights of both parties in dispensing with justice.
5. Respondent/Applicant's Submissions
Counsel for the Respondent/Applicant submitted that the Respondent is keen on cross-examining the Claimant before judgment is given and that the issue was neither raised in their earlier application nor discussed in the Ruling of 6th February 2024. She argued that the right to cross-examine is not just a right to be heard and goes a little bit further, it is the right to confront your case and it is a question of evidence. Counsel relied on the words of Havelock J. in the case of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & another* [2014] eKLR while citing sections 145 and 146 of the *Evidence Act*, that a witness who testifies may be questioned and that the same goes to the root of trial. Counsel further submitted that it is not too late to question the Claimant or the evidence presented to Court and that any prejudice the Claimant could suffer with the cross-examination can be met through an award of costs. She argued that the Court is efficient and the cross-exam can be conducted without undue delay before the Court gives its judgment.
6. Counsel for the Applicant further submitted that there is a clear distinction between entering a defence to calling witnesses in support of defence, and cross examining the party and that the fact the matter proceeded by formal proof does not preclude cross-examination. That in a criminal trial, the accused is given the right to cross-examine and that the *Evidence Act*, in recognition of the cardinal right to cross-examine, does not distinguish the trials in both Civil and Criminal.
7. Claimant/Respondent's Submissions



Counsel for the Claimant/Respondent submitted that the Application herein and the prayer to be allowed to cross-examine are res judicata as under section 7 of the *Civil Procedure Act*. That seeking to be allowed to cross-examine is tantamount to seeking orders to reopen the case and set aside the interlocutory judgment, which the Applicant had already sought in its application in November 2023. That this Court delivered a Ruling in February 2024 wherein it dismissed the application after specifically stating that the Respondent deliberately failed to participate. She argued that re-opening the case and cross-examination of the Claimant was substantially in issue and that the Respondent has just changed the wording in their current Application. On this submission, they relied on the case of *Chumba v Wells Fargo Limited (Cause E171 of 2023)* [2023] KEELRC 1874 (KLR) in which the Court cited the case of *William Koross v Hezekiah Kiptoo Komen & others* [2015] eKLR and stated that there has to be finality and litigation must come to an end. They also referred the Court to the case of *Muthuri v City Gas Limited (Civil Appeal E074 of 2020)* [2022] KEHC 65 (KLR) in which it was held that there has to be swift, sure and certain justice as without that, there will be no justice. As to whether this Court should grant the orders for stay of proceedings, Counsel for the Claimant submitted that the Court should be guided by the provisions of Order 42, rule 6 of the Civil Procedure Rules. She maintained that the Applicant had not indicated the substantial loss that would occur to it if the Court proceeds to render judgment in the matter. On the Applicant's failure to file a draft memo of appeal, Counsel referred to the case of *Mocha Hotel Ltd v Kwanza Estates Ltd (Environment & Land Case 14 of 2022)* [2023] KEELC 21729 (KLR) in which the Court stated that stay of proceedings is a drastic order and needs to be given sparingly in exceptional circumstances as it restricts a right of party to be heard. That stay is a discretionary prayer and the Court should consider if it will be in the interest of justice to grant it and under what terms it should be granted. She further submitted that the Applicant has not availed the reason for the stay and that the Motion of 26th February 2024 should thus be dismissed with costs to the Claimant.

8. The matter is one that has given the Court pause. The Supreme Court of India made the following determination in the case of *Modula India v Kamakshya Singh Deo* [AIR 1989 SUPREME COURT 162, (1988) 4 JT 214 (SC)]

The basic principle that where a plaintiff comes to court he must prove his case should not be whittled down even in a case where no defendant appears. [357E]. The defendant should be allowed his right of cross-examination and arguments. This right should be subject to certain important safeguards. [357H; 358A]

First, the defendant cannot be allowed to lead his own evidence. [358A]

Secondly, if cross-examination is permitted of the plaintiff's witnesses by the defendant whose defence is struck off, procedural chaos may result unless great care is exercised and it may be very difficult to keep the cross-examination within limits. But this is a difficulty of procedure rather than substance. It is a matter to be sorted out in practical application rather than by laying down a hard and fast rule of exclusion. [358B-D]

Thirdly, the latitude that may be extended by the Court to the defendant in spite of his not having filed a written statement should not cause prejudice to the plaintiff. The Court should ensure that by permitting the defendant at a later stage either to cross-examine the witnesses or participate in the proceeding, the plaintiff is not taken by surprise or gravely prejudiced; there is a wide discretion with the court and it is open to the court where it believes that the plaintiff has been misled, to exercise its discretion to shut out cross-examination or regulate it in such manner as to avoid any real prejudice to the interests of plaintiff. [358E; F-G]



Even in a case where the defence against delivery of possession of a tenant is struck off under section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled to (a) cross-examine the plaintiff's witnesses, and (b) address argument on the basis of the plaintiff's case. The defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses. [359G-H; 360B-C]

9. The Court discerns that there is a limited purview within which a Respondent such as the one before the court can be permitted to cross-examine the plaintiff in a case or his witnesses but strictly confined to demonstration of the falsity of the claim and NOT the presentation of evidence by the defendant. In this case, the Court has heard the Respondent and will now proceed to give a hearing date after this Ruling.

It is so ordered.

Dated and delivered at Nairobi this 4th day of April 2024

Nzioki wa Makau

JUDGE

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