



**Nguru v Cooperative Bank of Kenya Limited (Cause E044 of 2022)
[2023] KEELRC 1724 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1724 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E044 OF 2022**

M MBARÚ, J

JUNE 29, 2023

BETWEEN

JEPHTA ODHIAMBO NGURU CLAIMANT

AND

COOPERATIVE BANK OF KENYA LIMITED RESPONDENT

RULING

1. The respondent, Cooperative Bank of Kenya Limited filed application dated March 24, 2023 seeking for orders that;

There be stay of further proceedings in this suit pending the hearing and determination of Mombasa Court of Appeal Civil Appeal No. E027 of 2013; Cooperative Bank of Kenya Limited v Jephtha Odhiambo Nguru.

2. The application is supported by the affidavit of Duncan Matisero the legal manager on the grounds that the claimant filed suit seeking compensation for alleged unfair termination of employment and the suit revolves around whether the respondent had a reasonable basis to suspect him having received some money from Musti Investment Limited who sold Title No.Kajiado/Kitengela/107019 to him. The respondent has filed a response on the grounds that there was a reasonable basis for the suspicion that the claimant had received money through another account outside the respondent and the application dated 4th July, 2022 which sought to compel the claimant to produce the statements of account was dismissed in a ruling delivered on 22nd July, 2022 against which there is an appeal in Mombasa Court of Appeal Civil Appeal No. E027 of 2023. Despite this appeal, this suit is being processed for hearing and if allowed to proceed, it will substantially prejudice the respondent because hearing will proceed without the respondent having the best evidence obtainable and this will be in violation of the right to a hearing. If the appeal succeeds, the court will have been denied this evidence.



3. In reply, the claimant filed his Replying Affidavit and aver that there are no exceptional circumstances to warrant stay of proceedings as the issue on appeal related to an interlocutory application and appeals should not be entertained piecemeal. The respondent has not shown the impossibility of having the case concluded and should there be a grievance, if at all, such grievance can be taken up at the appellate court. The claimant stands to suffer prejudice if his right to be heard is interrupted and the application seeking stay of proceeding will deny him the right to a hearing.
4. The claimant also aver that the appeal filed relates to a ruling of this court delivered on 22nd July, 2022 following termination of his employment on the grounds that the respondent had undertaken thorough investigations and reviewed all relevant documents so as to justify the action taken. The court in the subject ruling appreciated these facts and the documents that the respondent is seeking to produce were not part of the record during the disciplinary hearing prior to termination of employment. As such, Section 43 of the Employment cannot be applied by the respondent to assert that it genuinely believed the existence of such matters and should not be allowed to shift as the matter moves along.

Both parties attended court and made oral submissions.

5. Stay of proceedings should only issue in exceptional cases calling for special measures. This is so because, stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious hearing and determination of suits filed in this court in terms of section 3 of the *Employment and Labour Relations Court Act*, 2011. The principle objective of the court is to ensure delivery of justice without delay. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case as held by the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR.
6. This is aptly summarised in the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR, Gikonyo J held that:

Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.

7. In *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 held) stated that;

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 a 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.

8. At the heart of an employment and labour relations claim is the due process applied before termination of employment. The employer must have both a substantive reason(s) and apply the due process. The burden of proof vests on the employer to demonstrate both aspects.



9. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal held that held that;

... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

10. Employment between the parties has since terminated. This is no longer an intention but a reality and the gist of the suit herein.

11. At the point the respondent took the decision to issue the letter and notice terminating employment which matters are addressed in the ruling delivered on 22nd July, 2022 grounds thereof must have been given to the reason(s) for taking such decision. Such reason(s) cannot change with time since this is now historical. The requirement for further evidence outside the disciplinary process will not serve justice while there is no counter-claim. Without going into the merits and demerits of the main claim, this shall suffice and to stay proceedings for reasons given will not aid justice in this instance.

12. Accordingly, application dated March 24, 2023 seeking stay of proceedings is without merit and is hereby dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

