



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**APPEAL NO. E171 OF 2021**

*(Before Hon. Justice Dr. Jacob Gakeri)*

<b>NJOROGE &amp; MUSYOKA ADVOCATES</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>MARGARET WANJIRU NJOROGE</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>JUDY WANJIRU GICHUMBI</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>DIANA NJOKI GICHUMBI</b>	<b>4<sup>TH</sup> APPELLANT</b>
<b>VERSUS</b>	
<b>EVELYNE WAMAI</b>	<b>RESPONDENT</b>

*(Being an appeal from the whole of the Ruling of the Hon. E. Wanjala Principal Magistrate  
delivered on 23<sup>rd</sup> November 2021 at Milimani Commercial Chief Magistrate's Court in  
CMEL Case No. 372 of 2020 – Evelyne Wamai v Njoroge & Musyoka Advocates & 3 others)*

**RULING**

1. By a notice of motion dated 23<sup>rd</sup> December 2021, the Applicants/Appellants moved the Court under a certificate of urgency of even date seeking orders that –

*(i) Spent.*

*(ii) Spent.*

*(iii) THAT this honorable court be pleased to stay any/all proceedings and consequent orders in Milimani Commercial Chief Magistrate CMEL CASE NUMBER 372 of 2020 pending the inter-parties hearing and determination of this application.*

*(iv) THAT the appellants/applicants do pray for an interim stay of the said ruling delivered on 23rd November together with all its consequential orders, pending the hearing and determination of this Application*

*(v) THAT this honorable court be pleased to stay any/all proceeding and consequent orders in Milimani Commercial Chief Magistrate CMEL CASE NUMBER 372 of 2020 pending the hearing and determination of appeal number E171 Of 2021.*

*(vi) THAT the applicants/applicants further prays that this honorable court stay all proceedings of this honorable court and/or including the mention slated for 19<sup>th</sup> January 2022 pending the hearing and determination of this application.*

*(vii) THAT the appellants /applicants prays that this honorable court stay all proceeding of this honorable court and/or including the mention slated on 19th January 2022, pending the hearing mid determination of the Appeal number E171 of 2021.*

*(viii) THAT costs of this application be in the in the cause.*

2. The application is premised on the affidavit of Esther Kirigo Kinyua, Advocate as well as the following grounds –

- a) THAT a ruling was delivered by Honorable E. Wanjala (PM) delivered on 23<sup>rd</sup> November 2021 closing the appellant's case without the appellants calling its key witness who is the 3<sup>rd</sup> Appellant to testify.
- b) THAT the appellants/applicants do pray for an interim stay of the said ruling delivered on 23<sup>rd</sup> November 2021 together with all its consequential orders, pending the hearing and determination of this Application.
- c) THAT the appellants/applicants being highly aggrieved and/or dissatisfied by the said ruling delivered by Hon. E Wanjala (PM) in Milimani Commercial Chief Magistrate CMEL CASE NUMBER 372 filed a Memorandum of appeal of civil appeal number E171 of 2021.
- d) THAT the appellants/applicants pray that this honorable court stays the Ruling together with all other consequential orders proceeding of this honorable court and /or including the proceeding of mention for submissions slated on 19th January 2022 pending the hearing and determination of this application.
- e) THAT unless this Honourable Court issues the orders sought, the appellants/applicants shall suffer irreparable loss and damage of being condemned unheard.
- f) THAT in such event, the appellants/applicants herein shall suffer irreparable loss and damage of being condemned unheard.
- g) THAT in such event, the defendants/applicants herein shall suffer irreparable loss and damage as they may never recover the decretal sum once judgment is delivered.
- h) THAT the Plaintiff/Respondent shall suffer no prejudice if the application is allowed.
- i) THAT it is the interest of justice that the prayer sought herein are granted.

