



**Statsala & another v Kevin & 2 others (Petition 9 of 2023)
[2024] KEELRC 1707 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1707 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION 9 OF 2023**

**JW KELI, J
JULY 4, 2024**

BETWEEN

ZACHARIA STATSALA 1ST PETITIONER

HERMAN INGANJI 2ND PETITIONER

AND

SAGALA KEMOLI KEVIN 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND NATIONAL
ADMINISTRATION 2ND RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, KAKAMEGA CENTRAL 3RD
RESPONDENT**

RULING

1. The ruling is on application by way of a Notice of Motion application by the Petitioners/Applicants (herein "Applicants") dated 26th April 2024 and filed on an even date brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, and Order 42 Rule 6(1), (20 and Order 51 Rule 1 of the Civil Procedure Rules, seeking the orders: -
 - a. Spent.
 - b. There be an interim order of stay of execution of the orders issued in the judgment delivered on 16th April 2024 between the parties herein pending the hearing and determination of this application, inter partes.
 - c. This Honourable Court be pleased to issue an order for stay of execution of the orders issued in the judgment dated 16th April 2024 between the parties herein pending the hearing and determination of the appeal preferred by the Applicants/Petitioners.



- d. The costs of his application be provided for.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit of Zacharia Shatsala(1st Petitioner) sworn on 26th April 2024 as follows: -
 - i. That the court delivered its judgment on the matter against the applicants on 16th April 2024 and the applicants were aggrieved by the said decision, and found that the best route to take would be to file an appeal and seek a stay of execution against the implementation of the orders contained in the said judgment.
 - ii. That the Applicants have filed an appropriate Notice of Appeal and applied for the typed proceedings and judgment and have commenced the process of extraction of the decree for purposes of appeal in the Court of Appeal (ZS-001 - Notice of Appeal).
 - iii. That unless an order for stay of execution is granted immediately, the 2nd and 3rd Respondents are likely to execute the order and inaugurate the 1st Respondent as the Assistant Chief of Shirere Sub-location, Kakamega County, at any time now, as there is nothing to stop them from doing so.
 - iv. That unless stayed immediately to preserve the status quo, the appeal will be rendered nugatory upon execution of the orders.
 - v. That the applicants' intended appeal has good prospects of success on appeal and the applicants have arguable issues of law that are likely to be determined in their favour.
 - vi. That it would be in the interest of justice for the court to grant the stay of execution considering that the matter is a public interest matter and the respondents will not be prejudiced by the said order.
 3. The Application was opposed by the respondents through the Grounds of objection dated 3rd May 2024 stating that: -
 - i. The application is incompetent, bad in law, frivolous, vexatious, and an abuse of the court process as it is trite law that a Notice of appeal is not an appeal as such, and thus there is no appeal warranting the granting of a stay of execution of the judgment of 16th April 2024.
 - ii. That the application is overtaken by events on the issue of swearing the 1st Respondent as Assistant Chief of Shirere Sub-Location and the same was done way before the petition was filed in court a fact on the court's record.
 - iii. That despite the applicant's claim that their appeal has a high chance of success, there is no draft memorandum of appeal presented.
 - iv. That the applicants' have not satisfied the conditions for the grant of the orders sought.

Written Submissions

4. The Court directed that the application be canvassed by way of written submissions. The parties complied. The Applicant's written submissions dated 29th May 2024 were filed by Mukavale Kevin & Co. Advocates. The Respondents' written submissions dated 31st May 2024 were filed by the Office of the Attorney General-State counsel, Dan Simiyu.



Determination

Issues for determination.

5. The Applicants addressed the following issue in their written submissions:-
 - a. Whether the Applicants/Petitioners are entitled to the order sought in the application dated 26th April 2024.
The Respondents addressed the following issues in their written submissions:-
 - a. Whether the Petitioners/Applicants have demonstrated that the intended appeal is arguable.
 - b. Whether upon success the appeal will be rendered nugatory unless the Petitioners/Applicants are granted a stay.
 - c. Whether the Petitioners/Applicant are entitled to prays(sic) sought in the Application.
6. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the court by the parties for determination of the application is: - Whether the application for stay of execution pending appeal was merited.

