



**Sang v Daniel Ochieng Ogola t/a Ongola Okello & Co. Advocates & another
(Cause 1869 of 2017) [2022] KEELRC 3770 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3770 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1869 OF 2017**

K OCHARO, J

MAY 4, 2022

BETWEEN

LILIAN JEBITOK SANG CLAIMANT

AND

JOB COLLINS ODHIAMBO OCHIENG 1ST RESPONDENT

**DANIEL OCHIENG OGOLA T/A ONGOLA OKELLO & CO.
ADVOCATES 2ND RESPONDENT**

RULING

1. When this matter came up for mention on the December 7, 2021, counsel for the claimant indicated that there is a criminal case pending at the Kibera Chief Magistrate's Court, namely Criminal Case 1862 of 2017, wherein the 2nd respondent is the accused and the claimant the complainant, a matter closely related to the one herein and whose outcome in her view, would have a vital implication on this case.
2. Counsel proposed that the proceedings herein be stayed pending conclusion of the criminal case, therefore. Counsel for the respondents was not agreeable to the suggestion. Considering the diametrically opposite positions that the parties had taken on the issue, this court directed that it be addressed by way of written submissions as to whether further proceedings in this matter shall await the conclusion of the criminal case.

The Claimant's Submissions

3. The claimant's counsel submitted that this being her case, she is entitled to bring the best possible evidence she can to advance it. That there is no dispute that there is a criminal case pending against the 2nd respondent in the Kibera Law Courts, whereat he is charged with assaulting the claimant. The



case is on-going. She has testified, and the prosecution is remaining with the doctor's evidence and the police officers to close their case.

4. It was argued that the claim herein is against the respondent [1st respondent as the former employer of the claimant and the 2nd respondent as a fellow employee and a proper party]. The claim herein is *inter alia* a constructive dismissal one, anchored on the facts that the 1st respondent condoned a work place atmosphere which allowed the 2nd respondent mete out insults, acts of assault and gender-based violence against the claimant, leading to the constructive dismissal.
5. It was submitted further that establishing assault by the 2nd respondent is a key pillar of the instant case. The criminal matter and this case are inextricably linked. A conviction of the 2nd respondent in the matter will lay a strong basis for her success in this matter.
6. Counsel for the claimant submitted that proceedings and judgment in a criminal matter can be put in evidence in a civil matter to fortify a plaintiff's case or claimant's case, as was held in the case of *Captain Moses Kariuki Wachira vs Joseph Mureithi Kanyita & 3 others* [2013] eKLR, thus:

“The admissibility of evidence taken in criminal proceedings and judgments arising therefrom, in subsequent civil proceedings, is provided for under various sections of the *Evidence Act* cap 80 of the laws of Kenya. The admission of any such evidence before the criminal court may not be conclusive evidence of facts, but may be used by the plaintiff in civil case by way of establishing a *prima facie* case against the defendant being the accused person[s] in the criminal suit.”
7. The respondent submitted that this matter has been running concurrently with the criminal case. In terms of section 193A of the *Criminal Procedure Code*, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms the High Court can be called upon to intervene.
8. The respondent is opposed to the claimant's plea on the grounds that the matter herein has been in court for the past five years, and to grant a stay of proceedings would delay its conclusion more. This shall be contrary to the spirit of a just and expeditious disposal of matters brought before the court. These two matters are in character a world part. The instant one is contractual in nature, that is employer-employee relationship, while the dispute in the criminal matter is criminal in nature featuring the claimant and the 2nd respondents.
9. It was argued further that the decision in *Patricia Wafula Ogana vs Kingway Typres Limited* [2021] eKLR, supports the respondents' position that a delay in prosecuting a suit in its self prejudices the interest of the defendant and runs contra to the provisions of the *Constitution* of Kenya, 2010 and the overriding objective of the court.
10. It was further argued that in this matter there is no clear material placed before court to establish that the civil proceedings and the criminal proceedings arose out of identical set of facts. That no doubt there is bound to be an overlap, but that by itself is never a sufficient ground to attract stay of the suit herein. The scope of the proceedings is substantially different. The standard to prove required in the proceedings are entirely different.
11. The respondents contended that the claimant was bound to demonstrate existence of extraordinary and exceptional circumstance to attract a favourable exercise of the court's discretion on her plea. She did not. The court should decline the plea and direct that the matter proceeds for hearing.



Determination

12. Stay of court proceedings can be made at any stage in the proceedings, and can be generally ordered following an application by the parties or by the court acting in its own motion. A party may make an application for stay of proceedings or a court can make an order of stay of proceedings out of its own initiative, including to allow for: a jurisdictional challenge; arbitration; an attempt to settle; related criminal proceedings, an opportunity to comply with procedural requirements or court order etc.
13. There is no invariable rule as regards the stay of civil proceedings pending determination of criminal proceedings. There is no hard and fast rule, each case must stand upon its own facts.
14. No doubt, the present case is a constructive dismissal case. In its character it would require of the claimant to demonstrate that the workplace environment became unbearable for her to continue with her employment. That the toxic environment was created by her employer's actions and or omissions. The claim is principally anchored on the alleged assaults on her person by the 2nd respondent, and the condonation of the actions of the 2nd respondent by the 1st respondent.
15. There is no contest as between the parties that the assault and the facts leading thereof form the basis of the criminal matter that the state commenced against the 2nd respondents. To this extent it is easy for one to conclude that the facts in the two matters are to a greater proportion identical.
16. I am not persuaded that the claimant's plea herein has been stirred by a desire to abuse the court process, or that the actions of the claimant as regards the instant matter are in a way tantamount to an abuse of the process of this court.
17. In the upshot, I am convinced that a case has been made for a stay of proceedings herein pending the outcome of the criminal matter. This matter shall be mentioned on the September 26, 2022 to check on the position of the criminal matter and for further directions.

READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MAY, 2022.

OCHARO KEBIRA

JUDGE

In presence of:

Mr. Ruto holding brief for Mr. Burugu for the Claimant/Applicant.

Ms Opiyo for the Respondents.

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.



OCHARO KEBIRA
JUDGE

