



**Kenya Union of Clinical Officers v Kirinyaga County Public Service Board; Public Service Commission (Interested Party) (Miscellaneous Case E002 of 2021) [2025] KEELRC 58 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 58 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
MISCELLANEOUS CASE E002 OF 2021  
ON MAKAU, J  
JANUARY 23, 2025**

**BETWEEN**

**KENYA UNION OF CLINICAL OFFICERS ..... APPLICANT**

**AND**

**KIRINYAGA COUNTY PUBLIC SERVICE BOARD ..... RESPONDENT**

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**RULING**

1. This ruling relates to the Applicant’s Notice of Motion dated 27<sup>th</sup> August 2024 brought under Articles 159, 259(1) of the *Constitution*, Section 7 of the *Appellate Jurisdiction Act*, section 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, and Order 42 Rule 6, 8, 51(1) & (3) of the Civil Procedure Rules. It basically seeks the following orders:
  - a. That this Honourable Court be pleased to stay the implementation of its ruling and order delivered on 9<sup>th</sup> August 2024 and consequential orders enforcing the PSC decision of 14<sup>th</sup> April 2021 reinstating the members of the Applicant’s union pending the hearing and determination of the intended Appeal.
  - b. That in the alternative this Honourable Court be pleased to grant orders of maintenance of status quo to the effect that the reinstatement of the members of the Applicant Union awaits the hearing and determination of the intended Appeal.
  - c. That the orders in prayers 1,2,3 and 4 above do apply mutatis mutandis to ELRC MISC No. E003 of 2021.



- d. That this Honourable Court be pleased to make any other or further orders as the circumstances and interests of justice herein may require.
  - e. The costs of the application be provided for.
2. The application is premised on the grounds on the body of the motion and the supporting affidavit sworn on the 7<sup>th</sup> October 2024 by Carolyne Kinyua, the Respondent's County Attorney. The gist of the application is that judgment was entered on 9<sup>th</sup> August 2024 dismissing the Respondent's application seeking quashing of the decision of the PSC delivered 14<sup>th</sup> April 2021; that it was dissatisfied by the said decision and intends to appeal against the decision before the Court of Appeal; that the temporary order of stay of execution given by the court has since lapsed and as such there is imminent danger of execution of the impugned decision; that running parallel set of employees pending the determination of the Appeal would occasion substantial loss upon it; that the parallel employees would not only cause strain on the wage bill but would also be contrary to public service policies on fiscal planning and optimum utilization of public resources.
  3. It is further applicant's case that the appeal has overwhelming chances of success and if stay is denied, the appeal will be rendered nugatory; that the application was brought without undue delay; that it was willing to furnish reasonable security for performance should the court deem it fit to order; and that it has a right to be heard on the intended appeal which should be protected by granting the stay of execution sought.
  4. The Respondent opposed this motion by its grounds of opposition dated 4<sup>th</sup> November 2024 wherein it sought for the motion to be struck out with costs on grounds that: the application is an abuse of the court process as it is intended to subvert the orders for leave to appeal and stay of execution given on 9<sup>th</sup> August 2024; that the application is aimed at arm twisting the Court and testing the court's authority on its decision that its mandate on the matter was basically to adopt the decision of the PSC given on 14<sup>th</sup> April 2021 and nothing more; that the Court is functus officio and the application is sub judice and res judicata therefore lacks the jurisdiction to grant the sought orders; that the orders sought are in contravention of section 88 of the PSC Act that requires county boards to comply with PSC decisions even where there is an application for review pending; that no reason was given as to why no appeal was filed within the time prescribed by the law; that no decree has been issued in this matter and thus no action has been taken towards execution; and that the Applicant has not met the legal threshold for granting stay of execution pending appeal prescribed under Order 42 Rule 6 of the Civil Procedure Rules and therefore the application be dismissed with costs.

### **Submission**

5. The Applicant submitted on whether this Honourable Court should grant the ex-parte Applicant's Notice of Appeal filed out of time, whether the intended appeal is arguable and who should bear the costs of this Application. On the first issue, counsel submitted that the Applicant only got to file its notice of appeal on 24<sup>th</sup> August 2024 at 5am due to system downtime during the week. The filing happened outside the 14 days limitation due to reasons beyond control.
6. It was submitted that Article 159 of the Constitution implores the Court to administer justice without undue regard to procedural technicalities. It was further urged that a party should not be driven away from the seat of justice when there is sufficient cause for the failure to comply with procedures and timelines.
7. It was further submitted that under Rule 18 of this Court's Rules 2024, the Court is clothed with the discretion to extend time within which a party can file an appeal. For emphasis, reliance was placed



- on the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR where the Court of Appeal discussed the matters to be considered in deciding whether or not to enlarge the time for filing an appeal.
8. The court was urged to grant the leave sought because the system failure leading to a delay of five hours is a factor beyond a party's control.
  9. It further submitted that this is a proper case for the court to grant stay of execution in order to protect the intended appeal from being rendered nugatory. It was submitted that, if the stay is not granted substantial loss will be occasioned on the applicant because reinstatement is a permanent process since once the employees resume work, the appeal will be defeated. Further the applicant will not be able to afford the budgetary requirement to pay the employees after reinstatement.
  10. It further was submitted that the Memorandum of Appeal raised weighty and arguable issues worth the consideration of the Court of Appeal and if stay is declined, the applicant will be completely locked out of the corridors of justice. In support of its arguments, reliance was placed on the case of Butt v Rent Restriction Tribunal [1982] KLR 417, where the Court of Appeal drew guidance on exercise of discretion in applications for stay of execution.
  11. It was observed that the Court has jurisdiction to grant stay pursuant to Rule 73 of this Court's Rules as read with Order 42 rule 6 of the Civil Procedure Rules. Consequently, it was submitted that the Court is not functus officio.
  12. It was further submitted that there was no delay in filing of the application as the court had granted 30 days stay of execution which lapsed on 9<sup>th</sup> September 2024, and the instant application was filed on 9<sup>th</sup> October 2024. It was also submitted that the Applicant was willing to give security of cost in compliance with any reasonable conditions for stay.
  13. For emphasis, reliance was placed on Cotton LJ in Wilson v Church (No.2) 12 Ch D (1879) 454 at p458, that the right of appeal is constitutional, and if there is an appeal which in the Court's mind is not frivolous, it is in the interest of justice that the court to protect it from being rendered nugatory.
  14. It was argued that the Applicant herein has attached a draft Memorandum of Appeal that raises weighty grounds warranting the consideration of the Court of Appeal, and the chances of success tilt in his favour. Consequently, the court was urged to allow the application and direct that the costs of the application shall abide the outcome of the appeal.
  15. On the other hand, it was submitted for the respondent that the application was incurably defective, bad in law and without merit for reasons that: no notice of appeal has been filed by the applicant hence the court lacked jurisdiction; that the court is functus officio; that the applicant is undeserving of the Court's discretion due to illegality in its conduct; that the applicant is guilty of unexplained laches as the application was filed two months after the impugned decision; and that no arguable appeal has been demonstrated.
  16. It was submitted that the since no notice of appeal has been filed herein the court lacked jurisdiction in this matter as order 42 requires for stay to only be granted where there is an appeal. For emphasis, reliance was placed on the case of Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR.
  17. As regards the Court being functus officio, it was argued in support that the Court had already exercised its sole and limited role in the matter by endorsing the decision of the PSC and therefore the Application has the effect of reopening the question of legality and enforceability of the PSC decision. It was argued that the application was seeking to stay the implementation of the decision of the PSC



which issue had been earlier dealt with and dismissed by this Court. Reliance was placed on the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR.

18. It was further submitted that the application being one seeking equitable remedies, the applicant is undeserving because it did not approach court with clean hands as it has continued breaching section 88b of the PSC Act. It was argued that the intention of the said section is that the PSC decisions are to be implemented regardless of any challenges. In support, reliance was placed on the case of Alice Njoki Mugo v KCB Bank Kenya Limited & Another [2020] eKLR.
19. It was also argued that the applicant's failure to implement the orders of the Court, amounts to contempt of court and not deserving of the orders sought herein.
20. It was submitted that for the court to grant stay orders, the application should be brought timeously but in this case the applicant is guilty of laches. It was submitted that the delay of 2 months to file the stay application was not explained and the same was inordinate given the circumstances of the case. In support reliance was placed on the case of Joseph Odide Walome v David Mbadi Akello [2022] KEHC 2748.
21. On whether the appeal is arguable, it was submitted that the applicant did not attach a draft memorandum of appeal in this application and thus it was unclear on what arguments the Respondent intended to make at the Court of Appeal. In support, reliance was placed on the Joseph Odide Walome case supra where the court dismissed the application on grounds that the draft memorandum of appeal was not annexed.

### **Determination**

22. I have considered the Application, response and the rival submissions. The issues falling for determination are:
  - a. Whether the court has jurisdiction to grant the stay order sought.
  - b. Whether the court is functus officio.
  - c. Whether application is res judicata.
  - d. Whether the application meets the legal threshold for granting stay of execution pending appeal.

### **Jurisdiction**

23. The jurisdiction of the trial Court to grant stay in case of a pending appeal is donated by Order 42 rule 6 of the Civil Procedure Rules, which provides as follows:
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order...
  2. No order for stay of execution shall be made under subrule (1) unless-
    - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- b. 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.
  - 3. ...
  - 4. For purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given
  - 5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling
  - 5. ... ”
24. The purpose of Rule 6 above, is stated on the side notes as “Stay in case of appeal”. This clearly means that the trial court can only exercise the power to grant stay only when there is a pending appeal with the exception of the said informal application made under subrule (5). An appeal to the Court of Appeal is only deemed to exist if it has been filed before the Court or if a notice of appeal has been given as prescribed by the Court of Appeal Procedure Rules.
25. In this case, there is neither an appeal duly filed at the Court of Appeal nor notice of appeal duly given as prescribed by Court of Appeal rules. Both the applicant and the respondent verbally requested for leave to appeal on 9<sup>th</sup> August 2024 when I rendered the impugned judgement. The notice of appeal ought to have been lodged within fourteen days of the impugned decision but up to now, none was lodged. Consequently, I find that there is no pending appeal in relation to the judgment herein and this court lacks jurisdiction to grant stay of execution pending a non-existent appeal.
26. The foregoing position obtains in the Court of Appeal which lacks jurisdiction to grant stay if no notice of appeal has been given or where no appeal has been filed. I gather support from *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR, where the Court of Appeal held that:
- “It is now trite law and as we shall be demonstrating later on in this ruling that the exercise of this Court’s mandate is usually set in motion by either the lodging of a notice of appeal thereby signifying a party’s intention to appeal or alternatively by the filing of the appeal itself. ...
- Once the Court realizes that there is no notice of appeal it must simply strike out the rule 5(2) (b) application, unless it is withdrawn.”
27. A Rule 5 (2) (b) application is simply an application before the Court of Appeal for stay pending appeal hence the equivalent of an application brought before this Court under Order 42 rule 6 of the Civil Procedure Rules. It follows that even this Court should strike out an application for stay pending appeal the minute it realizes that there exists no appeal pending or that no notice of appeal has been given as required by the Court of Appeal rules. Accordingly, I strike out the instant application for stay with costs since there is neither a pending appeal nor notice of appeal given after the impugned judgment was entered on 9<sup>th</sup> August 2024, and leave to appeal was granted.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**ONESMUS N MAKAU**

**JUDGE**



**Order**

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU****JUDGE**