



REPUBLIC OF KENYA



**Teachers Service Commission v Obi (Employment and Labour Relations  
Appeal E001 of 2024) [2024] KEELRC 838 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 838 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2024**

**DN NDERITU, J**

**APRIL 5, 2024**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**BARRY MOTARI OBI ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a notice of motion dated 22<sup>nd</sup> January, 2024 (the application) the appellant, a constitutional commission (the Commission), is seeking for the following orders –
  1. Spent
  2. Spent
  3. That the Honourable Court be pleased to order stay of proceedings in Kericho CMEL No. 15 of 2022 pending the hearing and determination of the Appeal.
  4. That the file and record of all proceedings in respect of Kericho CMEL No. 15 of 2022 be moved to this court to aid in the determination of the appeal.
  5. That the costs of this application be provided for.
2. The application is expressed to be brought under Article 159 of the *Constitution*, Sections 3A, 75, 78, & 79G of the *Civil Procedure Act*, and Order 42 Rule 6(1) & 8 of the *Civil Procedure Rules*. It is based on the grounds on the face of it.
3. The application is supported with the affidavit of Evaleen Mitei, the in-charge of the teacher discipline management in the Commission, sworn on even date with several annexures thereto.



4. In opposition to the application the respondent filed a replying affidavit sworn by himself on 16<sup>th</sup> February, 2024.
5. On 29<sup>th</sup> January, 2024, when the matter came up in court for directions, the court issued interim orders staying proceedings in Kericho CMCC ELRC No. 15 of 2022 between the parties herein pending the inter partes hearing and determination of the application. It was also directed that the application be canvassed by way of written submissions.
6. Counsel for the appellant filed written submissions on 21<sup>st</sup> February, 2024. The respondent, acting in person, filed his submissions on 20<sup>th</sup> February, 2024, and supplementary submissions, without the leave of the court, on 21<sup>st</sup> February, 2024.

## II. Evidence – Affidavits

7. In the supporting affidavit the deponent deposes that after the ruling by the lower court 13<sup>th</sup> December, 2023, the appellant lodged an appeal against the same vide a memorandum of appeal dated 10<sup>th</sup> January, 2024 filed in court on 23<sup>rd</sup> January, 2024 raising 12 grounds of appeal and praying that –
  - a. This appeal is allowed with costs;
  - b. The Ruling of Hon. F.M. Nyakundi in Kericho CMEL No. E015 of 2022 made on 13<sup>th</sup> December, 2023 expunging the Appellant’s minutes dated 9/2/2018 and the substituted witness statement of Doris Oyoo be set aside and the said documents be allowed as part in of the Appellant’s record.
  - c. Substitution of Order dated 13<sup>th</sup> December, 2023 with an Order dismissing the Respondent’s Application dated 6<sup>th</sup> November, 2023 with costs.
  - d. The matter to proceed to full hearing before any other Court other than Hon. F.M. Nyakundi.
8. It is deposed that by expunging from the record the appellant’s minutes of a disciplinary meeting dated 9<sup>th</sup> February, 2018 and a witness statement by one Doris Oyoo, the court effectively denied the appellant a right to fair hearing and due process as enshrined in the various provisions of the Constitution and statutes.
9. It is deposed that the striking out and expulsion of the said intended exhibit and witness statement shall highly prejudice the appellant’s case and as such it shall not receive justice.
10. It is disposed that the draconian action by the trial lower court was premature as it ought to have waited for the legal suitability and validity of the said intended exhibit to be tested during the hearing and in the cross-examination of whoever may be called as a witness to produce the same.
11. In the replying affidavit the respondent deposes that the intended appeal is a non-starter as the appellant did not file a defence to the claim in the lower court. It is deposed that the appellant is seeking to have the lower court matter moved to this court through the back-door.

## III. Submissions

12. Miss Manyasa for the appellant submits that the application seeks for stay of proceedings as opposed to a stay of execution. Counsel has cited Kenya Power & Lighting Company Ltd v Esther Wanjiru Wokabi (2014) eKLR stating that the appellant has a *prima facie* case as contained in the memorandum of appeal, that the application herein has been filed expeditiously, and that in the entire circumstances



and evidence in support of the application it is fair and in the interest of justice that the application be allowed.

13. Further, counsel has relied on *Kenya Medical Lab Technicians & Technologists Board V Prime Communications Limited* (2014) eKLR in support of the argument that the appeal herein is arguable and raises triable issues. It is submitted that the appeal raises fundamental issues of denial of the right to hearing to appellant by the lower trial court striking out and expunging from record evidence at an interlocutory stage without allowing the appellant to have the same produced and explained by a witness. It is submitted that the action by the trial court in essence violated and breached Articles 27(1) and 47 of the *Constitution*.
14. It is further submitted that if stay of the proceedings is not allowed the appeal shall be rendered nugatory as the evidence that the appellant is seeking to rely on in the trial shall be locked out. It is submitted that such denial of the application shall render the appeal merely academic.
15. Further, it is submitted that the appeal and the application were filed expeditiously. The ruling was delivered 13<sup>th</sup> December, 2023, the memorandum of appeal filed on 12<sup>th</sup> January, 2024, and the application filed on 22<sup>nd</sup> January, 2024.
16. Counsel has clarified that the prayer for the lower trial court to be availed to this court was only intended to give this court an opportunity to peruse the record thereof and not for this court to hear the cause pending in the lower court.
17. On the other hand, the respondent submits, and erroneously so, that the appellant is seeking to have the cause transferred from the lower court to this court for hearing and disposal. That is certainly not the order that the applicant is seeking and the court need not spend time dwelling on the same as the issue is clarified in the application and also in the submissions by the applicant's counsel.
18. On the issue of stay of proceedings in the lower court, the respondent submits that the cause has been pending in court since 2022 and the subject matter since 2018 and that any further delay or stay of the proceedings will greatly prejudice him. Citing *Kenya Wildlife Service v James Mutembei* (2019) eKLR the respondent argues that stay of proceedings is a very draconian action that may only be allowed in very special circumstances as it affects the right of access to justice and fair trial.
19. As noted elsewhere in this ruling, the respondent filed supplementary submissions without leave of the court. It is submitted, and wrongly so, that the appellant is seeking leave in the submissions by counsel to rely on the supporting affidavit to the application. In my view the respondent has completely misapprehended the import and the context of the submissions by appellant's counsel in that regard as the supporting affidavit is properly on record as filed alongside the application and in support thereof.
20. The second issue raised in the supplementary submissions is that there is no certified copy of the order appealed on record and as such the appeal is bad in law. It is submitted that there is no proper appeal for lack of the record of appeal.
21. The respondent urges the court not to grant the application and to allow expeditious hearing and disposal of the trial in the lower court by not issuing stay of the proceedings therein.

