



REPUBLIC OF KENYA



**County Assembly Service Board Nyamira County & 3 others v Bundi & 11 others
(Appeal E006 of 2024) [2024] KEELRC 1093 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1093 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E006 OF 2024

S RADIDO, J

MAY 15, 2024

BETWEEN

**COUNTY ASSEMBLY SERVICE BOARD NYAMIRA COUNTY 1ST APPELLANT
SPEAKER, COUNTY ASSEMBLY OF NYAMIRA 2ND APPELLANT
THE CLERK, COUNTY ASSEMBLY OF NYAMIRA 3RD APPELLANT
COUNTY ASSEMBLY OF NYAMIRA 4TH APPELLANT**

AND

**GRACE MASESE BUNDI 1ST RESPONDENT
VINCENT NYAMBANE NYAKIENI 2ND RESPONDENT
WIINIE MAKORI 3RD RESPONDENT
GLADYS MOTANYA 4TH RESPONDENT
JOB RODGERS NYARIBO 5TH RESPONDENT
EDSON MOGENI MAYAKA 6TH RESPONDENT
GATWERE ALLOYS 7TH RESPONDENT
JOASH ORUKO NYACHIRO 8TH RESPONDENT
LAMECK OSORO KOMETA 9TH RESPONDENT
JONES ONDUKO 10TH RESPONDENT
DAVID MATWA NYABARI 11TH RESPONDENT
MONGARE ONDIEKI OBWOCHA ELVIS 12TH RESPONDENT**



RULING

1. On 3 January 2023, the Appellants issued notices to the Respondents informing them of the revocation of their employment contracts. The notices listed the reasons for the decision.
2. The Respondents were aggrieved and they sued the Appellants before the Chief Magistrates Court in Nyamira alleging unfair termination of contract and breach of contract. Filed at the same time was a Motion seeking certain injunctive orders.
3. When served, the Appellants filed a Notice of Preliminary Objection contesting the jurisdiction of the Court on the ground that the Respondents had not exhausted the statutory dispute resolution mechanisms set out in Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and sections 85 and 87 of the Public Service Commission Act.
4. The Chief Magistrate delivered a Ruling on 28 March 2023, declining to uphold the Preliminary Objection on the reasoning that the reliefs sought could not be granted by the Public Service Commission. The Ruling is the subject of a different Appeal.
5. On 27 February 2024, the Chief Magistrate issued a mandatory order compelling the Appellants to pay the Respondents remuneration from August to December 2022.
6. The Appellants were dissatisfied and they lodged a Memorandum of Appeal with this Court on 11 March 2024 contending:
 - i. That the Learned Magistrate erred in law and in fact in failing to make a finding that the 1st to 12th Respondents had failed to prove their case (read Notice of Motion dated 10th January 2023) to the required standard and thus undeserving of the equitable discretion of the Court.
 - ii. Besides, the learned Magistrate erred in law and in fact in disregarding the evidence of the Appellants on record hence resulting to a wrong decision.
 - iii. That the Learned Magistrate erred in law and in fact by failing to find that the evidence on record and pleadings were at variance.
 - iv. That the Learned Magistrate erred in law and in fact in failing to take account of consideration of which he should have taken account, particularly on the jurisdictional question, doctrine of exhaustion, and locus standi. Consequently, the decision of the Trial Magistrate is fraught and/or wrought with contradictions, misconceptions, and/or misapprehension of the law.
 - v. That the Learned Magistrate erred in law and in fact by overlying on the 1st – 12th Respondents' submissions and legal authorities which were not relevant and without addressing his mind in the circumstances of the case.
 - vi. Even though the Learned Magistrates decision, albeit, a discretionary one was plainly wrong.
 - vii. That the Learned Magistrate erred in law and in fact in purporting to determine the suit at an interlocutory stage by making orders that are final in the nature and import.
 - viii. That the Learned Magistrate erred in law and in fact in failing to appreciate that the real issues in the application dated 10th January 2023 could only be determined after a full hearing.