3. The Respondent/Claimant filed a replying affidavit dated 11<sup>th</sup> January 2022. The Respondent depones that:

- (1) The instant application is a scheme to derail her quest for justice.
- (2) She wrote a demand letter to the Applicants/Appellants on 20<sup>th</sup> January 2020 soon after termination but they did not respond and even after being served with the claim, they did not enter appearance or file any defence until 29<sup>th</sup> June 2020 about five months later.
- (3) Between 29<sup>th</sup> June 2020 and 7<sup>th</sup> June 2021, the Applicants/Appellants took the Court round in circles on compliance with Order II.
- (4) The mentions slated for 24<sup>th</sup> March 2021, 22<sup>nd</sup> April 2021 and 17<sup>th</sup> May 2021 are case in point.
- (5) It was not until 17<sup>th</sup> May 2021; a hearing date was set for 5<sup>th</sup> October 2021 when the Claimant testified and was cross examined. The Applicants/Appellants' witness did not appear to testify though the witness had allegedly travelled to attend Court. Hearing was adjourned to 23<sup>rd</sup> November 2021 on which date the Applicants/Appellants' Counsel sought an adjournment because they were not ready to proceed with the hearing yet the hearing were virtual.
- (6) The instant application was filed after the Claimant served her submissions as directed by the Court on 23<sup>rd</sup> November 2021 since the Court was not satisfied that the Applicant/Appellants had a genuine reason to seek an adjournment and thus closed the Respondent's case  
as requested by the Claimant's Counsel on record.
- (7) The Applicants/Appellants are the authors of their misfortune of not being heard and stand to suffer no prejudice since they are at liberty to file submissions as directed by the Court.
- (8) The contents of the Appellants/Applicants' supporting affidavit was a defence and they have not tendered evidence or intimated to the Court how or when their witness would be ready to testify in the matter.
- (9) The Applicants/Appellants are perennial defaulters and do not deserve the Court's the discretion and the application should be dismissed since their hands are unclean.
- (10) That the excuses by the Applicants/Appellants is a scheme to frustrate the hearing and delay the cause of justice notwithstanding the Respondent's commitment in Court attendance.
- (11) The appeal by the Applicants/Appellants has been pending for almost two years.

(12) The application dated 29<sup>th</sup> December 2021 should be dismissed.

4. At the hearing of the application on 19<sup>th</sup> January 2022, the Applicants/Appellants Counsel sought seven days to file a further affidavit and submissions. The Respondent's Counsel requested for three days after service. The Court accorded the Applicant/Appellants Counsel seven days and the Respondent's Counsel three days as requested and the ruling stated for 28<sup>th</sup> February 2022.

5. In the further affidavit dated 29<sup>th</sup> January 2022, the 3<sup>rd</sup> Applicant/Appellant deposes that –

i) Her physical address is Raleigh, North Carolina in the United States of America and her continued absence from the proceedings was her absence from the country and could not communicate with the Advocate on record owing to time difference.

ii) She advised the advocate on record to apply to amend the defence to incorporate crucial information and not to delay the proceedings as alleged.

iii) Her work schedule could not permit her to appear in court virtually at the time and advised Counsel on record to file the appeal and the instant application after the court refused to grant an adjournment and closed the Applicants/Appellants case. That her work schedule was now more flexible and would be available to appear in court virtually for purposes of giving evidence.

6. The Affiant avers that the Respondent's Counsel was aware that the Applicants/Appellants' Counsel would seek and adjournment and were able to being paid the day's costs and the Court proceeded on its own motion to close the Applicants/Appellants' case.

7. That as a litigant, the Applicant/Appellant had the right to appeal or seek review of orders as and when necessary and did so in this case since her right to be heard was violated and stand to lose everything if not granted an opportunity to present their case and evidence in Court in light of the suit before the Court. That there was a possibility that the Appellants would be condemned to pay the Respondent's fictitious claims having been paid all dues.

8. That the Respondent is ably represented by Counsel and is thus not disadvantaged compared to the Applicants/Appellants and was not seeking reinstatement.

9. That the 3<sup>rd</sup> and 4<sup>th</sup> Applicants/Appellants were partners and operated the business of the 1<sup>st</sup> Applicants/Appellant until 2019 when they decided to close shop owing to economic hardships in the operations of the business which was a difficult decision after 42 years and all employers including partners became redundant which explains her travelling out of the country in search of livelihood.

