



Karanja & another (t/a Mirugi Kariuki & Co. Advocates) v Kabue (Civil Appeal E009 of 2024) [2024] KEELRC 2000 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2000 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CIVIL APPEAL E009 OF 2024
DN NDERITU, J
JULY 31, 2024**

BETWEEN

LAWRENCE MACHARIA KARANJA 1ST APPELLANT

HARRISON KAHIGA WAITINDI 2ND APPELLANT

T/A MIRUGI KARIUKI & CO. ADVOCATES

AND

SAMUEL NJOROGE KABUE RESPONDENT

RULING

I. Introduction

1. The appellants in this appeal are the respondents and the respondent herein is the claimant in Nakuru CM ELRC No. E160 of 2023. In that cause the respondent herein, a former employee of the appellants, is seeking for compensation for purported wrongful and unlawful termination of employment, among other reliefs.
2. The circumstances leading to this appeal are that on 6th February, 2024 when the above cause came up for hearing in the lower trial court the appellants sought for leave to file witness statements and a list and bundle of copies of the listed documents out of time. The trial court denied that request and fixed the matter for hearing on 19th March, 2024.
3. The appellants were dissatisfied with that ruling of the court above and filed this appeal raising several grounds of appeal and seeking that the order of the trial court, allegedly denying the appellants an opportunity to file witness statements and documents out of time, be overturned.
4. In the meantime, alongside the memorandum of appeal, the appellants filed a notice of motion dated 23rd February, 2024 (the application) under a certificate of urgency seeking for the following orders –



1. Spent
2. Spent
3. That pending hearing and determination of this appeal there be stay of proceedings in Nakuru Cm Elrc No. E0160 Of 2023 Samuel Njoroge Kabue -vs- Lawrence Macharia Karanja And Harrison Kahiga Waitindi T/a Mirugi Kariuki & Associates.
4. That costs of this application be provided for.
5. The application is based on the grounds on the face of it and supported with the affidavit of Lawrence Macharia Karanja sworn on even date with several annexures thereto.
6. In response to the application the respondent filed a replying affidavit sworn by himself on 4th March, 2024.
7. On 23rd February, 2024 the court issued a temporary stay of proceedings in Nakuru CM ELRC No. 160 of 2023 pending the hearing and determination of the application.
8. On 6th March, 2024 it was by consent directed that the application be canvassed by way of written submissions. Mr. Kibet for the appellants filed written submissions on 21st March, 2024 and Mr. Ndung'u for the respondent filed on 2nd April, 2024.

II. Evidence

9. In the supporting affidavit it is deposed that the respondent is a former employee of the appellants. It is deposed that after he left the employment of the appellants, the respondent filed the cause in the lower court alluded to above seeking various reliefs. The appellants entered appearance and filed a defence in that cause but as at the time when the cause came up in court for hearing on 6th February, 2024 the appellants had not filed witness statement(s) and documents that they wished to rely on during the trial and as such an application was made for leave to file the same out of time.
10. While the court agreed to adjourning the hearing of the cause, the appellants were denied leave to file witness statement(s) and the documents as sought. Further, the lower trial court ordered the appellants to pay costs of Kshs15,000/= before the next hearing date which was given as 19th March, 2024.
11. It is deposed that other allegations were made against the appellants including alleged interference or tampering with the court file. It is deposed that without any hesitation, the lower trial court agreed with the respondent and ordered that the court file be stored in the strong-room.
12. It is deposed that the trial court has exhibited open bias against the appellants to the extent of insinuating professional misconduct and as such the appellants are apprehensive that they may not get justice in the lower trial court and hence the application herein and the prayers in the memorandum of appeal.
13. In the replying affidavit by the respondent it is deposed that at no point was it insinuated that the appellants had engaged in professional misconduct. It is deposed that the respondent made an application that the lower trial court file be placed in strong-room after the file could not be traced in the registry when the respondent wished to peruse or file documents. However, it is deposed that this is not one of the issues for determination in the appeal or even in the instant application.
14. It is deposed that the appellant failed to file witness statement(s) and documents within the time allowed without giving any valid reasons and as such the lower trial court denied their application to file



the same out of time. It is further deposed that if the appellants feel that the lower trial court is biased, the application for recusal should be made in that court and not by way of an appeal to this court.

15. It is deposed that the failure by the appellants to file the witness statement(s) and the documents within the time allowed in law and the subsequent application to file the same out of time are deliberate and desperate attempts by the appellants at delaying the hearing and determination of the cause in the lower court. Likewise, it is deposed that the application herein and the appeal are steps in furtherance of the delay in the hearing and determination of the trial in the lower court.
16. It is deposed that the appellants intend to render the respondent unemployable for as long as it takes having denied him a certificate of service after rendering services to the appellants for over six years. It is deposed that an order for stay of proceedings shall greatly prejudice the respondent amounting to denying him his right to access justice.