- ix. That the Learned Magistrate erred in law and in fact in failing to appreciate the weight of the Appellants' evidence and the facts thereby arriving at an erroneous finding in respect of the application dated 10th January 2023.
 - x. That the Learned Magistrate erred in law and in fact in considering the merits of the suit at interlocutory stage this aiming to a wrong decision.
 - xi. That the Learned Magistrate failed to properly and/or sufficiently appraise and/or evaluate the totality of the submissions tendered by and/or on behalf of the Appellants herein and thereby arrived at an erroneous conclusion, informed by obvious and palpable ignorance of the law.
 - xii. The Ruling and/or decision of the Learned Trial Magistrate is wrought and/or fraught with errors of omission and/or commissions.
 - xiii. That the Learned Trial Magistrate erred in law and fact in analysing and/or evaluating the Respondents' evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-mediated impression upon the Appellant contrary to the established principles, which casts the burden of proof upon the Respondent.
7. On 11 March 2024, the Appellants filed a Motion seeking orders:
- i. ...
 - ii. ...
 - iii. ...
 - iv. The Honourable Court be pleased to grant an order of stay of execution and/or implementation of the Ruling delivered on 27th February 2024 and order made by the Subordinate Court on 29th February 2024 *vide* Nyamira CMCC E&LRC Case No. E002 of 2023 and in particular the limb thereof of mandatory orders issued compelling the applicants to pay the Respondents, together with all consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of the instant Appeal.
 - v. The Honourable Court be pleased to grant an order of stay of proceedings and/or further proceedings *vide* Nyamira CMCC E&LRC Case No. E002 of 2023 whatsoever and/or however pending the hearing and determination of the instant Appeal.
 - vi. Costs of the application be borne by the 1st to 12th Respondents herein jointly and/or severally.
 - vii. The Honourable Court be pleased to grant such further and/or other orders as may be deemed just, appropriate and/or expedient be granted.
 - viii. Costs of this application do abide the Appeal.
8. The grounds in support of the Motion were that the Chief Magistrate issued mandatory and final orders on 27 February 2024, compelling the Appellants to pay the Respondents; that the Respondents were on the verge of executing the orders and that the Appellants were likely to suffer substantial loss; the Appellants were ready to abide by any conditions imposed by the Court; the Chief Magistrates Court did not have jurisdiction over the cause of action; the application had been filed without any delay and that the Appeal was arguable and had high chances of success.
9. The Respondents filed a replying affidavit sworn by the 1st Respondent in opposition to the Motion on 27 March 2024 asserting that the application was frivolous and an abuse of the court process because



the Appellants had filed a similar Motion before this Court (differently constituted) and the Court had determined the application on 9 November 2023 rendering the instant proceedings res judicata; they had provided services from August to December 2022 and were entitled to the remuneration which was awarded by the Chief Magistrate; the Chief Magistrate's order had the effect of overturning the revocation of the employment contracts and that the Appeal lacked merit because the mandate of the Public Service Commission was restricted to decisions of a County Public Service Board.

10. The Respondents urged the Court to direct the Appellants to deposit in the Court the monies which were awarded by the Chief Magistrate.
11. The Clerk of the County Assembly filed a supplementary affidavit on behalf of the Appellants on 15 April 2024 wherein it was contended that res judicata did not arise since this Appeal was challenging a Ruling on 27 February 2024 while the other Appeal was challenging a Ruling delivered on 28 March 2023, and that by virtue of the Public Service Commission (County Appeal Procedure Rules) Regulations 2022, the Public Service Commission had the power to entertain an appeal from the revocation of the Respondents employment contracts.
12. The Court took oral submissions on 16 April 2024.
13. The Court has considered the Motion, affidavits and submissions.
14. Before addressing the merits of the application the Court is of the view and finds that res judicata does not arise as the instant Motion is challenging a Motion determined by the Chief Magistrate on 27 February 2024, while the related Appeal was in respect of a Ruling delivered on 9 November 2023.
15. The principles guiding an application for a stay of execution pending appeal are derivatives of Order 42 of the *Civil Procedure Rules* and in brief, they are a demonstration of substantial loss likely to be occasioned if the stay is not granted, provision of security for due performance of a decree or order and that application is brought without inordinate delay.
16. By the time the Respondents were moving to the Chief Magistrates Court, the Appellants had already revoked their contracts of employment. Nevertheless, the Chief Magistrate went ahead to award salary arrears at an interlocutory stage and before a hearing of the Cause on the merits.
17. The probability that the Respondents may not refund the monies if the Appeal were to succeed is in issue, and therefore, that a substantial loss of public funds may be occasioned need not be gainsaid.
18. The Appellants have offered to comply with Court orders in respect of the security for the due performance of the order by the Chief Magistrate.
19. The application was brought without inordinate delay.
20. Considering the above, the Court finds that the application is merited.
21. In order not to prejudice the hearing and determination of the Appeal, it is only fair and logical that the proceedings before the Chief Magistrates Court be stayed.

Orders

22. Flowing from the above, the Court orders:
 - i. Stay of execution pending the hearing and determination of Appeal is hereby granted on condition that the Appellants deposit the monies awarded by the Chief Magistrate into Court within 20 days of this Ruling.



- ii. The proceedings before the Chief Magistrate are stayed pending the hearing and determination of the Appeal.
 - iii. The Appellants to file and serve a Record of Appeal within 30 days.
23. Costs to abide the Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF MAY 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellants Mose, Mose & Mose Advocates

For Respondent MNW & Advocates

Court Assistant Chemwolo

