



**Oloo v Ndege, Secretary General Union of Kenya Civil Servant & 2 others;
Wangui (Interested Party) (Employment and Labour Relations Petition
E013 of 2023) [2024] KEELRC 1885 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1885 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2023

HS WASILWA, J

JULY 16, 2024

BETWEEN

PATRICIA AKINYI OLOO PETITIONER

AND

**TOM NDEGE, SECRETARY GENERAL UNION OF KENYA CIVIL
SERVANT 1ST RESPONDENT**

UNION OF KENYA CIVIL SERVANTS 2ND RESPONDENT

THE REGISTRAR OF THE TRADE UNION 3RD RESPONDENT

AND

SUSAN WANGUI INTERESTED PARTY

RULING

1. This Ruling is in respect of the Interested party’s Application, Notice of motion dated March 14, 2024, Brought pursuant to sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 51 rule 1 & Order 42 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law, seeking for the following Orders; -
 1. Spent.
 2. Spent.
 3. That an order be and is hereby issued for stay of execution of the judgment delivered on February 29, 2024 by Lady Justice Hellen Wasilwa, pending the filing, hearing and determination of the Appeal.



4. That the *status quo* be maintained, that is to mean the Applicant to remain in office, pending the hearing and determination of the Application.
5. That the *status quo* be maintained, that is to mean the Applicant to remain in office, pending the filing, hearing and determination of the appeal.
6. That the costs of this Application be in the cause.
7. That the court may grant any other orders that it deems fit.
2. The basis upon which these application was made is that the Applicant has filed a notice of Appeal and memorandum of appeal, challenging the Judgement of this Court delivered on February 29, 2024.
3. It is stated that the Applicant was not enjoined as a party to the suit, and thus was not granted a chance to be heard yet the matter and the judgment directly affects her and the office she holds.
4. It is contended that the Applicant is facing the risk and danger of being evicted and removed from office if the judgment entered in this case on February 29, 2024 is executed.
5. That Article 16 of the Trade Union Constitution provides for an arbitration clause which was not complied with before filing of the case.
6. She stated that if the Application is not allowed, her rights under Articles, 27 47, 49 and 50 of the constitution will be violated as the Applicant will have been denied right to fair trial, subjected to discrimination that will occasion miscarriage of justice.
7. That it is only fair and just that this Application be allowed so that the appeal will not be rendered nugatory. In any case that the Applicant has an arguable case with a high probability of success.
8. She avers that in the event this Application is not allowed and the appeal succeeds, then the Applicant will end up suffering irreparable damages. On the contrary, that the Respondents stand to suffer no irreparable loss and damage if the Application is allowed. Also that the Application has been made without undue delay and in good faith.
9. It is on this basis that the Applicant urged this Court to make an Order restraining the Respondents from executing the judgment pending the hearing and determination the appeal.
10. The Application is also supported by the affidavit of the Applicant sworn on March 14, 2024, reiterating the grounds of the Applicant and adding that she come on board on March 14, 2024, pursuant to directions issued by this Court, following the filling of the Application dated March 8, 2024, seeking *inter alia* to be joined to these proceedings. Therefore, that she is properly on record.
11. The Application is opposed by the Petitioner, who filed a replying affidavit sworn on April 26, 2024. In the affidavit, the petitioner stated that the Applicant's issues are three fold; That the Union of Kenya Civil Servants Article 16 was not followed before filing this petition in court, that the interested party is facing the risk and danger of being evicted and/or removed from office if the judgment of February 20, 2024 is executed and that if the interested party's application is disallowed, her rights under Articles 47, 49 and 50 of the constitution of Kenya 2010 will be violated.
12. She stated that she wrote to the Secretary General via his email and WhatsApp complaining of the rigged Rift valley regional elections immediately the elections were closed on September 5, 2021.
13. She stated that, in making the said complain, she was following procedure under the provisions of Appendix "A" paragraph 8 of the constitution of the Union of Kenya Civil Servants which states that, 'all official correspondences to the union shall be addressed to the Secretary General of the Union',



bearing in mind that it is his constitutional mandate as provided for by this constitution That he, the Secretary General of the Union, together with the guidance of the Advisory Council and National Executive Board as provided for under Article 16 was to set into motion the provisions of Article 16 sub Article 3(i).