Analysis

Whether the application for stay of execution pending appeal was merited.

Applicants' submissions

7. The Applicants urged that by dint of Order 42 Rule 6 of the Civil Procedure Rules, the Applicants will suffer substantial loss if the current status quo is not maintained as the Assistant Chief II(1st Respondent) will continue carrying out duties despite the pending appeal. The applicants contended that the Court prior to the judgment dated 16th April 2024, had issued conservatory orders restraining the 1st respondent from assuming office pending the hearing and determination of the application, which the Respondents did not obey. The Applicants' position was that as at the time the petition was being filed the Assistant Chief had been appointed and not inaugurated into office.
8. The Applicants urged that, despite the Respondents' argument that the application is overtaken by events, there is no proof of any inauguration having taken place. Unless the status quo is maintained, to prevent the Assistant Chief from conducting his official duties, then the Applicants' rights will be infringed. To buttress this assertion the Applicants relied on the decision in Kenya Shell Ltd v Kibiru & Another [1986]eKLR 410 to effect that the court in an application for stay pending appeal must address its collective mind to the question of whether to refuse the stay would render the appeal nugatory and in doing so balance with the position of a successful litigant being deprived of fruits of a judgment without a just cause.
9. The Applicants submit that their application was made without delay as the judgment was delivered on 16th April 2024 and their application was filed on 26th April 2024. The Applicants urged that since the matter is a public interest suit no security is needed and that in all civil matters filed before the court of appeal, parties are required to deposit Kshs. 6,000 as security for costs.



Respondents submissions

11. The Respondents submit that the Applicants' assertion that their appeal is arguable cannot be established since there is no draft memorandum of appeal annexed to their application. The Respondents argue that the Notice of appeal dated 19th April 2024 is not an appeal and it offends Rule 77 of the Court of Appeal Rules 2022. The respondents assert that the failure to attach a draft Memorandum of Appeal renders the applicants' application moot for failing the first test in granting a stay of appeal. To buttress this assertion they relied on the decision in *Mabel Kibore v National Oil Corporation Of Kenya* (2017)eKLR.
12. On the limb of whether the intended appeal will be rendered nugatory if the stay is not granted, the Respondents submit that on 25th September 2023, the 1st Respondent was appointed Assistant Chief of Shirere sub-Location, he reported to the chief of the location and assumed his duties right away. The Respondents assert that the interim application dated 15th December 2023 accompanying the petition had been brought to court seeking to bar the 1st Respondent from assuming the office of Assistant Chief. The Respondent submits that on 24th January 2024, upon hearing of the parties' oral submissions, the Respondent informed the Court that the 1st Respondent had already taken office. The Court directed that the application be abandoned and the status quo be maintained and the 1st Respondent went on to carry on his duties as an assistant chief.
13. The Respondents state that the applicants' current application seeks to stay the 1st Respondent's appointment but the same has already been overtaken by events and it would be pointless to grant orders of stay when the substratum of the matter is no longer in existence. The Respondents relied on the decision in *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020]eKLR.
14. The Respondents further submit that the Court dismissed the Applicants' petition and the instant application for stay seeks to stay a negative order , which cannot be stayed as the court in *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* ((supra) held that:-

“The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order. We are guided by the decision in the case of *Western College Farts and Applied Sciences v Oranga & Others* [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated inter alia as follows:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”



