



Kinyeki & 88 others v Kenya Ports Authority & another (Cause 40 of 2015) [2023] KEELRC 2038 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 2038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 40 OF 2015
M MBARŪ, J
JULY 27, 2023**

BETWEEN

JOHN WANGOMBE KINYEKI & 88 OTHERS CLAIMANT

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

**THE MANAGING DIRECTOR KENYA PORTS AUTHORITY 2ND
RESPONDENT**

RULING

1. The respondents, Kenya Ports Authority and the Managing Director, Kenya Ports Authority filed application dated 3 March 2022 seeking stay of proceedings herein; there be a review of the orders issued on 24 July 2019 to the extent that it limited the options of the parties herein to the settlement of the claimant herein or in crafting issues for determination outside the scope of the decision of the Court of Appeal in Civil Appeal No.134 of 2018 Kenya Ports Authority and the Managing Director Kenya Ports Authority v Joseph Makau Munyao & 4 others.
2. The respondents are also seeking for stay of proceedings herein pending the hearing and determination of the appeal to the Supreme Court from the decision of the Court of Appeal in Civil Appeal No.134 of 2018.
3. The application is supported by the Affidavit of Stephen Kyandih and on the grounds that on 24 July 2019 the court gave directions to the parties before they had an opportunity to consider the Court of Appeal decision in Civil Appeal No. 134 of 2018 delivered on 11 July 2019. The time taken to consider the appeal was because the certified copy of the judgment would only be issued by the Registrar, Court of Appeal. this was only made available on 22 July 2019, 2 days before the scheduled court attendance.
4. On 24 July 2019 the respondent made submissions in court that they had not considered the Court of Appeal judgment and that a Notice of Appeal had been filed the same day to avoid time lapse of 14



- days. The court directions were issued as final and without knowledge that an appeal would be pursued by the respondents.
5. The respondents are pursuing a clarification of the Court of Appeal judgment and applied for leave to file Notice of Appeal out of time due for ruling on 10 June 2022.
 6. The matters for determination by the Court of Appeal are materially significant and interrelated to the matters pending before this court being that the respondents are the same as herein even though the claimants are different but the cause of action arose out of the same industrial action on 29 and 30 March 2011 and the disciplinary process is the same. The determination by the Court of Appeal inextricably links the two matters to the extent that the proceeding with the hearing of the present case while there is a pending appeal will occasion the respondents grave miscarriage of justice and create an absurdity should there be a clash thereon.
 7. The respondents have a right to exhaust all its constitutional rights including that of an appeal. the court should not be placed upon a point to determine a matter that is before the Supreme Court which is likely to impact on these proceedings. When the employees in Civil Appeal No. 134 of 2018 filed their Petition before the Constitutional Court on 20 June 2012 which was transferred to this court on 14 February 2014, the claimants herein would have had notice of the filing to the suit. they waited until 2015 to file their claim and the delay has caused to the current state of things and the respondents should not be made to bear the cost of their indolence.
 8. In reply, the claimants filed the Replying Affidavit of John Mangombe Kinyeki the 1st claimant and aver that the court directed parties to consider the judgment of the Court of Appeal in Civil Appeal No.134 of 2018 and its implication to this matter and which was in pursuance to the submissions by the respondents but no decision emanated from such directions. The claimants, having looked at the decision of the Court of Appeal have decided to proceed with this matter whose hearing is at an advanced level and there are only two witnesses remaining.
 9. The claimants are aware the decision of the Court of Appeal is now the subject of an appeal to the Supreme Court, Petition No. E008 of 2023.
 10. In Civil Appeal No.134 of 2018 the respondents filed a Cross-appeal before the Supreme Court and the matter is now subject of appeal before the Supreme Court without an indication as to when there will be a hearing or determination. For these reasons, application dated 3 March 2022 is overtaken by events and ought to be dismissed.
 11. The decision of the Court of Appeal is predicated upon this application being referred to the Supreme Court and the said decision cannot be the basis for the stay of the proceedings herein and which matter should proceed on the merits.
 12. The application by the respondents herein is a ploy to frustrate the hearing and determination of this claim on the grounds that the respondents have filed a response and proceeded with the hearing and cross-examination of several witnesses called by the claimants.
 13. There has never been an application to consolidate the matter herein with any other suit despite the fact that the respondents are represented by the same advocates in both cases. There is a substantive difference between claims and reliefs put forth by the claimants in this matter and ELRC Cause No.68 of 2012 which gave rise to Court of Appeal Civil Appeal No.134 of 2018 which is clear from the pleadings.
 14. The *Constitution*, the *Employment and Labour Relations Court Act* require the court to expedite justice and to stay proceedings herein will go contrary to such mandatory provisions. There is no order or



