



**M'mayi v Institution of Engineers of Kenya (Petition 135 of 2018)
[2024] KEHC 2609 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 135 OF 2018
EC MWITA, J
MARCH 15, 2024**

BETWEEN

HOWARD ASHIHUNDU M'MAYI PETITIONER

AND

INSTITUTION OF ENGINEERS OF KENYA RESPONDENT

RULING

1. On 27th October 2022, the Institution of Engineers of Kenya, (respondent) took out a motion on notice seeking stay of proceedings pending the hearing and determination of an appeal in the Court of Appeal (No. E413 of 2023).
2. The appeal is against the ruling of this Court delivered on 13th October 2022, declining the respondent's application to recall the petitioner for further cross examination and for the respondent to adduce additional documents.
3. The respondent asserted that given the issues in dispute, such as whether the petitioner deliberately misrepresented his qualifications to the respondent, and whether the respondent was justified in disqualifying the petitioner from the 2018/2020 Council elections on that basis, it is proper that the Court stays further proceedings pending determination of the appeal.
4. The respondent maintained that its appeal is arguable and it will be rendered nugatory if the proceedings herein are not stayed. The respondent argued that it is in the interest of justice to grant the application since the petitioner will not suffer any prejudice.
5. The respondent relied on rule 32 of the *Mutunga Rules* and decisions in *John Mbaabu & another v Kenya Revenue Authority* [2020] eKLR; *Butt v Rent Restriction Tribunal* [1979] eKLR; *Port Florence*



Community Health Care v Crown Health Care Limited [2022] eKLR and *Kenya Wildlife Service v James Mutembei* [2019] eKLR, to urge the Court to allow the application.

6. The petitioner opposed the application, arguing that in rejecting the application for recall for further cross examination and production of new/further evidence in form of documents, the Court delivered a well-reasoned and considered ruling.
7. The petitioner asserted that the Court was right in holding that there had been no plausible explanation by the respondent for the absence of the documents for over 5 years. The Court also held that there would be no benefit to cross examine makers of documents who are not parties to the proceedings.
8. According to the petitioner, the application is an attempt to have the Court review a decision that rejected the previous application in the guise of an application for stay. “Whereas the respondent has a right to pursue the appeal, the exercise of such a right does not automatically translate into a stay.” The petitioner argued.
9. It is the petitioner’s position that the respondent has not satisfied the grounds for a stay of proceedings. Further, the application is a delaying tactic to ensure the matter is not concluded anytime soon.
10. The petitioner relies on *Emerg Investments Ltd v Kenya Farmers Association Limited* [2022] eKLR; *Peter Kariuki Mburu & another v Neema Shah* [2011] eKLR; *Kenya Wildlife Service v James Mutembei* [2019] eKLR; and *John Mbaabu & another v Kenya Revenue Authority* [2020] eKLR.
11. According to the petitioner, although rule 32(1) of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules), allow a party to apply for stay of proceedings, an appeal does not operate as stay. Rule 3(4) also enjoins the Court to facilitate the just, expeditious, proportionate and affordable resolution of cases. For that reason, the application goes against substantive justice.
12. The petitioner again relied on *Re Global Tour & Travel Ltd* [HCWC No. 43 of 2000] that the respondent has not met the conditions for stay of proceedings.
13. The application seeks stay of proceedings pending determination of the respondent’s appeal before the Court of Appeal. This application followed the Court’s ruling (Ong’udi J) dated 11th October 2022 delivered on 13th October 2022 by Thande J, declining to allow the respondent recall the petitioner for further cross examination and for the respondent to produce more documents.
14. The application has been opposed on grounds that it is not justified and the respondent will not suffer any prejudice if stay was not granted.
15. Rule 32 of the *Mutunga Rules* provides that an appeal or second appeal does not operate as stay of execution or proceedings under a decree or order appealed against. The rule allows a party to make an application informally immediately after delivery of judgment or ruling or make a formal application.
16. The respondent made an informal application immediately after the ruling but the Court directed that a formal application filed, hence this ruling.
17. In the meantime, the respondent filed a notice of appeal and proceeded to lodge the appeal (No. E413 of 2023) which is pending before the Court of Appeal.
18. This Court has wide discretion to grant stay of proceedings. However, like any other discretion, this discretion should be exercised judiciously and on terms that are just. This is because stay of proceedings is a grave judicial action that seriously interferes with a litigant’s right to a quick disposal of his case.



19. Among the factors the Court should consider in determining whether or not to grant stay of proceedings, (even where rules allow), is whether an applicant has demonstrated that the appeal would be rendered nugatory, would suffer prejudice and that there are exceptional circumstances which make stay of proceedings warranted as opposed to having the case first concluded and all the grievances that may arise are taken up on a single appeal. (*Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (NRB Winding up cause No. 43 of 20000) and *David Morton Silverstein v Atsango Chesoni* [2002] eKLR).
20. I have gone through the record and, in particular, the ruling dated 11th October 2022 and delivered on 13th October 2022 declining to grant leave to recall the petitioner and to produce more documents. I have also considered the grounds on which the application before this Court is based as well as the age of the case.
21. There is no doubt that this is an old case filed in 2018. The petitioner was extensively cross examined by the respondent's counsel on 7th May 2021. After cross examination, the respondent's counsel asked the court to issue directions on filing of limited submissions based on the petitioner's evidence which meant that the petitioner closed his case on that day.
22. The respondent was not to call evidence and therefore also closed its case. The application for recall was then made on 24th May 2021 but declined on 13th October 2022.
23. Having considered the facts of this petition and the circumstances under which the application has been made, it is the view of this of this Court, that the respondent has not demonstrated that it will suffer prejudice if the application is not granted. In the event the appeal succeeds, this Court will have no option but to reopen the case and accommodate the respondent as the Court of Appeal will have directed.
24. On the other hand, this being an old matter, it is desirable to have it heard and concluded without further delay. If the proceedings are stayed and the appeal is eventually dismissed, the delay would have caused injustice so that justice delayed is justice denied.
25. It will also do justice of the case and to the parties to have the petition heard rather than staying the proceedings which will keep the rights of the parties indeterminate as long as the matter remains a live in this Court awaiting a determination of the appeal in the Court of Appeal that is unknown.
26. As already alluded to, if the appeal succeeds, there would be no difficulty in recalling the petitioner for further cross examination. If, however, the appeal fails, the delay occasioned would be irreversible.
27. In the circumstances, and for the above reasons, the application for stay of proceedings is declined and dismissed. I make no order on costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024

E C MWITA

JUDGE