14. She avers that being a member and aspiring to be elected as a representative, she did not have the mandate to operationalize the provisions of Article 16(3)(i) as such powers was vested in the Secretary General, who despite receiving the complaint refused to act on it causing the Petitioner to file the current petition.
15. The Petitioner stated that the Interested party's apprehension of being removed from office if the judgment entered on February 29, 2024 is executed is not justified because if judgment is executed and re-election conducted, the interested party, if she genuinely won the seat, will still be elected in to office, Therefore, she does not have to fear the re-election.
16. On the joinder Application, the petitioner stated that the interested party should not have been joined to these proceedings because she was a union official and a member of the National Executive Board, as such, she was fully aware of these proceedings but never bothered to joined until judgment was delivered.
17. It is stated that the Union had sought to be allowed to appeal in the court of appeal under petition no. 037 of 2024, which Court has not pronounced itself on the issue to date. Additionally, that the interested party cannot purport to be interested to join the appeal or the petitioner's petition No. 013 when she knew these proceedings by dint of sitting in the monthly National Executive meetings. That as it stands the Application is an afterthought.
18. She stated that the interested parties' interests are fully taken care of by the main union which is the main respondent in this matter. Further, that there is no eminent threat since the bill of costs is yet to be taxed and even if it is taxed, it is not going to be settled by the interested party but the main union. Thus, she is not going to suffer any prejudice at all.
19. It is also stated that the interested party was not a party before judgment was delivered and it is therefore not right for her to oppose a judgment where she was not a party.
20. On the issues of violation of Articles 47, 49 and 50 of the *constitution*, she stated that in lodging a complaint with the Secretary General, she was exercising, her right under Article 15(1.1) and 2(c) of the Union Constitution as is read with the provisions of Article 27(1),(2),(3) of the *constitution* of Kenya . Further that she relied on Article 17(2) of the Union Constitution that provides that the Secretary General is the one empowered to settle such matters by invoking the provisions of Article 16 (3)(i), but since the Secretary General refused to settled the issue, she approached this Court. Hence the Petition was properly before this Court.
21. The Petitioner stated that Article 159(3) of the *constitution* of Kenya states that Traditional disputes resolution mechanism shall not be used in a way that: contravene the bill of rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or is inconsistent with this constitution or any other law.
22. She stated that by denying to allow the execution of the judgment delivered by this Court on February 29, 2024, the interested party is infringing on her rights which had been infringed by the Secretary General and that the only fair practice under such contested elections is to allow for re-elections to be held in order to get the correctly elected person and create peace among the contending parties. Therefore, that the Applicant cannot rely on the provisions of Articles 47, 49 and 50 but ignore the provisions of Article 159 sub article 3 a, b and c which the Secretary General violated.



23. She maintained that the Application herein is an afterthought, meant to deny her the fruit of her judgement and that it is in the interest of justice and fairness that this court declines the interested party's prayers and both parties go to the elections for fair play to be seen to have been done.
24. The Application was canvassed by written submissions.

Applicant's Submissions.

25. The Interested party/ Applicant submitted from the onset regarding the merits of the Application and began by defining *prima facie case* as a case that on the material submitted to it, portends a possibility of success. In this, she relied on the case of *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKLR where the court relied on *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* where the Court of Appeal stated as follows:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a *prima facie case*? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. Similarly, in *Nguruman Limited v Jan Bonde Nielsen & 2 others*, the Court of Appeal agreed with the definition of a *prima facie case* in the *Mrao Case* and stated:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie case* lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie case* has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie case*. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie case* is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

27. Accordingly, that the Petitioner filed a suit and never served the Applicant, knowing very well that the outcome of the case would definitely affect the leadership position that the Applicant holds. She argued that the only way to show that the Applicant was aware of the suit is by the Petitioner tendering proof of service. Therefore, that since the Applicant was not served, he was not heard as required under the law, when the judgement affect her position. She added that, she has real evidence that will prove she was properly elected into office and the judgment entered in this matter was uninformed since the court was not supplied with true facts. She maintained that service to the Union, did not mean service to her.



