



**Kenya Union of Clinical Workers & 76 others v County Government of Vihiga  
(Cause 32 of 2021) [2024] KEELRC 1626 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1626 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 32 OF 2021**

**JW KELI, J  
JUNE 26, 2024**

**BETWEEN  
KENYA UNION OF CLINICAL WORKERS & 76 OTHERS ..... CLAIMANT  
AND  
COUNTY GOVERNMENT OF VIHIGA ..... RESPONDENT**

**RULING**

1. The ruling is on application by way of a Notice of Motion application by the Respondent /Applicant (herein “Applicant”) dated 11<sup>th</sup> March 2024 brought under the provisions of Articles 50(1) and 159(2) (d) of the Constitution, Sections 1A, 1B, 3A and 63(e) of Civil Procedure Act, Order 42 Rule 6, Order 43 Rule (1)(x) and Order 51 Rule of the Civil Procedure Rules, Section 12(3)&(4) of the Employment and Labour Relations Court Act, and Rule (sic) of the Employment and Labour Relations Court Rules seeking the orders: -
  - a. Spent.
  - b. Spent.
  - c. Pending interpartes hearing and except for this application, the Honourable Court do issue an order of stay of further or other proceeding before this Honourable Court and before the magistrate’s Courts in this matter.
  - d. Pending interpartes hearing the Honourable Court do issue an order of stay of execution of the decree arising from the judgment of the Honourable Court delivered on the 26<sup>th</sup> day of May 2023 and or the ruling of the Honourable Court dated or delivered by Honourable Lady Justice Keli on 29<sup>th</sup> February 2024 and all consequential orders arising therefrom.



- e. The orders of stay of further or other proceedings and stay of execution once issued, be extended and or remain in force until the final determination of the appeal at the Court of Appeal.
  - f. Cost of this application to abide the outcome of the appeal.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit sworn by Tony Godia, Legal Counsel in the office of the County Attorney on 12<sup>th</sup> March 2024 as follows: -
- i. That the Court delivered a ruling on 29<sup>th</sup> February 2024(TG-1) which dismissed the applicant's application dated 13<sup>th</sup> December 2023 that sought to review the computation by the Court contained in the ruling of 30<sup>th</sup> November 2023.
  - ii. That the effect of the said ruling renders the applicant liable to pay the respondents close to Kshs. 150 million inclusive of costs and interest from public funds which are budgeted for under the Public Finance Management Act and other regulations.
  - iii. That the applicant is entitled to a right of appeal to the said ruling under Article 50(1) of the Constitution and Order 43 Rule 1(x) of the Civil Procedure Rules which the applicant has exercised by lodging a notice of appeal in the Court(TG-2).
  - iv. that the appeal raised substantial issues of law amongst them whether the Court had jurisdiction to entertain the suit and whether the Court had the mandate to tabulate salary arrears payable by the respondents as it did, which are now to be executed by the Claimant/ respondent and for failure to rule on all prayers sought in the applicant's application of 13<sup>th</sup> December 2023(TG-4-Drfat Memorandum of appeal).
  - v. That the Respondents have already through several communications posted on social media expressed their eagerness and intention to tax their costs in the lower Court in further proceedings and execute the same.
  - vi. That unless the Court stops the proceedings and execution through the order sought in this application, the respondent shall proceed to execute unabated thereby occasioning substantial and irreparable harm and or loss to the Applicant.
  - vii. That the Applicants have applied for the typed proceedings and ruling from the Court(TG-3) required for their appeal, and they are apprehensive the same may not be supplied immediately to enable the appeal hearing.
  - viii. That it is only fair the Applicant be granted the opportunity through the orders sought to canvass the appeal uninterrupted and from a level playing ground.
  - ix. That if the appeal was to succeed when execution has taken place, substantial and irreparable injustice shall be occasioned on the Applicant.
  - x. That the applicant is ready and willing to abide by the terms the Honourable Court may attach to the orders if granted and the respondents stand to suffer no prejudice if the orders sought are granted even if the appeal is unsuccessful as they can recover from County Government what was granted by the Court as the County is not winding up.
  - xi. In the interest of justice, the application and the orders sought be granted.



