



**Njenga v DIB Bank Kenya Limited (Cause E400 of 2020)
[2024] KEELRC 2122 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E400 OF 2020
BOM MANANI, J
JULY 29, 2024**

BETWEEN

IRENE NJERI NJENGA CLAIMANT

AND

DIB BANK KENYA LIMITED RESPONDENT

RULING

Background

1. The instant application seeks to stay further proceedings before the court pending the hearing and determination of the appeal that has been preferred from the court's ruling that was delivered on 15th June 2023. By that ruling, the court allowed the admission into evidence of certain documents which the Respondent/Applicant contends were obtained illegally.
2. The application is supported by an affidavit by one of the Respondent's/Applicant's officers. In the affidavit, the Respondent/Applicant reiterates the position that it has a pending appeal which seeks to challenge the court's ruling.
3. According to the Respondent/Applicant, the Supreme Court delivered a ruling shortly after this court's decision in which it settled the law on the issue at hand. It is the Respondent/Applicant's contention that it is now settled that evidence that has been irregularly obtained cannot, whatever the circumstances, be relied on in judicial proceedings
4. The application has been opposed. The Claimant relies on her replying affidavit dated 30th October 2023 to oppose the motion.
5. It is the Claimant's contention that the instant application is part of the Respondent's/Applicant's wider scheme to delay the prosecution of the claim. The Claimant contends that the documents that the Respondent/Applicant alleges are confidential have already been brought into the public realm



through the latter's filings in HCC Petition No. E171 of 2023 which is pending before the Commercial Division of the High Court, Nairobi.

6. The Claimant argues that the Supreme Court decision which the Respondent/Applicant seeks to rely on to advance its case is distinguishable from the instant case. In the Claimant's view, that decision was rendered in the context of confidential information that is held by the State or other public bodies which is not the case in the instant case.
7. The Claimant argues that to issue an order of stay of proceedings in the instant case will gravely prejudice her right to access justice. According to her, such order will only serve to delay this suit further without justifiable cause.
8. The Respondent/Applicant filed a further affidavit dated 7th December 2023. In the affidavit, the Respondent/Applicant reiterates the contention that it is not intent on delaying prosecution of the Claimant's case. All that it (the Respondent/Applicant) is seeking is to protect its right to fair trial as guaranteed in .
9. The Respondent/Applicant avers that the Claimant ought to establish its claim using legitimately obtained evidence. It contends that the attempt by the Claimant to use irregularly obtained evidence to prove her case is a mockery of the constitutional protections for fair trial.
10. The Respondent/Applicant denies that the disputed documents were disclosed in HCC No. E171 of 2023 as asserted by the Claimant. It is the Respondent's/Applicant's case that the documents disclosed in that case related to the Claimant's facilities only.
11. The Respondent/Applicant argues that should its appeal succeed after the impugned trial has progressed to conclusion, it will present a challenge to segregate the impugned evidence from the rest of the evidence. As such, the legitimacy of the trial court's judgment will be brought into question.
12. In the Respondent's/Applicant's view, this undesirable eventuality can be avoided if the court heeds the call to stay proceedings at this stage. In the Respondent's/Applicant's view, an order for stay of proceedings will also ensure efficient utilization of judicial resources in a manner that is less prejudicial to the parties to the dispute.

Analysis

13. As a general principle, a court of law should not permit stay of proceedings that are before it unless there are exceptional circumstances that inform the stay order. In *Kenya Wildlife Service v James Mutembei* (2019) eKLR, the court expressed itself on the matter as follows:-

“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 proceeding beyond all reasonable doubt ought not to be allowed to continue.”

14. In *Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui* [2022] eKLR, the court commented on the subject as follows:-

“.....stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial.”



15. In *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling), the court expressed itself as follows on the circumstances under which a court may issue an order for stay of proceedings:-

“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.”

16. The Judge went ahead to lay down the factors which a court must consider when determining a request for stay of proceedings. He expressed himself on the matter as follows:-

“In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. 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: They 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 Applicant 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 Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant 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 Applicant must demonstrate that the application for stay was filed expeditiously and without delay.