10. That the Respondent stands to suffer no prejudice if the instant application is allowed because the business is no longer operational and the remedies sought do not include reinstatement.

11. That the Applicants'/Appellants stand to suffer if the application is not granted as the appeal will be rendered nugatory and will lose opportunity to be heard.

### **Applicants/Appellants' Submissions**

12. According to the Applicants/Appellants, the issues for determination are whether:

i) The Defendant's right to a fair hearing was curtailed;

ii) The Defendants should have been given the adjournment as sought;

iii) The Defendants meet the threshold to warrant issuance

of order of stay pending appeal.

13. As to whether the Applicants/Appellants' right to fair hearing was curtailed, reliance is made on Article 50 of the Constitution of Kenya, 2010 as well as several decisions including **Judicial Service Commission v Gladys Boss Shollei [2014] eKLR** and **Mandeep Chauhan v Kenyatta National Hospital & 2 others [2013] eKLR** to urge that the right to a fair hearing is a cardinal principle in the administration justice enshrined in the Constitution which courts are constrained to uphold.

14. It is submitted that the Applicants/Appellants should be allowed to give their testimony.

15. As regards the adjournment sought on 23<sup>rd</sup> November 2021, it is contended that the Applicant/Appellants Advocate gave a good reason as to why he sought the adjournment and had communicated the same to the Respondent's Counsel and the witness was out of the country. Reliance is made on Order 17 Rule 1 of the Civil Procedure Rules on hearing and adjournments as well as the decision in **Kenya Commercial Bank Limited v Titus Kilonzo Mutua T/A Mbwala Agencies & 16 others [2014] eKLR** on the circumstances the Court should take into consideration in the determination of questions of adjournment.

16. As to whether the Applicants/Appellants have met the threshold for issuance of stay pending appeal, it is submitted that the application of adjournment was not intended to delay the proceedings filed in 2020.

17. The decisions in **Betheul Muiruri Benjamin v Development Bank of Kenya [2006] eKLR** as well as **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** are used to demonstrate the guiding principles applicable in determining whether or not to grant stay of proceedings.

18. Finally, it is submitted that the Applicants/Appellants advocate demonstrated that the principles applicable had been met and the application for stay of proceedings pending appeal should be granted.

### **Respondent's Submissions**

19. The Respondent identifies three primary issues for determination namely whether;

(i) All proceedings relating to CMEL CASE NO. 372 OF 2020 should be stayed pending *inter partes* hearing and determination of the application.

(ii) The Appellants have proven a *prima facie* case for grant of interim orders on stay of the ruling delivered on 23<sup>rd</sup> November 2021;

(iii) The application should be allowed;

(iv) Costs.

20. On whether all proceedings in CMEL Case No. 372 of 2020 should be stayed, the Respondent relies on Order 7(6) Rule 1 of the Civil Procedure Rules on appearance after summons and filing of defence within 14 days of entering appearance and service after filing. That the Appellants filed their defence late did so after the Respondent had sought summary judgment.

21. It is submitted that the mention date of 24<sup>th</sup> June 2020 to confirm compliance with Order 11 was adjourned and the matter dragged for almost one (1) year and gave no candid reason why the matter has taken so long to prosecute despite two hearing dates taken by consent. That applications for adjournment of the case have been the norm. That the physical absence of a witness can no longer be used to delay the case since hearings are virtual.

22. The Respondent submits that equity aids the vigilant but not the indolent. Reliance is made on the decision in **John Njue Nyaga v Nicholas Njiru Nyaga & another [2013] eKLR** where the Court of Appeal found the Applicant underserving for want of clean hands.

23. It is submitted that the Respondent has a right to access justice expeditiously and should not be derailed by the Appellants who have not shown keen interest to litigate the matter. That the application for stay of proceedings should be dismissed.

