



**Ngure v Total Kenya Limited (Cause E6462 of 2020)
[2022] KEELRC 3963 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3963 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6462 OF 2020
MA ONYANGO, J
SEPTEMBER 20, 2022**

BETWEEN

DAVID KAMAU NGURE CLAIMANT

AND

TOTAL KENYA LIMITED RESPONDENT

RULING

1. Vide an application dated 14th January 2022, made under Section 3 of the *Employment and Labour Relations Court Act*, 2011, Rule 17 of the *Labour Relations Court (Procedure) Rules*, 2014 and all enabling provisions of the Law), the Applicant, the Respondent in this suit, seeks the following orders –
 - (i) This application be certified as urgent and service be dispensed with in the first instance.
 - (ii) This Honourable Court be pleased to stay the proceedings in this matter pending the hearing and determination of this Application.
 - (iii) This Honourable Court be pleased to stay the proceedings in this matter pending the hearing and determination of the Applicant's intended appeal.
 - (iv) Costs of this application be in the cause.
2. On the grounds in support of the application, the Applicant states that it was aggrieved by the dismissal of its application for stay of proceedings herein and to refer the dispute to arbitration. That it intends to appeal against the decision, that the appeal is arguable and it will suffer prejudice should the orders sought herein not be allowed.
3. The application is supported by the affidavit of Rosemary Wakabe, Legal Officer of the Respondent/ Applicant sworn on 14th January 2022 in which she reiterates the grounds on the face of the application.



- She further avers that should the hearing of the suit herein proceed, the Respondent's appeal would be defeated.
4. The Claimant opposes the application through the replying affidavit of Samuel Maina, an advocate practicing under the firm of Kithu Mbuthia Advocates which has the conduct of this suit on the Claimant's behalf, sworn on 28th January 2022.
 5. In the replying affidavit, Counsel states that the Applicant has not demonstrated the prejudice it would suffer should its application not be granted. That it has further not demonstrated by way of evidence that it has filed any appeal.
 6. Counsel further avers that the Applicant has not declared any intention to refer this suit to arbitration or set in motion the arbitration process.
 7. It is Counsel's averment that the application is made in bad faith with the intention to frustrate the Claimant's prosecution of his claim herein and that it is in the interest of justice not to allow the application.
 8. The application was disposed of by way of written submissions. In its submissions, the Applicant relying on the decision in *Global Tours Travels Limited*, Nairobi, Winding up Cause No. 43 of 2000 as cited in *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited* [2019] eKLR submits that the Court ought to consider whether the stay would meet the ends of justice, whether the appeal is not frivolous and whether the application has been filed expeditiously.
 9. It is further submitted that the appeal is not frivolous and that the appeal goes to the jurisdiction of this Court. For emphasis the Applicant relies on the decision in *Niazons (K) Ltd v China Road & Bridge Corporation Kenya* as cited in *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited* (supra).
 10. For the Claimant it is submitted that there is no proof that the Applicant has filed an appeal as the documents appended to the application have no signature, stamp or receipt to demonstrate that the Applicant has filed an appeal in compliance with Order 42(1) of the *Civil Procedure Rules*.
 11. The Claimant further reiterates that the Applicant has not demonstrated substantial loss that it would suffer should the application not be allowed. It is submitted that the grant of stay pending appeal is a matter of discretion as was held in *Butt v Rent Restriction Tribunal* [1982] KLR 417.
 12. I have considered the grounds and affidavit in support of the application. I have further considered the replying affidavit, and the submissions filed in support and in opposition to the application. The issue arising for termination is whether the Applicant has demonstrated that it deserves the grant of the orders sought.
 13. It is not in doubt that this Court has powers to grant the orders sought. The same must however be on justifiable grounds.
 14. In the instant application, the reasons adduced by the Applicant are that it has filed an appeal against the ruling of this Court and that it would be prejudiced if the orders are not granted.
 15. Although the Claimant questioned the prejudice that the Applicant would suffer in the replying affidavit, no effort was made by the Applicant to address the same.
 16. As I pointed out in the ruling that is the subject of appeal, there were two agreements between the Claimant and Respondent, one an employment contract dated 15th June 2017 and the other the Young Dealer Marketing Licence Agreement (YDMLA), the relevant one dated 23rd February 2018. It is the YDMCA that contains the arbitration clause.



17. From the prayers in the statement of claim, it is clear that what is in dispute is the employment agreement and not the YDMLA. I therefore see no prejudice that the Respondent would suffer if the claim herein proceeds to hearing as it is not the subject of the Arbitration Clause. The employment contract does not contain an arbitration clause.
18. I therefore agree with the Claimant that the application is misconceived and intended to delay the prosecution of the Claimant's case.
19. For the foregoing reasons, I find no merit in the application and dismiss the same with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2022

MAUREEN ONYANGO

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 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 *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.

MAUREEN ONYANGO

JUDGE