28. On whether the application was filed expeditiously, it was submitted that the Applicant learnt of this matter after judgement was delivered and was informed that the Judgement was to the effect that, she was to vacate her office and immediately contacted her advocate to take remedial measures, Hence the Application was file timeously and in good faith.
29. On whether the Orders sought should issue, it was submitted that the Applicant stands to suffer irreparable damage if the Application is not allowed. It was argued that, forcing the Applicant to vacate her office without granting her an opportunity to be heard will taint her image in the society and raise a lot of questions with respect to her character and dignity yet she was legally elected into office. Further that her removal violates her constitutional rights such as; right to be heard, right to access justice and freedom of expression.
30. The Applicant submitted that it is in the interest of justice that the Application be allowed since the Petitioner will not suffer any loss or damage if the Application is allowed. Besides, that the Petitioner is the one that erred by not including the Applicant as a party to the suit knowing that the reliefs sought would directly affect the Applicant.
31. The Applicant took issue with the fact that the Petitioner was awarded costs including the amount paid to Applicant to facilitate performance of their contract. He argued that the issue of contract was not heard and thus, it is necessary to stay execution until the appeal is heard and determined. Failure to which, the Appeal will be rendered nugatory. In support of this, the Respondent relied on the case of Bungoma High Court Misc. Application No 42 of 2011 - *James Wangalwa & Another vs Agnes Naliaka Cheseto* where the court stated that:

“The applicant must establish other factors which show that the execution will create state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”

32. Similarly, she relied on the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and the case of *Mukuma v Abuoga*, which Court in the latter referred to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the *CPR* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

“...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.”

33. Accordingly, that the only way to preserve the subject matter of the appeal, is by maintaining the status quo in that the Applicant continues to hold her position until the appeal is heard and determined.
34. It was submitted that Order 42 Rule 6(2) of the *Civil Procedure Rules* set out the principles that guide court in considering whether to grant Stay of execution and the Applicant is ready to take directions on security. However, that the Court should take notice of the subject matter being an election issue and note that there is no financial loss on the part of the Petitioner and refrain from granting security. In support of this, she relied on the case of Civil Appeal No. 107 of 2015, *Masisi Mwita Vs Damaris Wanjiku Njeri* [2016] eKLR, the Court while affirming these criteria held that:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another..Vs...Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:- “The Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause,



substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

35. It was submitted that, in line with the above submission and considering that an Appeal has already been lodged, it is only proper that stay of execution is granted because to Order otherwise will render the Appeal nugatory in the event it succeeds and cause the Applicant immense loss.
36. In conclusion, the Applicant submitted that the prayers sought are aiming at ensuring the Applicant is given a chance to a fair hearing and that she will not suffer irreparable loss on account that a stay of execution of a judgment that has been appealed against was not granted. She urged this Court to weigh the issues raised and consider granting the Application as prayed and finally award the Applicant costs.

Petitioner’s Submissions

37. The petitioner submitted with regard to allegations that the interested party will be removed from office without being heard and argued that the elections were rigged in the sense that the delegates that attended the meeting to vote were 30, However, 6 left before the voting began and therefore that only 24 delegates voted and was surprise to see the record showing that 30 people voted. It is on this basis, that the petitioner raised a complaint with the Secretary General via WhatsApp and email on the same day in line with the Union constitution, but that the Complaint was never acted upon.
38. It was argued that it’s the failure by the Union to action her complaint that led to the filling of this case that Court directed for re-election for the particular post of Female South Rift representative to be repeated, therefore that the Applicant is not going to be removed, rather that afresh elections are first held then the legitimate winner is elected and takes office, without any loss on her part.
39. On whether the Interested party will suffer any losses, it was submitted that the Interested party works full time in the Government and paid from the exchequer and only paid an allowance by the Union, therefore that there is no loss of salary and or income if the re-election is carried out as ordered by the Court.
40. On the the Appeal, the Petitioner submitted that the Interested party is seeking to be enjoined to proceedings after judgement contrary to the law. It was argued that the Interested party did not participate in the trial Court proceedings and therefore it will be absurd to be joined to an Appeal, which she was not part of. It is on this basis, that the Petitioner submitted that the current Application is an afterthought and an abuse of Court process.
41. It was submitted in addition that there is nothing on record to show that indeed the interested party was allowed by this Court to come on record and urge this Application. In any event that a party cannot be joined to a suit after judgement. Further that it is not proper to appeal in a suit, one was not a party in.
42. The Petitioner also submitted that the Interested party has not particularized the alleged violations of her rights and therefore that as it stands, none of the Applicant’s rights will be violated. Conversely, that by calling for a fresh election, the Court is balancing the interested of both the interested party and the Petitioner.
43. In conclusion, the Petitioner urged this court to dismiss the Application herein for lacking in merit with costs to her.
44. I have examined all the averments and submissions of the parties herein. What is clear is that the applicant herein has never been a party to these proceedings. She has also not applied to be enjoined in the said proceedings.



45. As the application stands, it is filed by a party without *locus standi* to file the same and on that ground alone, I decline to grant the prayers sought and dismiss the application forthwith. Costs to Respondents.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimathi for Applicant – Present

Respondents – Absent

Court Assistant - Fred