24. As regards establishing a *prima facie* case, it is submitted that the Appellants have on a balance of probabilities not done so. There is no record of the lower Court before the Court. It is contended that the Appellants have not furnished sufficient evidence to demonstrate why their witness has been unable to attend court on two occasions or the irreparable loss or damage they stand to suffer.

25. That the Respondent is greatly inconvenienced by the delay despite attending Court routinely. That the Appellants can argue their pending case through submissions in the trial Court.

26. As to whether the application should be allowed, it is contended that the Appellants have not been condemned unheard since they had the opportunity to make their case but ignored calls to do so and have not shown how their witness intends to testify.

27. It is further submitted that there is no proper appeal before the Court since the decree is not attached as provided by Order 42 Rule 2 of the Civil Procedure Rules. The decision in **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR** is relied upon to urge that without a record of appeal, a Court cannot determine an appeal. Section 79G of the Civil Procedure Act is also cited to urge that an appeal from a subordinate Court is incompetent if the order or decree appealed against is not filed together with the appeal. That without a decree, there is no appeal.

28. As regards costs, it is submitted that the Appellants should bear the costs of the application. The decision in **Republic v Rosemary Wairimu Exparte Applicant v Ihururu Dairy Farmers Co-operative Society Limited [2021] eKLR** is relied upon to urge the Court to award costs to the Respondent.

### **Analysis and Determination**

29. I have considered the application, the grounds on which it is based, replying and further affidavit and submissions by the parties. The issue for determination is whether the issuance of stay of proceedings pending appeal is merited.

30. As regards the right to fair hearing, the Court is in agreement with the Applicants/Appellants' submission that adjournments are governed by Order 17 Rule 1 of the Civil Procedure Rules and involve the exercise of judicial discretion by the Court. Order 17 Rule 1 of the Civil Procedure Rules provides that –

**(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.**

**(2) When the court grants an adjournment it shall give a date for further hearing or directions.**

31. In **Kenya Commercial Bank Limited v Titus Kilonzo Mutua T/A Mbwala Agencies & 16 others (supra)** the Court expressed itself as follows –

*“An adjournment is granted by a court in the exercise of its judicial discretion. Such discretion will be based on the reasons given by the party applying and on the particular circumstances of the case (Sultan Hardware Ltd –vs- William Murithi Kimani & Another, Civil Appeal No. 150 of 2012)”. The elements the trial court should take into consideration in dealing with question of adjournment are the adequacy of reasons given for the application, how far, if at all, the other party is likely to be prejudiced by the adjournment, and how far such other party can be suitably compensated by the order against the applicant to pay costs (Job Obanda – vs- Stagecoach International Services Ltd & Another, Civil Appeal No. 6 of 2001).”*

32. In **Famous Cycle Agencies Ltd & 4 Others v Masukhalal Ramji Karia [1995] IV KALR** the Supreme Court of Uganda held as follows:

*“Under this rule, the granting of an adjournment to the party to a suit is thus left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner, and upon proper material. It should be exercised after considering the party’s conduct in the case, the opportunity he had of getting ready and the truth, and sufficiency of the reason alleged by him for not being ready. But the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause refers to the acts or omissions of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case and generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part an adjournment would not normally be refused. But where the party has been wanting in due diligence or is guilty of negligence an adjournment may be refused ...”*

33. The Court is in agreement with these sentiments.

34. From the foregoing, it is clear that the granting of or refusal of an adjournment is judicial discretion exercisable on the basis of the circumstances of the individual case. It behoves the Court to determine whether the party applying for the adjournment has established sufficient cause.

35. It is not for this Court to determine whether the Applicants/Appellants were entitled to an adjournment since the ruling appealed against is not on record.

36. Similarly, the Court is in agreement with the Applicants/Appellants that *“the right to hearing is fundamental right that cannot be denied”*. See **Mbithuka Titus v Jackline Mutindi [2020] eKLR**.