decree which would be the basis of stay of proceedings as the basis for stay of proceedings herein and the Advocates for the parties are required to assist the court to administer justice in terms of Section 3 of the [Employment and Labour Relations Court Act](#). The application is without merit and should be dismissed with costs.

15. The respondents as the applicants submitted that they are seeking stay of proceeding herein pending the hearing and determination of their appeal before the Supreme Court in Petition No. E008 of 2023 Kenya Ports Authority v Joseph Makau Munyao & 4 others. This follows judgment from the Court of Appeal in Civil Appeal No.134 of 2018 – [Kenya Ports authority and the Managing Director, Kenya Ports Authority v Joseph Makau Munyao & 4 others](#) which has similar facts and issues as this case.
16. The respondents informed the court of these matters on 24 July 2019 but on 29 July 2019 the court issued orders without knowledge of the appeal the respondents wanted to pursue. Order 42 rule 6(1) of the [Civil Procedure Rules](#) allow for stay of proceedings as held in the case of Global Tours & Travels Limited, Nairobi High Court Winding Up Cause No. 43 of 2000; [Lucy Maitbera Kimanga & 2 others v John Waiganjo Gichuri](#) [2015] eKLR.
17. the respondents submitted that they have an arguable appeal which should be allowed to conclude before these proceedings can conclude and it is in the interests of justice to stay these proceedings to avoid a miscarriage of justice.
18. The claimants submitted that on 24 July 2019 the court having been notified by the respondents of the decision of the Court of Appeal in Civil Appeal No.134 of 2018 directed the parties to study the same and then frame issues for determination herein but the parties could not arrive at a consensus. Stay of proceedings should not be readily issued and to enjoy the order of review, there must exist justified grounds which the respondents have failed to satisfy. The reliefs sought by the claimants herein are different from the matter now subject before the Supreme Court and which was before Court of Appeal in Civil Appeal No.134 of 2018. In [Benson Khwatenge Wafula v Director of Public Prosecutions; Ethics and Anti-Corruption & 2 others \(interested parties\)](#) [2020] eKLR the court held that in civil proceeding, where a notice of appeal has been lodged, order of stay of execution, an injunction or a stay of proceedings can issue as the court may deem fit. Stay of proceedings must be related to the matter on appeal. In [Kenya Wildlife Service v Geoffrey Mokaya Aboki & Karen Chepkurui](#) [2022] eKLR the court declined to stay proceedings on the basis that such an order is grave and should not be readily issued where there is no good cause.

Determination

19. The twin issues which emerge for determination are whether the court should stay proceedings herein to allow the hearing of Civil Appeal No 134 of 2018 [Kenya ports Authority and the Managing Director, Kenya Ports authority v Joseph Makau Munyao & 4 others](#) and whether the court should review the orders issued on 24 July 2019.
The instant application is dated 3 March 2022.
20. Pending the hearing of the application, the respondents filed Supreme Court Petition No. E008 of 2023 [Kenya Ports Authority v Joseph Makau Munyao & 4 others](#) and which is pending.
21. The filing of the petition at the Supreme Court is a matter that arose post the instant application and only addressed in the written submissions. Written submissions in their nature cannot introduce new facts. Such are matters that go into affidavits, evidence or as directed by the court.
22. The orders sought are specific and have not been amended since the hearing of the instant motion commenced.