#### **IV. Analysis & Determination**

22. As far as this court understands the import and the context of the application, the appellant is seeking stay of proceedings in the lower trial court, pending the hearing and determination of the appeal. The appellant is aggrieved by the decision of the lower trial court in expunging a document, minutes of



- disciplinary hearing, and a witness statement. It is the appellant's position that such draconian action shall deny it the right of access to justice and fair hearing.
23. The court has carefully and dutifully gone through the ruling by the trial lower court dated 13<sup>th</sup> December, 2023. It is true that an exhibit intended to be used by the appellant in the trial was expunged from record before commencement of the hearing. The witness statement by one Doris Oyoo was also expunged alongside a supplementary list of documents as the same had been filed without leave of the court.
  24. At this stage in considering the application herein, the court is mindful not to engage into evaluating the merits and demerits of the appeal. However, the court notes that the learned trial magistrate expunged a witness statement and a list of documents for the lawful reason that they had been filed without leave of the court or by consent of the parties. In my view, instead of filing an appeal in that regard the appellant ought to have sought the requisite leave to file or replace the expunged documents on record and thereafter, depending on the outcome of the application for leave, take the appropriate action.
  25. However, the appellant raises a very fundamental issue of the right to access justice and fair hearing. It is the appellant's case that the trial lower court took a very draconian action in expunging the impugned minutes of a disciplinary hearing allegedly held on 9<sup>th</sup> February, 2018. The reasoning was that the 3<sup>rd</sup> respondent had disowned the said minutes and as such the trial court held that the same were fraudulent.
  26. Without prejudging the appeal, it is my view that the trial court ought to have waited for the impugned minutes to be introduced during the trial and determine on the evidential and probative value of the same and the legal competency of whoever purported to introduce and produce the same during the trial.
  27. In the foregoing circumstances, it is my view, and I so hold, that the appellant has demonstrated an arguable appeal in regard to the expulsion of the impugned minutes of the disciplinary hearing. Of course, the appellant has a right as well to press its appeal on the other issues in regard to the expunged witness statement and the documents.
  28. The subject matter of the appeal is about fundamental constitutional right of access to justice and fair hearing. It is only fair that the appeal be heard expeditiously for determination of those issues.
  29. There is no debate that the appeal and the application were filed expeditiously as per the timelines alluded to in an earlier part of this ruling. There is also a high likelihood that if the stay is not granted the appellant may suffer serious prejudice from the exclusion of the expunged documents and witness statements in the trial.
  30. Of course, the court has to be mindful of the rights of the respondent to an expeditious hearing and determination of his cause in the lower court. But in my view, the appeal shall be rendered nugatory if the trial is allowed to proceed without the above issue being resolved in the appeal.
  31. Striking out a pleading, a witness statement, or a document is a very draconian action that should only be taken as a last resort and only in the clearest of cases where the pleading or the document is in clear violation of the rules and procedures or process of the court. In the ruling, the trial court took the view that the impugned minutes were fraudulent as the 3<sup>rd</sup> respondent had allegedly disowned them and having allowed the 3<sup>rd</sup> respondent to exit the proceedings there was no way for the minutes to be produced as an exhibit.



32. In the circumstances, and for all the foregoing, the court takes the view that the proceedings in the lower trial court should be temporarily halted for this appeal to be quickly heard and determined. To avoid prejudice to the respondent by way of prolonged delay in the hearing and disposal of the cause pending in the lower court, the court shall issue guidelines and timelines on the hearing and disposal of the appeal as hereunder.
33. The net effect is that the court is persuaded to stay the proceedings in Kericho CMCC ELRC No. 15 of 2022 pending the hearing and determination of the appeal herein.
34. For avoidance of doubt, the application herein is not seeking for the transfer of the said cause to this court and the submissions by the respondent in that regard is clearly misconceived. The prayer for the lower court file to be brought to this court was only intended to give this court an opportunity to peruse the same in aid of writing this ruling.

#### **V. Orders**

35. The court thus issues the following orders –
  - a. An order be and is hereby issued conditionally staying the proceedings in Kericho CMCC ELRC No. 15 of 2022 pending the hearing and determination of the appeal herein.
  - b. To facilitate an expeditious and timely disposal of the appeal the appellant be and is hereby ordered and directed to file and serve a record of appeal within 30 days of this ruling.
  - c. In default of (b) above the stay shall automatically lapse.
  - d. This matter shall be mentioned on 24<sup>th</sup> June, 2024 for directions on the hearing and disposal of the appeal.
  - e. The costs of the application shall be in the appeal.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