3. The Application was opposed by the Respondent through the Relying affidavit sworn by Hawkins Aling'o (Vihiga Branch Chairman of Claimant) on 9<sup>th</sup> April 2024 on the grounds that: -
- i. The Applicant swore a false affidavit owing to the fact that the Respondent rendered services in respect of the salary arrears and the Respondent is a debtor. That the Claimant borrowed money to be able to continue working for the respondent for 20 months each.
  - ii. That no judgement creditor is entitled to a stay of execution which is granted as a discretion of the Court, upon satisfying the conditions set by the Court such as depositing the entire decretal amount in Court or an interest-bearing account.
  - iii. That in the present case, where no substantial loss is proved, the stay ought to be refused, as no employer can claim to suffer substantial loss for paying salary arrears for which services have been rendered.
  - iv. That Courts have refused to grant a stay of execution in respect of employees' dues, reasoning that it had not been demonstrated that the employee would not be able to pay back the money paid, and in the present case, the Claimants are permanent and pensionable employees(see. [\*Rev Isaac Murwon -vs-Rev. Simon Alovi\*](#), Kisumu HCC Misc. Appl. No. 99 of 2013).
  - v. That the dismissal of a suit and or application dated 13<sup>th</sup> December 2023 (HA-1) is a negative order which the Court cannot stay(see. Court Appeal decision in [\*Western College of Arts and Applied Sciences v EP Orannga & 3 others\*](#) (1976)eKLR.)
  - vi. that on 28<sup>th</sup> March 2024 at 2.56 pm, the respondent sent to their advocate the order made by the Court on 28<sup>th</sup> March 2024, and on 2<sup>nd</sup> April 2024, the said advocate requested a copy of the application referred in the said application and never received a response to date(HA-2).
  - vii. that the advocate obtained the application on the e-filing portal on 4<sup>th</sup> April 2024 and the respondents have thus failed to comply with order no. 2 and rules of practice requiring them to serve an order together with an application.
  - viii. That the respondents have come to Court with unclean hands having failed to comply with Court directions and yet ask the Court to exercise its discretion in its favour.
  - ix. that the applicants endeavor to further delay the payment of salaries which have been in arrears for about 5 years some going up to 20 months.
  - x. That reiterating the contents in the replying affidavit sworn in opposition to the review application dated 13<sup>th</sup> December 2023; the claimants have been working for the respondent in various health establishments in Vihiga county since June 2019, and they are employed on a permanent and pensionable basis.
  - xi. that the said county legal counsel, is misrepresenting the facts in the case as under rule 33 of the [\*ELRC rules\*](#), an order for review of a decree or order shall not be subject to a further review.
  - xii. the application before the Court is disguised as an appeal against the judgment delivered on 26<sup>th</sup> May 2023 which the respondent chose to review, and also it is disguised as a review of the ruling delivered on 29<sup>th</sup> February 2024. (See [\*Gerald Kitbu Muuvchanje v Catherine Muthoni Ngare & Another\*](#)(2020) eKLR); [\*Serephen Nyasani Menge v Rispah Onsa\*](#)(2018)eKLR.
  - xiii. That the review remedy is only available to a party who though has a right to challenge a decision in question by an appeal is not appealing or to whom there is no right of appeal. That one cannot exercise the right of appeal and at the same time apply for a review of the same



judgement, and in the present case the Respondent chose to review the said judgement which application was dismissed and they cannot now appeal against the same decision, neither apply for a stay of execution pending an appeal it has elected not to lodge.