Decision

15. Order 42 Rule 6 of the Civil Procedure Rules, 2010 specifies the circumstances under which the Court may order a stay of execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following:-
 - a) Substantial loss may result to the applicant unless the order was made;
 - b) The application was made without unreasonable delay; and
 - c) Such security as the Court orders for the due performance of such Decree or Order as may ultimately be binding on him has been given by the applicant.”
16. From the above provision, it is clear that the Court must be satisfied that there is “sufficient cause” to grant a Stay. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.
17. The Applicant urged that the court issued conservatory orders restraining the 1st Respondent from assuming office and that the 1st Respondent has never been inaugurated to office. The Applicants had filed the Notice of motion application dated 15th December 2023, which sought a conservatory order to restrain the 1st respondent from assuming office and orders restraining the 2nd and 3rd Respondents from installing/inaugurating the 1st Respondent as the Assistant Chief of Shirere Sub-Location.
18. The Court granted the interim conservatory order on 15th December 2023 to restrain the 1st respondent from assuming office until hearing and determination of the application. The matter was slated for an interpartes hearing on 24th January 2024. When parties appeared before the court, it was brought to the court’s attention that the 1st Respondent had already assumed office. The court found that the application had been compromised and the parties were directed to retain the status quo of that date and the matter proceeded to the hearing of the main petition.
19. The status quo maintained was that the 1st Respondent who had already assumed office would continue serving as the Assistant Sub Chief pending the determination of the main Petition. The court in its judgment of 16th April 2024 dismissed the Petition.
20. The court’s judgment sought to be appealed against was delivered on 16th April 2024, where the court dismissed the Applicants’ petition with no orders as to costs. The order was thus in the negative.
21. The Court of Appeal decision in the case of *Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another* [2020]eKLR(supra) stated:-

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”

The court in *Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another* (supra) upheld the decision in *Western College Farts and Applied Sciences v Oranga & Others* [1976]KLR 63, where the Court while considering whether an order of stay can be granted in respect of a negative order stated inter alia as follows:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs....”



The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.” I uphold this decision to apply in the instant application.

22. In the instant case, the Court dismissed the Petition with no Order as to costs. There is absolutely nothing to stay.
23. Furthermore, the onus of proving that substantial loss would occur unless a stay is granted rests upon and must be discharged accordingly by the applicants. It is not enough to merely state that loss will be suffered, the Applicant ought to show the substantial loss that they will suffer in the event the orders sought are declined. The applicants have not shown how their rights will be infringed.
24. The Court of Appeal in *Rhoda Mukuma v John Abuoga*[1988] eKLR, held that “It was laid down in *Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979*, (following *Wilson v Church (No 2)* [1879] 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo. . (Emphasis added).

25. The present status quo maintained during the hearing and determination of the petition was that the 1st Respondent who had already assumed office would continue to act as so. The Court dismissed the petition and the status quo was confirmed.
26. The Respondents contended that the failure of the applicant to attach a draft memorandum of appeal does not disclose whether the appeal is arguable.
27. The Applicants contended that their intended appeal has good prospects of success and raises arguable issues of law that are likely to be determined in their favour but did not set out any of the said grounds nor attach a draft memorandum of appeal.
28. The Court of Appeal in *Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR) (19 January 2024) (Ruling) held that: “An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One is sufficient. For a point to be arguable it needs merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and is worthy of the court’s consideration.
33. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there is no rule that it must be so. One can raise such grounds on the face of the motion and even in the supporting affidavit, as happened in this case. We reiterate what was said recently in *Ontweka & 3 others v Onderi (supra)*“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that



it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.”(Emphasis added)

29. The Applicants neither attached the draft Memorandum of Appeal nor did they set out what they consider to be arguable points that they intend to raise during the appeal.
30. Needless to say, under the Judgment intended to be appealed against being a negative order, the application was rendered moot on that ground.
31. In the upshot, based on the foregoing reasons, the application dated 26th April 2024 is held to be without merit and is dismissed.
32. This being a public-spirited cause, the Court makes no order as to costs.
33. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF JULY 2024.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Macheso

Applicants: - Mbetera

Respondents: Simiyu