37. In **Mandeep Chauhan v Kenyatta National Hospital & 2 others (supra)** Lenaola J. (as he then was) citing the decision of the Supreme Court of Uganda in **The Management of Committee of Makondo Primary School and Anotr v Uganda National Examination Board, HC Civil Misc Applic No. 18 of 2010**, stated as follows;

*“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”*

38. The principle was further elaborated in **Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji Nairobi Civil Application No. 179 of 1998** as follows:

*“The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”*

39. Article 59 of the Constitution of Kenya, 2010 is unambiguous on the right to a fair hearing.

40. In the instant application, the Applicants/Appellants urge that on 23<sup>rd</sup> November 2021 when their Advocate sought an adjournment, he had already communicated with the Respondent’s Counsel on the issue owing to the unavailability of the witness and it was the first time the matter was coming up for defence hearing. The Court did not award the Claimant’s Counsel costs of the day but closed the defence.

41. Finally, Counsel for the Applicants/Appellants had communicated to the Court that its witness was residing in the United States of America.

42. For the above reasons, the Court finds and holds that the denial of the adjournment sought and closure of the defence case denied the Applicant the right to be heard, a cardinal principle of natural justice. This is more so because any liability in this case will crystalize on individuals, the witness included.

43. As regards whether the order of stay is merited it is important to note that application for stay must meet the threshold prescribed by law as expressed in **Betheul Muiruri Benjamin v Development Bank of Kenya (supra)** –

*“The Court’s discretion in deciding whether or not to grant stay of proceedings in this application must be guided by any of the following three main principles: -*

*a) Whether the Applicant has established that he/she has a prima facie arguable case;*

*b) Whether the application was filed expeditiously;*

*c) Whether the Applicant as established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.*

44. As regards *prima facie* arguable case, the memorandum of appeal faults the trial Court for closing the Applicants’ case without the testimony of the key witness who was desirous of testifying to counter the allegations by the Respondent.

45. The Court failed to appreciate that the witness was unable to attend the hearing on 23<sup>rd</sup> November 2021 because she was working out of the country in a different time zone.

46. It is trite law that closure of the defence case, as it transpired in this case implicates the cardinal principle of right to fair hearing which is a constitutional imperative. Whereas delay has been occasioned by the Appellants, a fact they cannot deny, justice cuts both sides and both must be accorded their day in Court unless their conduct relative to the case before the Court is so contumacious that their right to be heard prejudices the other party. The Court is not satisfied that is the case in the instant case.

47. In **Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union [2012] eKLR** the Court reiterated that even one *bona fide* arguable issue satisfied the requirements of the law.

48. In **Naivas Company Limited v Paul Thuku Gachora [2017] eKLR** the Court of Appeal stated that –

*“This court has in many of its decisions under rule 5(2)(b) (supra) held that an arguable appeal is not necessarily one that is bound to succeed. All that an applicant has to show is that there is an arguable point or points of law in the appeal. This court has in the past held that an applicant does not have to show a plethora of arguable points. Even a single point of law will suffice.”*

49. In the instant case, the memorandum of appeal on record raises arguable points of law.

50. As regards the timing, whereas the impugned ruling of the trial Court was made on 23<sup>rd</sup> November 2021 and the memorandum of appeal filed on or before 22<sup>nd</sup> December 2021 and the instant application on 29<sup>th</sup> November 2021, it is the finding of the Court that the Applicants/Appellants filed the instant application expeditiously and without undue delay.

51. With regard to interests of justice, the Applicants/Appellant submit that if the stay order is not granted, they will have been condemned unheard contrary to Article 50 of the Constitution of Kenya, 2010 and legions of judicial authority.

52. The Court is satisfied that in the interest of justice the order of stay pending appeal is merited.

53. Accordingly:

**(i) Stay of all proceedings in Milimani Commercial Chief Magistrate CMEL Case Number 372 of 2020 is hereby granted pending the hearing and determination of the Appeal No. E171 of 2021.**

**(ii) Costs of this application shall be in the appeal.**

**(iii) The Appellants have 90 days to move the Court to hear the appeal. In the event of default, the Respondent has liberty to apply for its dismissal.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**