- xiv. That the proper thing having elected not to appeal was to combine an application for review with an application for a stay of execution; the application for a stay is therefore barred by the resjudicata rule.
- xv. That referring the Court to the Claimant's trial bundle filed on 11<sup>th</sup> November 2019 at Nairobi and an amended memorandum of Claim and list of bundles dated 8<sup>th</sup> December 2019; witness statements of 24<sup>th</sup> February 2020 and the Claimant's reply to the second defence of 19<sup>th</sup> September 2019 and the claimant's evidence, in this case, relied on in the judgement of 26<sup>th</sup> May 2023, the Respondents since the judgment was delivered have used all means to prove the claimants from enjoying the fruits of their judgement and now it is 11 months since the said judgment was delivered and it is clear the respondents do not wish to comply with it.
- xvi. That the grievants are entitled to enjoy the fruits from their judgement and the respondent has not and cannot satisfy the requirements for either stay of execution or the proceedings as per Order 42 Rule 6(2) of the Civil Procedure rules.
- xvii. That the application is an abuse of Court process meant to frustrate the claimants (See. I.H. Jacob (The Inherent Jurisdiction of the Court)(Abuse of the process of the Court Pgs. 40-41;1970 issue of Current legal problems).
- xviii. That the application is barred by the doctrine of finality of Litigation(see. Jasbir Singh rai & 3 others v Tarlochan Singh rai and 4 others (2007)eKLR
- xix. That the application is based on a callous view of the modern contract of employment (see. Prof. Charles Reich in his 1964 Article, *The New Property*, at Pages 738-739).
- xx. That the applicant seeks to benefit from its wrong by contravening section 18 of the Employment Act and it is not in dispute that the claimants are still working for the Respondent.
- xxi. That the Applicant has been aware of the judgement in place since 26<sup>th</sup> May 2023 and there is no substantial loss that has been demonstrated by the Applicant by paying salary arrears it owes the Claimants for over 20 months and has not shown the substantial and irreparable injustice that will be occasioned should the present application not be granted (See. Joseph Obachi Dianga & Another v Kennedy Onyango Obiero & 2 others, Kisumu ELC Appel No. 39 of 2019)
- xxii. That the Court's power to grant stay of execution orders is discretionary balancing the rights of the successful litigant and the right of appeal of the dissatisfied litigant (See. Jeremiah Yaich V Christopher Kipkosgei & 3 others ELC No. 288 OF 2017).
- xxiii. That as already stated, for a party that elects to review a judgment /ruling, the said decision cannot be subject to further review. That on 25<sup>th</sup> June 2020, the Court held that it had jurisdiction to hear the cause(HA-3) and the respondent did not appeal against the said decision.
- xxiv. That if aggrieved by the Court's ruling on salary arrears delivered on 30<sup>th</sup> November 2023, the Respondent ought to have appealed against the said decision but did not do so.



- xxv. That the claimants have a right to have their Bill of Costs taxed in defending their rights and the grounds raised in the memorandum of appeal are not arguable and a further review is not allowed.
- xxvi. That a stay of taxation of Courts cannot be granted unless a party moves under the Advocates Act Regulations or provides security for any taxed costs.
- xxvii. That the Applicant does not provide any particulars of the terms which they propose to comply with.
- xxviii. That the amount due from the judgement is salary arrears for employees working with the respondent since 2019 and they have experienced great hardships due to the withholding of their salaries for up to 20 months.
- xxix. That the Respondent has always had those arrears available since the claimants were employed and the Court should thus dismiss the application.

### **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 24<sup>th</sup> April 2024 were filed by June Aresa of the Office of the County Attorney. The Claimant/Respondent's written submissions dated 9<sup>th</sup> April 2024 were filed by Kamau Kuria & Company Advocates.