17. In *Gichubi Macharia & another v Kiai Mbaki & 2 others* [2016] eKLR, the court quoting with approval the decision in *Re Global Tours & Travel Ltd* HCWC No.43 of 2000, expressed itself on the same issue as follows:-

“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 for 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.”

18. What emerges from the foregoing is that although a court of law has the discretion to order stay of proceedings, it should do so only where the Applicant has demonstrated that there are exceptional circumstances that warrant the grant of the order. Therefore, in determining the instant application, regard must be had for the above principles.
19. As suggested above, an application for stay of proceedings pending an appeal from an interlocutory order should ordinarily be presented to the appellate court. This enables the appellate court to set the timelines within which the appeal will be processed, should the stay order be granted. In turn, this ensures that the proceedings before the trial court are not unduly delayed as a result of the appeal.
20. Thus, the instant application ought to have been filed in the pending appeal. However, since it was presented before me, I will process it with the above requirement in mind.
21. The Respondent's/Applicant's request is to enable it pursue an appeal against the court's decision by which a series of documents which are said to have been procured illegally were admitted into evidence. It is the Respondent's/Applicant's case that production of such documents violates article 50 of the Constitution which restricts the use of illegally obtained evidence in judicial proceedings.
22. The Respondent/Applicant has stated that shortly after the court delivered its ruling, the Supreme Court delivered a ruling in which it settled the law on the use of such evidence in judicial proceedings. According to the Respondent/Applicant, the Supreme Court made it clear that such evidence cannot be used in litigation.
23. Based on this development, the Respondent/Applicant argues that it has a strong case on appeal. Further, the Respondent/Applicant argues that to allow the proceedings to go on without resolving the issue on appeal would highly prejudice its case.
24. I have considered the position expressed by the Respondent/Applicant on the matter. The question that the Respondent/Applicant raises regarding whether the Constitution absolutely proscribes the use of illegally obtained evidence in judicial proceedings is of critical importance in the administration of justice. In my view, the issue presents a weighty ground of appeal that merits evaluation by the appellate court. It cannot by any stretch of imagination be considered as a frivolous matter. In the premises, I am satisfied that the Respondent/Applicant has an arguable appeal.
25. The Claimant has contested the application on, inter alia, the ground that through it, the Respondent/Applicant invites the court to sit on appeal on its decision. According to the Claimant, to ask the trial



court to determine whether the intended appeal is arguable is to inevitably ask it to evaluate the merits of the appeal which stems from its decision thus potentially inviting it to sit on appeal from its decision.

26. In evaluating whether the proposed appeal is arguable, the trial court does not necessarily interrogate the merits of the proposed appeal. All that it does is to consider whether the issues that are proposed to be raised on appeal are worth interrogation by the appellate court (*Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling)). This in my view, does not necessarily amount to an invitation to the trial court to sit on appeal on its decision.
27. That said, I remain alive to the fact that to stay proceedings infringes on the right to access justice as it clogs the trial process. There is no evidence that suggests that the proceedings that are pending before me are frivolous thus warranting their automatic stay pending the processing of the intended appeal.
28. The net effect is that I am called upon to balance the scales of justice by ensuring that I determine the instant request without prejudicing either side. I should neither unduly prejudice the right of the Claimant to process her pending case nor scuttle the Applicant's/Respondent's right to prosecute its pending appeal whilst maintaining the substratum of the case.

Determination

29. Having regard to the foregoing, I am minded to grant the application for stay of proceedings subject to certain conditions. In making this order, I have considered the fact that the order that is the subject of appeal was rendered more than one year ago. Therefore, the processing of the appeal that stemmed from the decision must be at an advanced stage.
30. In the premises, I order as follows:-
 - a. Stay of proceedings is granted for a period of four months from the date of this ruling.
 - b. The four months aforesaid exclude the period during which the superior court is ordinarily on vacation.
 - c. The Respondent/Applicant should endeavor to process its appeal before the Court of Appeal within the four months aforesaid.
 - d. Upon the lapse of the four months aforesaid, the order for stay of proceedings that has been granted shall automatically lapse.
 - e. Costs of the application are granted to the Claimant.

CONCLUSIONS

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER



In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

