



**Mursal v Shalle & 6 others (Petition E080 of 2020)  
[2024] KEELRC 2384 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2384 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E080 OF 2020  
NJ ABUODHA, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**ALI ABDULLAHI MURSAL ..... PETITIONER**

**AND**

**WADERE KALIHE SHALLE ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL  
GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**REGIONAL COMMISSIONER NORTH EASTERN REGION ... 3<sup>RD</sup>  
RESPONDENT**

**DEPUTY COUNTY COMMISSIONER WAJIR WEST SUB  
COUNT ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY COMMISSIONER WAJIR COUNTY ..... 5<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICES COMMISSION ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent filed this application dated 4<sup>th</sup> August, 2023 which was brought under Articles 162(1)(a), 165(3)(b) and (c) of *the Constitution*, section 7 of the Fair Administration Act, section 1A, 1B and 3A of *Civil Procedure Act*, Orders 22 Rule 22(1), Order 10 Rule 11, Order 19 Rule 2 and Order 51 of the Civil Procedure Rules.
2. The Application is seeking for orders of stay of execution of judgement and decree dated 19<sup>th</sup> December, 2023, set aside the entire proceedings pending hearing and determination of the application herein.



3. The Application also sought orders of stay and suspension of the advertisement of 28<sup>th</sup> July, 2023 by the 2<sup>nd</sup> and 4<sup>th</sup> Respondent for the position of chief Boji Heri location in Wajir west Sub County pending the hearing and determination of the application herein.
4. The Application also sought for orders that the 1<sup>st</sup> Respondent to be granted leave to defend the suit and the same be heard and determined on merit.
5. The application was supported by the Affidavit of Wardere Kalihe Shalle the 1<sup>st</sup> Respondent herein who averred that on 28<sup>th</sup> July,2023 the 2<sup>nd</sup> Respondent advertised vacancy for the position of Chief Boji Heri Location, the subject of this suit in compliance with orders of the Judgment delivered on 19<sup>th</sup> December,2022.
6. The Applicant averred that if the application was not heard urgently he may end up losing his job when the 2<sup>nd</sup> to 5<sup>th</sup> Respondent employs another person to his position. That he had initially filed the application dated 25<sup>th</sup> May 2023 seeking the stay proceedings which was never heard and it was withdrawn when filing this application.
7. The Applicant averred that on 5<sup>th</sup> November,2020 he was appointed as the chief Boji Heri Location in Wajir West Sub County in Wajir County and continued executing his duties.
8. That on the month of February and March 2023 he did not receive his salary and thought it was a financial constraint on his employer. Upon inquiry in the month of April he was informed that there was a court order terminating his employment as a chief.
9. That he instructed his advocates to find out only to be shocked that there was a judgement delivered in this matter where he was sued as the 1<sup>st</sup> Respondent.
10. The Applicant averred that he was never served with any court summons, pleadings, Mention or hearing notices or any documents relating to the suit. He only came to learn about it when his salary was stopped. That he had a water tight defense and response to the Petition.
11. The Applicant prayed that he be allowed to file his draft response to the Petition herein to illustrate that he did apply, was interviewed and appointed for the job after advertisement and he was qualified for the same. That he will be condemned unheard without fair hearing if the orders sought herein are not granted.
12. The Applicant averred that he will suffer loss if the advertisement proceeds while implementing the ex-parte judgement which he was not served with proceedings. That the same should be set aside and his application be allowed.
13. The Petitioner filed its submissions dated 19<sup>th</sup> June,2024 but did not file their response to the Application apart from the grounds of opposition to the withdrawn application of 25<sup>th</sup> May,2023. They opposed the 1<sup>st</sup> Respondent's application in their submissions.

### **Determination**

14. Stay of execution is generally provided for under the Civil Procedure rules under Order 42 Rule 6 which gives the grounds upon which this Court exercises as follows;
  - (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.

15. In *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR the court in support of the above provision held as follows: -

Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely

- (a) 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 such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

16. As to what substantial loss is, it was observed by Gikonyo J in the case of *James Wangalwa & Anor v Agnes Naliaka Cheseto* [2012] eKLR. Where the learned Judge observed:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process...The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.

17. As observed in the cases cited above, it is confirmed that no appeal has since been filed to challenge the Court’s judgment revoking the 1<sup>st</sup> Respondent appointment which was delivered on 19<sup>th</sup> December,2022 and the 2<sup>nd</sup> to 5<sup>th</sup> Respondent have commenced the process of filing up the 1<sup>st</sup> Respondent position as per court Order by advertising for the position on 28<sup>th</sup> July,2023.
18. The 1<sup>st</sup> Respondent’s assertions that he was not involved in the proceedings cannot be entertained since he never sought that the process server who claimed to have served him be cross examined. The court also notes that judgment in this case was delivered on 19<sup>th</sup> December,2022 and the 1<sup>st</sup> Respondent made its first Application on 25<sup>th</sup> May,2023 which was later withdrawn before filing the current application.
19. The 1<sup>st</sup> Respondent did not explain why they did not prosecute their first application properly and in time. The 1<sup>st</sup> Respondent only rushed to court on this Application when the 2<sup>nd</sup> and 4<sup>th</sup> Respondent advertised their position on 28<sup>th</sup> July,2023. This meant the 1<sup>st</sup> Respondent relaxed all along only to move the court after his position was being filed up as per the court’s judgment.
20. The court is therefore of the view that the 1<sup>st</sup> Respondent did not come to it with clean hands and came when it was inordinately late. There was no appeal preferred against the said decision so one wonders why this court must stay a judgment. Pending which activity?
21. In addition, staying the court’s judgment and or setting aside the same will have a serious effect on the appointing bodies as well as third parties who will be affected by this move which is requested more than one and half years after delivery of the Judgment.
22. The orders sought by the 1<sup>st</sup> Respondent from this court therefore seem to have been overtaken by events due to the lapse a long time after the delivery of the Judgment. The court is therefore of the view



that the Applicant has not met the conditions for grant of stay of execution there being no appeal to challenge the Judgment of this court revoking his appointment.

23. The application is therefore found without merit and is hereby dismissed with costs.

24. It is so ordered.

**DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024**

**DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