23. The matter at the Court of Appeal which forms the basis of the instant application being Civil Appeal No.134 of 2018 has since been determined with the judgment delivered on 11 July 2019. This was the gist of the issues before the court on 24 July 2019 when the respondents made submissions that such judgment had issued and required time to go through and on 29 July 2019 the court directed parties to identify the pending issues for determination with a view of hearing the claim herein.
24. Following the judgment of the Court of Appeal in Civil Appeal No.134 of 2018, the respondents filed Notice of Appeal on 24 July 2019.
25. The cited appeal relates to different claimants as against the claimants herein.
26. Even though the respondents in this claim and ELRC Petition No. 11 of 2015 and subject of Civil Appeal No.134 of 2018 are the same, the claimants herein have a legitimate expectation that their claim should be heard on the merits just like in the other matters now before different courts. Indeed, as correctly submitted by the claimants, stay of proceedings should rarely issue because it is a grave and fundamental interruption of the right that a party should conduct litigation on the foundation of its merits.
27. This is aptly captured in the case of *Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui* [2022] eKLR where the court in considering a similar matter 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

28. Where any action taken by the court is remotely or in any form go contrary to access to justice, such must be stopped instantly. Court exists to protect the rule of law and access to justice is a key pillar that once shaken, the entirety of the system crumbles.
29. The stay of proceedings herein sought is to allow the respondents to ventilate their petition before the Supreme Court over a matter unrelated to the claimants and whose hearing had largely progressed by call of several witnesses without the respondents seeking to consolidate or place together taking into account the respondents are the same in both matters. To seek for such orders at this instance would be to delay access to justice. Any pronouncements by the Supreme Court on the matter pending before it, in my humble view, will only foster access to justice but not impede on it. Proceeding with the claim herein is to achieve the same purpose, access to justice. There is no possibility of conflict where the objectives are, access to justice.
30. The orders sought for review, in my humble view, were to assist the parties identify issues for determination following judgment by the Court of Appeal in Civil Appeal No. 134 of 2018. At the point of issuing such orders and directions, the court took into account the following matters;

... the appeal seems to have arisen from the decision of this Court, which related to the same industrial action in gantry operations at the Port, said to have taken place in March 2011.

Although the claimants are different, the claimant herein were colleagues of the claimants in the Cause giving rise to the Appeal.

Similar issues, disciplinary processes and prayers are involved ... it is noted that on February 20, 2019 the Court directed parties to file issues, in order to keep focus on the dispute.



No issues have been filed.

In light of these, it is not prudent to proceed with hearing today or next week.

The court in the view that parties should study the decision of the Appellate Court and either;

- a. Use that decision as a basis for settling this claim out of court in full.
- b. Craft issues in dispute, so that we do not have to evaluate and make determination on matters that the Court of Appeal has ruled upon. ...

31. The court was cognisant of the matter from the Court of Appeal, its implications and hence the directions given.

32. Subsequently, there was no settlement or issues in dispute identified.

33. Parties returned to the position subsisting as at that point, hearing of the claimants' case that was adjourned on 24 July 2019.

Should the orders of 24 July 2019 be reviewed?

34. The respondents' case is that the option given by the court on 24 July 2019 to the extent that it limited the options of the parties herein to the settlement of the claims

... or the crafting of issues for determination outside the scope of the decision of the Court of Appeal in Civil Appeal No. 134 of 2018. ...

35. As noted above, the claimants in this suit are different from the referenced appeal. An order of the court can only be subjected to review where there is a discovery of new matter that was not within the knowledge of the parties at the time the orders issued, there is error, mistake, need for clarification or for other good cause. On the analysis above, the matter sought to be corrected in error or mistake or need for clarification or good cause is lost. To conflate issues to allow the respondents to proceed with the matter before the Supreme Court in Petition No. E008 of 2023 is not similar to having a sufficient cause to justify an order for review.

36. Since 24 July 2019 the respondents have not found any need to stay proceedings herein or to seek orders of review. Where such needs were necessary and justified, based on the directions of 24 July 2019, diligence and vigilance required such application be pursued with earnest.

The court will hear the instant claim on the merits.

37. Accordingly, application dated 3 March 2022 is hereby found without merit and is hereby dismissed with costs to the claimants.

38. This being a 2015 matter and the claimants have given most of their evidence, hearing directions shall issue.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

In the presence of:

Court Assistant: Japhet Muthaine

M. MBARÚ JUDGE

