Ogundo v Standard Group Limited (Civil Suit 64 of 2013) [2020] KEHC 9229 (KLR) (Civ) (30 January 2020) (Ruling)

Peter Kuria Nguru v Judicial Service Commission & 3 others; Cabinet Secretary Ministry of Health (Interested Party) [2020] eKLR

Neutral citation: [2020] KEHC 9229 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 64 OF 2013

JN KAMAU, J

JANUARY 30, 2020

BETWEEN

JAMES OGUNDO ..... PLAINTIFF

AND

THE STANDARD GROUP LIMITED ..... DEFENDANT

RULING

Introduction

1. The Application before me is the Notice of Motion dated 7th August 2019 seeking for orders inter alia:

   a) Spent

   b) That this honorable Court be pleased to order stay of execution of this Court's Judgment of 10th July 2019 pending the lodgment, hearing and determination of the intended Appeal.

   c) That the costs of this application be in the cause.

   The notice of motion is premised on the grounds on the face of the application and supported by an affidavit sworn on by the Applicant on 7th August 2019. The 1st to 3rd Respondents in opposition to the Notice of Motion filed a Replying Affidavit sworn by the Chief Registrar of the Judiciary Anne A. Amadi on 7th October 2019.

2. The Notice of Motion was canvassed by way of written submissions. The Applicant's written submissions were to the effect that the Court should consider whether the intended appeal is arguable and whether if stay orders are not granted the appeal will be rendered nugatory. The Applicant

submitted that *vide* its judgment delivered on 10th July 2019 the Honourable Court dismissed the Applicant's application seeking to stop his transfer and declared that the transfer that the 2nd Respondent intended was well within the law. The Applicant being aggrieved by the orders sought an appeal. The Applicant submitted that the orders of the court of 10th July 2019 were to the effect that he could be transferred any time to any station including Hamisi which he sought to stay and this will be done regardless of his health concerns and this is likely to be detrimental to his health unless this court grants orders of stay pending appeal. The Applicant submits that he has moved the Court of Appeal by filing a Notice of Appeal as soon as the Judgment was delivered. He submits that this was within reasonable time and so was this instant Application seeking stay orders. The Applicant argued that he had also attached a draft memorandum of appeal in support of his application for stay and submitted that the appeal as presented is arguable and implored this Honourable Court to find it just to grant stay and exercise its discretion in his favour by allowing the application for stay. The Applicant submitted that the grounds raised in the memorandum of appeal are arguable and as opined in *Damji Pragji Mandavia v Sara Lee Household and Body Care (K) Limited* Civil App No 345 of 2004 Nairobi (unreported) an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court and a single bona fide arguable ground of appeal qualifies an appeal to be deemed arguable. He submitted that on the question as to whether the appeal will be rendered nugatory, this depends on whether or not what is sought to be stayed if allowed to happen is reversible. He submits that if it is not reversible whether damages will reasonably compensate the party aggrieved. The Applicant argues that he seeks for stay of his transfer to either Hamisi or any station that is far away from his medical centre in Nyeri as he suffers from serious back condition that has brought with it several health complications. He is in constant need of therapy as well as his family. He submits that he cannot travel for long distance and moving him from Nyeri would only imply that he has to constantly travel back to Nyeri for medical checkup and therapy as well as move his family to the place of posting which is a tall order on his health which is likely to deteriorate. The Claimant submitted that health is sacred and if the court does not grant stay pending appeal, the Applicant's health is likely to be affected and he will also be transferred and in the event he suffers more complications that can neither be reversible nor can it be compensated by way of damages. The Applicant implored the Court to allow the application if not for anything else but to preserve and safeguard his health which is crucial for his well-being as well as executing his duties as directed by the Respondents. The Claimant submitted that in the event the Respondents are not restrained from executing the judgment and further proceedings are not stayed in the motion, the Applicant will be transferred and the substratum of the intended appeal will no longer be available and the appeal will be rendered nugatory. The Applicant submits that in view of the foregoing he has raised sufficient basis for this court to exercise its wide and unfettered discretion in his favour by allowing the motion and order a stay of execution pending lodgment, hearing and determination of the intended appeal.

3. The 1st to 3rd Respondents' raised the following issues for determination. Whether the Applicant has satisfied the requirements for stay as provided for under Order 42 Rule 6 of the Civil Procedure Rules and whether the orders issued by this court on 10th July 2019 are capable of being stayed. As to whether the Applicant has satisfied the requirements for stay as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, the Respondents cited the case of *Kinyunjuri Muguta v Wotuku Muguta* [2018] eKLR where it was stated that for a stay order to be granted, the applicant needs to satisfy the following conditions namely, substantial loss may result to the applicant unless the order is made; the application has been made without unreasonable delay; such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant. The Respondents submitted that the power of the court to grant an order of stay of execution is discretionary as was held in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR. The

Respondents submitted that the Court addressed itself on what constitutes substantial loss in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the Court held *inter alia*

> "No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed that is to say the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.
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> … the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

The Respondents submitted that the Applicant has not proved what substantial loss he will suffer if the 1st Respondent proceeds to execute its power donated by Section 10 of the *Judicial Service Act* in furtherance of its mandate under Article 172 of the *Constitution* to transfer him. The Respondents submitted that the effect of this Court granting an order for stay would be to effectively accord the Applicant preferential treatment from other employees of the JSC and to bar JSC from carrying out its constitutional mandate. The Respondents submitted that judgment issued by this Court in dismissing the Applicant's application did not order any party to do or refrain from doing anything capable of being stayed. There was no decree or order issued by the Court capable of being enforced for purposes of Order 42 Rule 6 of the *Civil Procedure*. The Respondents therefore submit that the order fell within the ambit of what may be deemed as a negative order which is incapable of execution hence cannot be stayed as was held in the case of *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR. The Respondents submit that consequently, the notice of motion application dated 7th August 2019 is incompetent as the orders issued by this Court were negative orders that cannot be stayed. The Respondents submit that in view of the foregoing the Applicant has not demonstrated any grounds for the grant of an order for stay of execution by this Court and in the circumstances the Notice of Motion Application should be dismissed with costs to the Respondents.

4. The factors to consider in grating or denying stay are well established and there is no need to rehash them. What is focal is whether there is merit in the stay sought by the Applicant. It is common ground that the motion seeks to stay a decision of the Court made on 10th July 2019. The decision is captured on pages 8 and 9 of the decision. I reproduce the pertinent Section for ease of reference and clarity:-

> The Applicant was challenging through the motion the attempted transfer. The impugned transfer was attacked for allegedly being discriminatory and in contravention of various Articles of the Constitution and the provisions of the Judiciary Human Resources Procedure Manual 2014. The Respondents correctly point out that the essence of judicial review is a challenge on procedure and not the merits of the decision. In this case, the Respondents assert that due process and procedure were followed in the transfer that they sought to effect. The Applicant on his part asserts the transfer was without consideration of Section 8(1) of the *Occupational Safety and Health Act* as his health did not permit the Respondents carte blanche in the transfer as he was in need of special consideration. The Applicant is a public servant serving one of the arms of Government. The Judiciary as employer is mandated to transfer staff as appropriate following the guidelines of the transfer policy which permits the employer to transfer the staff serving in the Judiciary to rationalise services and fill gaps as well as ensure an officer does not serve in one station for more than 5 years. The process employed to effect the transfer was explained by the Respondents thus: After a capacity and staff rationalisation audit, the Respondents found that 33% of

employees had served in the same station for between 5 and 30 years. The Respondents were required to select the staff for transfer having regard to efficiency as well as making the decision that is the most appropriate in the circumstances. I find that the decision by the Respondents was not contra-statute as it was made well within the Respondents' mandate under Article 172 of the *Constitution* and pursuant to Regulation 14 of Part IV of the Third Schedule to the *Judicial Service Act*. The Applicant has not demonstrated what error the Respondents committed in sending him on transfer as the proper course was followed since the Applicant met the criteria of staff due for a transfer using the matrix above. He had served at the station for 5 years fulfilling one of the conditions of the policy for transfer. As no evidence was led that he was discriminated against, the challenge was at best misplaced and a shot in the dark. He would not therefore be immune from a transfer well planned and executed by the Respondents within their mandate under the law and in line with the policy and procedures in place regarding transfer of staff of the Judiciary. Since this was the singular issue for determination and it is resolved in favour of the Respondents, there is liberty to effect a transfer bearing in mind the peculiar circumstances of the employee. Applicant's motion is therefore unmerited and only fit for dismissal. As this is a matter involving parties who are still engaged in an employee-employer relationship I will make no order as to costs.

5. The order the Court gave in the matter before it was not an order capable of execution. It was in the nature of a negative order that cannot be stayed as the Court declined to grant the Applicant the relief sought in the Miscellaneous application. There is nothing to stay as the decision was that the 1st to 3rd Respondents were at liberty to transfer the Applicant with due regard to the requirements of the mandate the 1st to 3rd Respondents have over the Applicant as employee. In my view therefore there is nothing the Court can stay and the motion is entirely misplaced and devoid of merit. The Notice of Motion Application dated 9th August 2019 is hereby dismissed with costs to the 1st, 2nd and 3rd Respondents.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JANUARY 2020

NZIOKI WA MAKAU

JUDGE