



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

ELRC MISC. APPLICATION NO. E002 OF 2021

DAMARIS SAMUEL MUTIOAPPLICANT

VERSUS

COUNTY GOVERNMENT OF BUNGOMA.....1ST RESPONDENT

BUNGOMA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The ruling is on Notice of Motion Application dated 1st July, 2021 by intended Appellant seeking the following orders:-

- (a) That this Application be certified extremely urgent and that service of the same be and is hereby dispensed with in the first instance.
- (b) That there be a stay of execution of the decree delivered on the 8th day of January 2021 in Bungoma Chief Magistrate's Employment and labour Relations Cause No. 1 of 2020 pending the hearing and determination of this application inter-partes.
- (c) That this Honourable court be pleased to enlarge time to enable the Applicant file appeal out of time.
- (d) That there be a stay of execution of the decree delivered on the 8th day of January 2021 in Bungoma Chief Magistrate's Employment and Labour Relations Cause No. 1 of 2020 pending the hearing and determination of the appeal.
- (e) The costs of this Application be provided for.

The grounds of the Application are listed thereunder and supported by the Affidavit of the Applicant sworn on the 1st July, 2021.

2. The Application is opposed vide replying affidavit of Cyril Simiyu Wayong'o County Attorney of 1st Respondent filed on behalf of the Respondent and sworn on the 1st March 2022.

3. The court gave directions for the Application to be canvassed by way of written submissions. The Applicant has not filed her submissions. The Respondent vide the Law firm of Ibrahim Alubala Advocates filed written submissions dated 7th March 2022 and filed in court on the 8th March, 2022.

DETERMINATION

3. The court considered the pleadings on record and the submissions of the Respondent and the Applicable law.

Issues for determination

4. The Respondent identified the following as issues for determination :-

- (a) Whether the proposed appeal is arguable.
- (b) Whether the application if not granted, the success of the appeal were it to succeed, would be rendered nugatory.

(c) Deposit for security as a pre- condition for granting stay of execution and who bears costs of this application.

5. The court having considered the foregoing list of issues by the Respondents and the application and replying affidavit is of the opinion the following issues will determine the application.

- (i) Whether the intended appeal is arguable
- (ii) Whether there is merit to extend time to file appeal out of time
- (iii) Whether stay of execution should be granted and on what conditions?
- (iv) Who shall bear costs of this application.

Whether the intended appeal is arguable.

5. The court considered the annexed proposed Memorandum of Appeal. Among the grounds of appeal being that the Applicant's rights were violated when she was retained on casual basis, that while she had been offered employment on permanent and pensionable terms with effect from 15th June 2017 her terms were unilaterally varied vide letter dated 29th March 2019 to appoint her on casual basis, to her disadvantage. The Respondent in response states the intended appeal is not arguable. They submit the trial court was right in dismissing the case and in any case the Magistrate's court had no jurisdiction as the Applicant was employed by County Government and first port of law was the Public Service Commission not the court.

6. The court is persuaded that the Applicant having been employee of the County Government she ought to have presented her claim to the Public Service Commission under Section 77 of the County Governments Act. Section 87 (2) of the Public Service Commission Act states:-

"A person shall not file any legal proceedings in any court of law in respect to matters within jurisdiction the Commission to her and determine appeals for the County Government Public Service unless the procedure provided for under this part has been exhausted".

7. There are numerous decisions of the court upholding the provisions of section 77 of the County Government Act for the appeals from the decisions of the 2nd Respondent to be heard in the first instance by the Public Service Commission. This court has declined jurisdiction on decisions on staff of County Governments in numerous past decisions including *Fred Marmelei Loronyoliwe -vs County Government of Samburu and Another (2020) eKLR* and *Chrispinus Lumiti -vs County Chief Officer Public Service Kakamega County and 3 others (2020) eKLR*. The Court of Appeal in *Secretary County Public Service Board and Another -vs Huylbhai Gedi Abdalla (2017) eKLR* *Makhandia, Ouko and M'inoti JJA*, allowed the appeal in that case on basis that the Respondent had failed to utilize the process under Section 77 of the County Government.

7. The court finds that the trial court did not have jurisdiction to determine the dispute in the first place. There is thus no arguable appeal that can emanate on the merits of the decision of the lower court.

Whether there is merit to extend time to file appeal out of time.

6. The court having found there is no arguable appeal from the decision of the lower court then there is no basis for extending time.

Whether the stay of execution should be granted and on what conditions.

7. Stay of execution is hinged to the existence of arguable appeal so that its outcome if successful is not rendered nugatory. The court having held that there is no arguable appeal then there is no basis of stay of execution.

Who should bear costs of this application.

8. The court has considered that the Claimant was acting in person against the employer, a public service entity and the fact the appeal was not filed or argued on merit. It orders each party to bear own costs in this application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF MARCH, 2022.

J. W. KELI

JUDGE

In the Presence of :-

COURT ASSISTANT : Brenda Wesonga

APPLICANT:- PRESENT

RESPONDENT : ABSENT