III. Submissions By Counsel

17. On the one hand, counsel for the appellants identified the issues for trial and determination in this application as follows – Whether the appellants have an arguable appeal; Whether it is in the interest of justice that this court does grant an order for stay of proceedings in Nakuru CM ELRC No. E160 of 2023; and, Whether the application has been brought expeditiously.
18. On the first issue it is submitted that the crux and gist of the application is the refusal by the lower trial court to allow the appellants to file their witness statement(s) and documents out of time. Counsel has cited Ringera J (as he then was) in *Re Global Tours & Travel Ltd HCWC No. 43 of 2000* wherein the Learned Judge opined that stay of proceedings is a discretionary remedy that the court should take seriously considering such factors as need for expeditious disposal of matters, prima facie merits of the appeal, whether the appeal is arguable, optimum utilization of judicial time, and whether the application has been brought expeditiously.
19. It is submitted that by denying the appellants an opportunity to file witness statement(s) and documents the trial lower court denied the appellants a hearing without the opportunity of providing and adducing their evidence. It is submitted that in those circumstances, the hearing shall be one-sided and if the stay is not ordered pending the hearing and determination of the appeal, and the appeal ultimately succeeds, the proceedings in the hearing shall be rendered futile. Likewise, it is submitted that if the stay is denied the appeal shall be rendered nugatory and merely academic. Counsel has cited *Wachira Waruru & Another V Francis Oyatsi (2002) 2 EA 664* in supporting that proposition.
20. It is further submitted that by denying the appellants the opportunity to file witness statement(s) and documents that they intend to rely on during the trial, the lower trial court breached Article 50 of *the Constitution* and counsel cited *Philip Mutiso Mulalya V Samuel Dominic Muathe & 2 Others (2022) eKLR* in emphasizing the cardinality and centrality of the right to a fair hearing in a judicial process.
21. On the second issue, it is submitted that unless a stay of proceedings is granted the appeal shall be rendered nugatory. Counsel cited *Butt V Rent Restriction Tribunal (1982) KLR 417* and urged the court to consider whether in all fairness the decision and the order of the lower court should stand on appeal. The court is again urged to consider the interest of justice as the overriding principle as provided for in Article 159(2)(a)(b)(c) & (d) of *the Constitution* and Sections 1A & 1B of the *Civil Procedure Act*.
22. On the third issue, it is submitted that the application was filed without undue delay. It is submitted that the impugned orders of the lower court were issued on 6th February, 2024 and leave to appeal was sought and granted on the same day. It is further submitted that a memorandum of appeal was filed on 23rd February, 2024 well within the time allowed in law. The application was also filed on the same date.



23. The court is urged to allow the application with costs.
24. On the other hand, counsel for the respondent identified two issues for determination by the court – Whether the appellants/applicants have made out a case for grant of stay of proceedings; and, Who should meet the costs of the application?
25. It is submitted that the appellants were on numerous occasions given an opportunity to file their documents and statements but they squandered all such opportunities and as such the lower trial court ordered for the matter to proceed without the said intended documents and witness statement(s) as the matter could not be held in abeyance forever. It is submitted that the appellants had had over five months to comply but failed to do so. It is submitted that the appellants are desperate in delaying the hearing of the cause as much as possible to further punish the respondent who is now jobless.
26. It is submitted that while the remedy for stay of proceedings is a discretionary one, the cardinal consideration should be the interest of justice. In that regard, counsel cited Global Tours & Travels Limited (Supra).
27. It is further submitted that the appellants have not demonstrated that they have an arguable appeal let alone one that can succeed. Citing Halsbury's Laws of England, 4th Edition Vol. 37 pg. 332 counsel submitted that stay of proceedings is a remedy that should be exercised sparingly and only in exceptional circumstances.
28. It is submitted that the appellants are authors of their own misfortune for failing and or neglecting to obey the timelines set out in law even after the trial court accommodated them time and time again. It is submitted that an order for stay of proceedings shall prejudice the respondent and subject him to irreparable loss and damage. It is further submitted that the appellants have not demonstrated that they shall suffer prejudice, loss, or damage if the stay is denied.
29. The court urged to dismiss the application with costs.

