



**Kulundu v Chief Executive Officer, Independent Electoral and Boundaries Commission & 9 others (Petition E170 of 2022) [2024] KEELRC 2143 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2143 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E170 OF 2022**

**L NDOLO, J**

**JULY 31, 2024**

**IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & (3), 22(1) & (2)(B) & (C), 23(1) & (3), 25(A) & (C), 27, 28, 29(A), (C) & (D), 41(1) & (2)(B), 47, 48, 50(1),73,75,159,162(2)(A), 165(3)(B), 232, 258(1)&(2)(B)&(C) AND 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE PETITIONER’S  
FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED BY  
ARTICLES 27,28,31,41,48 AND 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES  
OF GOVERNANCE UNDER ARTICLE 10, PRINCIPLES OF LEADERSHIP AND  
INTEGRITY UNDER ARTICLE 73 AND VALUES AND PRINCIPLES OF PUBLIC  
SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**RUTH KHATIEVI KULUNDU ..... PETITIONER**

**AND**

**CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**WAFULA CHEBUKATI ..... 4<sup>TH</sup> RESPONDENT**



<b>BOYA MOLU .....</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>PROFESSOR ABDI YAKUB GULIYE .....</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>JULIANA CHERERA .....</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>FRANCIS WANDERI .....</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>JUSTUS NYANG'AYA .....</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>IRENE MASIT .....</b>	<b>10<sup>TH</sup> RESPONDENT</b>

## RULING

1. By their Notice of Motion dated 20<sup>th</sup> March 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seek stay of taxation proceedings stemming from the judgment of the Court dated 30<sup>th</sup> November 2023, pending the hearing and determination of their appeal at the Court of Appeal.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further seek orders to insulate the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents from liability arising from the taxation. I think however that this prayer is not only premature but is also an outlier in the application. I will therefore proceed to consider the plea for stay of taxation only.
3. The Motion is supported by an affidavit sworn by the 2<sup>nd</sup> Respondent's Director of Legal and Public Affairs, Chrispine Owiye, and is based on the following grounds:
  - a. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have lodged an appeal at the Court of Appeal against the judgment of the Court dated 30<sup>th</sup> November 2023, vide a Memorandum of Appeal dated 28<sup>th</sup> January 2024;
  - b. That failing to stay the taxation proceedings will render the appeal nugatory;
  - c. That in exercising its discretion, the Court ought to take into account the twin overriding principles of proportionality and equality of arms, which are aimed at placing the parties before the Court on equal footing and establish where the scales lie. The Court should always opt for the lower rather than the higher risk of injustice;
  - d. That there is a higher risk that allowing the taxation proceedings will occasion injustice to the Respondents;
  - e. That should the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pay the costs demanded by the Petitioner, the money will not be refunded should the appeal succeed, hence occasioning substantial loss to the Respondents;
  - f. That the matter having gone on appeal, there is likely to be additional costs against the Applicants if the appeal is lost, or the Applicants may be discharged from the burden of payment of costs if the appeal succeeds;
  - g. That in light of the aforementioned, it makes judicial sense to avoid a situation where the taxation will eventually have to be repeated or become redundant depending on the outcome of the appeal.



4. The Petitioner's response to the application is contained in her replying affidavit sworn on 3<sup>rd</sup> April 2024. The Petitioner terms the application as frivolous and unmeritorious whose sole aim is to prevent her from enjoying the fruits of the judgment delivered in her favour.
5. The Petitioner depones that the Applicants have not demonstrated any exceptional circumstances to warrant grant of orders staying the taxation proceedings.
6. She points out that the parties in the dispute, including the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have filed their responses and submissions on the Bill of Costs, as directed by the Taxing Officer.
7. The Petitioner's case is that the present application does not satisfy the triple conditions established by Order 42 Rule 6 of the *Civil Procedure Rules*.
8. This application is brought under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*, which sets the following conditions for grant of orders of stay of execution pending appeal:
  - a. That the court is satisfied that substantial loss may result to the applicant unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. That the applicant has furnished such security, as the court orders, for the performance of such decree or order as may ultimately be binding on the applicant.
9. The present application is somewhat unique as the main judgment has been fully satisfied with the only pending issue being costs, whose taxation is the subject of the stay being sought. The Petitioner's averment that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are preventing her from reaping the benefits of her judgment is therefore incorrect. The parties are in an active employment relationship and the Petitioner is fully engaged.
10. Further, the employer is a fully funded government commission and there is no danger of the Petitioner losing out on her costs if the appeal fails. On the other hand, apart from pointing out her position of employment, the Petitioner does not disclose her financial capability. The Court is therefore unable to confirm her ability to repay the costs if the appeal succeeds.
11. Taking all the foregoing factors into account, I am satisfied that the order of stay of taxation proceedings sought by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is merited.
12. Consequently, I grant an order of stay of the taxation proceedings, pending the hearing and determination of the appeal before the Court of Appeal.
13. The costs of the application will be costs in the appeal.
14. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY JULY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Manwa for the Petitioner

Mr. Nura for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Mboya for the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents



No appearance for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents

