



Ndalut & another v Nairobi City Water & Sewerage Company Limited (Employment and Labour Relations Petition E099 of 2022) [2025] KEELRC 2163 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2163 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E099 OF 2022**

**JW KELI, J
JULY 18, 2025**

BETWEEN

KIPTOO NDALUT 1ST PETITIONER

GRINNIN CHOGO LIBABU 2ND PETITIONER

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT

RULING

1. The Petitioner/Applicant moved this Court post judgment vide a Notice of Motion dated 25th February 2025 seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of the intended appeal, there be stay of execution barring the Respondent from implementing the judgment of this court and filling the positions occupied by the Petitioners.
 - d. The Court to grant any other order it deems fit to grant.
2. The Notice of Motion dated 25th February 2025 was based on the Grounds thereof and the Supporting Affidavit of the 2nd Petitioner/Applicant sworn on the same date.
3. The Respondent opposed the Notice of Motion dated 25th February 2025 through a Replying Affidavit sworn on 5th February 2025 (sic), and filed on 5th March 2025.
4. The court gave directions that the application be disposed of by way of written submissions, and both parties complied.



5. The Petitioner/Applicants' application is brought Rule 73 of the Employment & Labour Relations Court (Procedure) Rules 2024.
6. The application is premised on the grounds that on 14th February 2025, this very Court entered judgment in this matter. Both the Petitioners and the Respondents intend to lodge appeals of the said decision, and towards this end, have filed Notices of Appeal dated 24th February 2025, and 17th February 2025 respectively. The Petitioners state that, while the Respondent is aggrieved by the entire decision of the court, the Petitioners are aggrieved by the reliefs awarded to them. They seek stay of execution of the judgment in order to preserve the subject matter of the appeal, namely the positions which they continue to hold in an acting capacity within the Respondent organization. In their view, if stay of execution is not granted, their appeal will be rendered nugatory.
7. The Petitioners aver that they have a strong prima facie case on appeal since the court ruled that their right to fair labour practices was indeed violated. Upon making this finding, the appropriate remedy would have been confirmation to the respective acting positions which they have held for over 6 years. It is the Petitioners' position that the Respondent is keen on filling the positions that they hold in an acting capacity, and if these positions are filled they will suffer irreparable harm that cannot be compensated by way of damages. The Petitioners state that they have six (6) years remaining to their retirement, hence if the court does not preserve the subject matter of the appeal, they will not get their desired remedy even if their appeal is successful. While they acknowledge that monetary compensation is one of the remedies contemplated at law if their appeal is successful, the Petitioners state that being able to work and retire at their current positions is a worthier remedy. Finally, the Petitioners state that the Respondent will not suffer any prejudice if stay of execution is granted.
8. The Respondent opposes the grant of the orders sought for the reasons that the Petitioners have not met the threshold for grant of the same since they have not demonstrated that they will suffer substantial loss. The Respondent avers that vide its judgment dated 14th February 2025, the court found that the Petitioners right to fair labour practices was violated and awarded the sum of Kshs. 500,000/- to each of the Petitioners. In the same judgment, the court declined to grant the other prayers sought for the reason that the same had been determined vide the ruling of 26th October 2023 which ruling was not appealed against. In paragraphs 25 and 26 of the aforesaid ruling, the court held that Clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual gave the Respondent a wide discretionary authority to determine the period that one can hold office in an acting position. The appointment and further extensions of the Petitioners acting positions have always been on the basis that the same is subject to the positions being filled competitively/substantively. No automatic confirmation is provided for by the Respondent's Human Resource Policy and Procedures Manual where an employee has served in an acting capacity beyond the recommended period.
9. It is the Respondent's position that the Petitioners will not suffer substantial loss, as the court has already held that there can be no confirmation of the Petitioners to the subject positions without competitive recruitment as contemplated by Clause 4.2 of the Respondent's Human Resource Policy and Procedures Manual in line with national values and principles of transparency, integrity and accountability under Article 10 (2) (c) of *the Constitution*. Further, the fact that the Petitioners have been and continue earning acting allowances means that they cannot claim that they will suffer substantial loss.
10. The Respondent informs the Court that they have since the judgment filled the Petitioner/Applicants' positions substantively and deployed the new officers to their work stations, hence the orders sought have been overtaken by events. They affirm that they will suffer prejudice if the orders sought are granted as they have already carried out the recruitment process, and granting the orders sought will



be interfering with the Respondent's human resource functions. Finally, the Respondent argues that the Applicant has not indicated the security that they propose to deposit as a precondition for grant of stay orders.

Determination

11. I have carefully considered the Notice of Motion dated 25th February 2025, the Grounds thereof and Affidavit in Support thereof; the Replying Affidavit sworn by Titus Tuitoek on behalf of the Respondent on 5th February 2025 (sic) and filed on 5th March 2025; and the written submissions of the parties dated 7th May 2025 and undated, respectively. I return that the only issue for determination is as follows:-
 - a. Whether this Court should grant stay of execution of the judgment and decree issued on 14th February 2025 pending Appeal.

Whether this Court should grant stay of execution of the judgment and decree issued on 14th February 2025 pending Appeal.

12. Both the Petitioners and Respondents herein have preferred appeals against the Judgment of this Court delivered on 14th February 2025 in this matter. I have taken notice of the Notices of Appeal dated 17th February 2025, and 24th February 2025, filed by the Respondent and the Petitioners/Applicants respectively.
13. Through the impugned Judgment, the court allowed the Petition dated 16th June 2022, to the extent that the Petitioners' right to fair labour practices under Article 41 of *the Constitution* were violated by the continuous, erratic and undefined acting periods that the Petitioners were subjected to by the Respondent for over 3 years. The Court awarded the Petitioners general damages of Kshs. 500,000/- each as compensation for the violation of their right to fair labour practices. The remainder of the prayers sought by the Petitioners were dismissed.
14. Having considered the grounds of the Petitioner/Applicants' Notice of Motion dated 25th February 2025, while being cognizant of the fact that I am yet to see a copy of the Petitioner/Applicants' Memorandum of Appeal, I reach the conclusion that the Petitioner/Applicants appear to be appealing against the part of the judgment that dismissed some of their prayers. In particular, they are aggrieved by the failure of the court to grant the relief of ordering the Respondent to confirm the Petitioner/Applicants in the positions they had been acting in. This is clearly shown by Ground (f) of the Petitioner/Applicants' Notice of Motion which states as follows:

“The Petitioners intend to urge the Court of Appeal that the appropriate remedy once the court established violations of their rights was a confirmation to their respective positions which they have held for the last 6 years and they continue to hold even at the time of filing this application”
15. In that regard, the portion of the order made on 14th February 2025 that is being appealed against, and seeking to be stayed, is therefore, a negative order.
16. The Petitioner/Applicant's Notice of Motion application is grounded on Rule 73 (2) of the Employment and Labour Relations Court (Procedure) Rules 2024. The same provides that:

“Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules.”



17. Order 42 Rule 6 of the Civil Procedure Rules 2010 which grants this Court power to stay the execution of a Judgment, Decree or Order, pending appeal, provides that:

- “(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.”

18. While the Court appreciates that the Petitioner/Applicants have demonstrated that they intend to appeal against part of the decision of 14th February 2025, and to this end filed their Notice of Appeal dated the 24th of February 2025 within the statutory timelines, it is now well settled that a negative order is incapable of being stayed. The foregoing was eloquently expressed in *Western College of Arts and Applied Sciences vs Oranga & Others* [1976] KLR 63, where the Court whilst considering whether an order of stay can be granted in respect of a negative order, and which I fully adopt, stated 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.”

19. This was affirmed by the Honourable Court of Appeal in *Kaushik Panchamatia & 3 Others vs Prime Bank Limited & Another* [2020] eKLR where the Court held 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.”

20. In light of the above, the part of the decision of 14th February 2025 that dismissed the Petitioners/Applicants prayer to be confirmed to the positions of Security Officers, being a negative order, cannot be stayed. The Petitioners/Applicants have not demonstrated, through a memorandum of appeal and/or the grounds to their application, that what they seek to be stayed is the positive order of the court that ordered payment of damages of Kshs. 500,000/- each to the Petitioners.

21. In the upshot, I dismiss the Petitioner/Applicants’ Notice of Motion dated 25th February 2025, with costs.

22. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY, 2025.

**J.W. KELI,
JUDGE.**

In the Presence of:



Court Assistant: Otieno

Respondent: Ms. Yala