IV. Issues For Determination

30. In my view there is only one main issue for determination in this application – Should the court order stay of proceedings in Nakuru CM ELRC No. E160 OF 2023 pending the hearing and determination of the appeal?
31. The court is handicapped and disadvantaged in one major way in that the record of the proceedings in the lower court has not been availed. Likewise, a record of appeal has not been filed. In those circumstances, the court's view is obscured and foggy as to what exactly took place before, during, and after the trial lower court orders of 6th February, 2024.
32. On how many occasions were the appellants granted leave to file their trial bundles and failed to comply? Exactly how was the application by the appellants for more time to comply made on 6th February, 2024? How did the respondent respond to that application? How exactly did the trial magistrate rule? What reasons were given for that ruling? Those are important and germane questions that the court cannot address without the benefit of the lower court record being availed and filed.
33. It is unfortunate that the appellants have not availed the said proceedings and no reason has been advanced in explaining that omission. While the court is aware that it takes a while for court proceedings to be typed, it cannot be assumed that that is the case here without the parties, and more so the appellants, stating so in the application. Nonetheless, it is not refuted by the respondent that the lower trial court issued the impugned orders.



34. Be that as it may, counsel for both parties agree that the central issue for consideration in determination of an application for stay of proceedings is the interest of justice. Justice is the foundation of fairness. The decisions and readings cited by counsel for both parties in *Global Tours & Travels Limited (Supra)*, *Butt V Rent Restriction Tribunal (Supra)*, and *Halsbury's Laws of England* are all relevant and applicable in the circumstances of this application.
35. One of the cardinal rules of natural justice is that no person shall be condemned unheard. The principle is espoused in Article 50(1) of *the Constitution* in the following terms –
 - (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
36. The right to a fair hearing or trial is one of those fundamental rights that may not be taken away under Article 25 of *the Constitution*.
37. The appellants are crying out loudly that if their trial bundle is not admitted they may be condemned unheard. However, their right to be heard should not negate the same right for the respondent. The respondent is equally entitled to access justice and to have his case heard and determined expeditiously.
38. It is the foregoing rights and interests of the parties that the court has to consider and balance to render justice in determining this application. As stated above the court is not seized of the record of the proceedings in the lower trial court and hence the path to justice herein is dark and murky with debris.
39. However, I do not understand why such an otherwise simple issue has given rise to such protracted and emotive arguments. While I do understand that the matter arises from an employment relationship, the matter need not be handled with emotions and that rather personal touch. Counsel for the parties ought to rise above such attachment and advise the parties in a professional manner geared towards expeditious resolution of the same. Accusations and counter-accusations shall not resolve the matter. The subject matter of this application and the appeal should not have arisen had the parties and counsel approached the matter without personal grudges and emotions and bitterness that appear to feature prominently in the pleadings filed.
40. However, the question remains – what are the most appropriate orders for this court to make in the circumstances?
41. While the appeal and the application were filed without delay, and while the appellants hold that they have an arguable appeal, the respondent takes the view that the proceedings herein are intended to punish him through prolonged delay of the hearing and disposal of the cause in the lower court.
42. Due to lack of the lower trial court record, the court may not be in a position to assess how arguable the appeal is. Likewise, the court cannot assess the circumstances under which the application for leave to file the trial bundle out of time was made and why the same was denied. That can only be determined upon a full trial and hearing of the appeal.
43. I still feel that the parties can even at this stage still make some concessions and compromises that can enable and allow the trial in the lower court to proceed. For example, and without prejudice, why can the parties and their respective counsel not agree that the appellants be allowed to file and serve the witness statement(s) and the bundle of documents within say 14 days with a corresponding leave for the respondent to counter the same in say seven (7) and thereafter the matter to proceed to hearing? If the appellants are of the view that the judicial officer is biased, an application for recusal may be made before the trial court for appropriate orders. That approach would save a lot of judicial time and



facilitate an expeditious disposal of the matter rather than having the appeal pend in this court for a while.

44. For clarity, the court is not proposing that the parties should not pursue their rights, including filing of applications and appeals, to logical conclusions. However, I am only demonstrating how a rather not too complex an issue can prolong and clog the court system for longer than its due fair share of judicial time.
45. For the sake of justice and fairness, and in due consideration of the entire circumstances of this matter, the court shall make orders that will ensure that the trial in the lower court is not delayed while at the same time giving the parties an opportunity to argue and respond to the appeal to its logical conclusion.

V. Orders

46. The court makes the following orders –
 - a. The appellant shall file and serve a record of appeal within 30 days of this ruling and in default the stay of proceedings in (b) below shall automatically lapse.
 - b. In the meantime, an order for stay of proceedings in Nakuru CM ELRC No. E160 of 2023 be and is issued pending the hearing and determination of the appeal.
 - c. The costs of the application shall abide with the appeal.
 - d. This matter shall be mentioned in court on 7th October, 2024 to confirm compliance and for directions on the expeditious hearing and disposal of the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 31ST DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