### **Determination**

#### **Issues for determination.**

- 5. The Applicant addressed the following issues in their submissions: -
  - a. Whether there is a valid appeal to warrant the orders sought.
  - b. Whether the Applicant has satisfied the conditions of stay.
- 6. The Respondent submitted globally objecting to the application, asserting that the Applicant is not entitled to the grant of the orders sought.
- 7. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the Court by the parties for determination of the application is whether it was merited
- 8. On the 29<sup>th</sup> February 2024 this Court delivered a ruling dismissing an application by the Respondent/Applicant through which they had sought for a review of the computation by the Court of the Respondents' salary arrears as awarded in the Judgment of the Court delivered on the 26<sup>th</sup> day of May 2023.
- 9. The Applicant, following the ruling on the review, brought the instant application seeking for a stay of further proceedings in this matter and further before the Magistrates' Court and once issued, be extended and or remain in force until the final determination of the intended appeal at the Court of Appeal. The grounds upon which the application was premised are as outlined above and aimed to comply with the provisions of Order 42 (6)(2) of the Civil Procedure Rules to wit:- '(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.”
10. The Court finds that indeed the Applicant satisfied the criteria for a stay pending appeal under Order 42 (6)(2) of the Civil Procedure Rules applying the decision of the Court of Appeal in County Government of Laikipia & home & 114 others; transitional authority & another (interested parties)(Civil Application E008 of 2022 )(2023) KECA 215(KLR)(3 March 2023 ) where the Court of Appeal (F Sichale, Fa Ochieng & La Achode, JJA) held:-

“ 11. We have carefully perused the annexed memorandum of appeal and were indeed satisfied that the applicants have an arguable appeal worthy of consideration by this Court and more so whether the respondents were rightful employees of the 1<sup>st</sup> applicant. We shall however say no more regarding this issue lest we embarrass the bench that will be eventually seized of the appeal.

12. As to whether the appeal will be rendered nugatory if stay orders are not issued, we are satisfied that indeed public funds will have been lost in the event the respondents who are 115 in number are paid the disputed emoluments as salaries and they may not be able to refund the same in the event the appeal is successful as their sources and means of income remain unknown.”

I noted similarities in facts between that case before the Court of Appeal with the instant one. However, in that case, the appellant had not exercised the option of review before the trial Court.

11. The issue before the Court was that pursuant to rule 33 of the Court Rules the Applicant had opted for review and not appeal. The applicant was silent in their submissions on this issue yet the law does not envisage that a party would file for review and if not successful file an appeal. Rule 33 of the ELRC (Procedural ) Rules of 2016 states:-

“ 33.

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
  - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
  - (b) on account of some mistake or error apparent on the face of the record;
  - (c) if the judgment or ruling requires clarification; or
  - (d) for any other sufficient reason.



- (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed.” (emphasis given on the option of either appeal or review). The Applicant already exercised the option of review to finality.

12. The Respondent addressed the issue of the option of either review or appeal in their submissions with authorities. The Court of Appeal in *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* (2020)e KLR (Makhandia JA )considered a similar application and held as follows:-

“The applicant was aggrieved by the judgment of the trial Court. Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the Court stated that

“From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure rules*, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”

See also the case of *Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others* (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled..... I therefore decline to exercise my discretion to grant the application and accordingly dismiss it with no order as to costs.”

13. The Applicant in the supporting affidavit of Tony Godia of 12<sup>th</sup> March 2024 stated that the appeal raises substantial issues of law amongst them whether the Court was seized of the requisite jurisdiction to entertain the suit in the first instance, had the mandate to tabulate salary arrears payable by the respondent and now sought to be executed and failure of the Court to rule on all prayers in the application dated 13<sup>th</sup> December 2023. I find there was a mixture of grounds of appeal on the judgment and the ruling on review.
14. The Court dismissed the application for review and it is the automatic right of the applicant to appeal that decision. It was a negative order for not even costs were awarded. There was nothing to stay about the ruling which disallowed the review.
15. In the upshot, for the foregoing reasons, the application dated 11<sup>th</sup> March 2024 is dismissed with costs to the Respondent/Claimant.



16. Right of appeal.

17. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 26<sup>TH</sup> DAY OF JUNE 2024.**

**J.W KELI**

**JUDGE**

**IN THE PRESENCE OF: -**

Court Assistant: Brenda

Claimant: - Dr. Kamau Kuria

Respondent/Applicant: Aresa

