



Arapkoko v Ethics and Anti-Corruption Commission (Employment and Labour Relations Petition E107 of 2022) [2024] KEELRC 1602 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1602 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E107 OF 2022**

**K OCHARO, J
JUNE 24, 2024**

BETWEEN

ABRAHAM LOROT ARAPKOKO CLAIMANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

RULING

Background

1. The Petitioner/Applicant moved this Court vide a Notice of Motion dated 20th February 2024 expressed to be under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010; Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act* 2010, and other enabling provisions of law, seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the pending appeal, this Honourable Court be pleased to issue an order of stay of disciplinary hearing as commenced against the Petitioner/Applicant by the Respondent.
 - d. That the Respondent bears the Costs of this application.
2. The Notice of Motion is based on the grounds set out on the face of the application and the Supporting Affidavit of the Petitioner/Applicant sworn on the same day.
3. The Respondent opposed the application through a replying affidavit sworn on 26th February 2024, by Diana Kenduiwa, one of its Legal Officers.



4. The Petitioner states that on 16th February 2024, this very Court entered Judgment in this matter, dismissing the Petition in its entirety. Following the dismissal, the Respondent summoned him to a disciplinary hearing which was to be held on 22nd February 2024. The action was only intended to defeat the Petitioner/Applicant's exercise of his right of appeal by dismissing him from employment before he could initiate the appeal process.
5. He asserts that should the Court decline to grant the order of stay of execution as sought, this application and the intended appeal shall be rendered nugatory and an academic exercise, and overtaken by events.
6. The Applicant asserts that if the disciplinary hearing is allowed to proceed before the intended appeal is heard and determined, he will suffer irreparable loss and damage. He will lose his employment without being allowed to fully ventilate his case.
7. The Respondent resists the application, charging that the same is destitute of merit and a waste of judicial time. Further, at the time of filing the instant application, the Applicant hadn't filed and served it with the Notice of Appeal. The application was without foundation, therefore.
8. The Respondent argues further that having declined to grant the reliefs sought in the Petition, this Court is functus officio. It cannot grant the orders sought in the application.
9. In addition, to the foregoing, the Respondent states that the Petitioner/Applicant has not proved that he will suffer substantial loss if the stay is not granted. Further, that the disciplinary proceedings will be conducted unfairly against him. Should the Applicant be dissatisfied with the outcome of the disciplinary proceedings, he will have recourse in the court process.
10. The Respondent asserts that if the Petitioner succeeds in his appeal, it will be able to compensate him for any loss suffered as a result of the absence of stay orders. The balance of convenience leans in favour of denying the stay orders.
11. Counsel for the parties made oral submissions on 4th March 2024. I have dully considered the same.

Analysis and Determination

12. I have carefully considered the application, the grounds on the face thereof, the affidavit in support thereof, the replying affidavit, and the oral submissions by the parties. I return that the only issue for determination is as follows: -
 - a. Whether this Court should grant a stay of the disciplinary hearing pending Appeal.
Whether this Court should grant a stay of the disciplinary hearing pending Appeal.
13. There is no doubt that the Petitioner filed a notice of appeal herein within the statutory time. I have not lost sight of the fact I dismissed the petition for its destituteness in merit, a negative order. It is trite that a negative order is incapable of being stayed. In the case of *Western College of Arts and Applied Sciences vs Oranga & Others* [1976] KLR 63, the Court stated: -

“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.....”



14. The Court of Appeal in *Kaushik Panchamatia & 3 Others vs Prime Bank Limited & Another* [2020] eKLR held:

“...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 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.”

15. As a result, the Petitioner’s application is for rejection. It is hereby dismissed.

16. It is so ordered.

READ, DELIVERED AND SIGNED THIS 24th DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Ochieng for the Applicant

No appearance for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

