



Mweresa v County Public Service Board of Vihiga & another (Employment and Labour Relations Cause 4 of 2022) [2023] KEELRC 434 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 434 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 4 OF 2022**

**JW KELI, J
FEBRUARY 16, 2023**

BETWEEN

CLARENCE EBOSO MWERESA CLAIMANT

AND

COUNTY PUBLIC SERVICE BOARD OF VIHIGA 1ST RESPONDENT

COUNTY GOVERNMENT OF VIHIGA 2ND RESPONDENT

RULING

1. The Applicant/ Claimant, following Ruling of the Court delivered on the 24th November 2022, filed in court Notice of Motion Application dated 6th December 2022 seeking the following substantive orders:-
 - a. That Execution of the ruling of the court of 24th November 2022 be stayed to the extent and to the any effect that the decree of the court made on the 4th August 2022 is valid and binding upon the Public Service Commission in exercise of it jurisdiction over the appeal before it on the same dispute.
 - b. That execution of the ruling of this court on 24th November 2022 be stayed to the extent that any other authority would be bound by the finding that the agreement signed between the two parties herein settling the dispute was valid.
2. The Application is grounded on the following reasons:-
 - i. That the Claimant herein has intends to appeal the decision of this court made on 24th November, 2022 and has filed a notice of appeal.
 - ii. That the Public Service Commission is seized of an appeal by the Claimant in this matter filed on 1st February 2022 pursuant to an express order of this court on 20th January 2022 in Kisumu ELRC Cause No. 012 of 2021.



- iii. That on or about 7th April, 2022, the parties in this suit signed an agreement purporting to consent to withdraw this suit, an agreement whose validity has been the subject of contestation in this court.
- iv. That the same agreement referred to above was filed before the Public Service Commission and has also been the subject of contestation awaiting resolution to determine whether or not the Public Service Commission will proceed with the hearing and determination of the appeal before it.
- v. That this court proceeded in the absence of the claimants, and adopted the agreement as a consent order and issued a consent decree on 4th July, 2022.
- vi. That in fact it is only when the Respondents herein filed the said decree of 4th of August 2022 before the Public Service Commission that the claimant knew of the decree and immediately contested the validity of the decree and the validity of the agreement that led to the decree before this court.
- vii. That the Claimant successfully moved this court *ex parte* on 1st of September 2022 to stay execution of the decree of the court of 4th of August 2022 pending hearing of the application to set aside the decree.
- viii. That this court on 24th November 2022, after hearing of the urgent application to set aside, made findings, *inter alia*, that the agreement signed by the parties and sent to the Deputy Registrar on or about 7th April 2022 for adoption as an order of the court was in fact valid.
- ix. That the court therefore disallowed the application to set aside the decree of the court settling the suit, and adopting the consent as an order of the court.
- x. That for the same reasons that the applicant sought the earlier stay of execution, the Claimant herein (Appellant at PSC) is apprehensive that the finding of the court herein on the validity of the agreement is directly applicable to the same agreement that was similarly filed at the Public Service Commission by the Respondents.
- xi. That for the same reasons that the Applicant sought the earlier stay of execution, the claimant herein (appellant at PSC) is apprehensive that the decree of this court declaring that the dispute is settled has the effect of terminating the dispute at the Public Service Commission, because as per the order of this court on 20th January 2022, the PSC was under supervision of the court subject to the active suit. In fact, the parties were to report to the court upon conclusion of the appeal at the Public Service Commission.
- xii. That it would seem unreasonable of any tribunal proceeding with an employment dispute between two parties when the parties have been deemed by a competent court to have settled the matter by valid consent, with the parties each getting a bargain out of it.
- xiii. That as the Claimant is persuaded that it would obviously be double jeopardy upon the respondents herein to settle a matter before court by consent, only for the same matter, between the same parties, on the same dispute, to be the subject of contestation in a tribunal subordinate to that very court.
- xiv. That the above assertions are made fully aware that the court in its ruling declining to set aside its decree, made cognizance that the PSC is an independent statutory body with jurisdiction to deal with its matter without court interference, but fell short of recognizing that the issue of the validity of the signed agreement which was before court was the same issue before the



Public Service Commission and the Public Service Commission in that case is likely bound by the decision of the court.

- xv. That in any case, whether the Public Service Commission would be bound or not bound by the decision of this court was not a question that was contested or framed by the court, and was not material to the court arriving at the decision in the ruling of 24th November 2022, hence meets the criteria for classification as obiter dictum.
 - xvi. That these circumstances create the situation that whether or not the Public Service Commission proceeds to hear and determine the appeal or not on its merits, either of the two sides will invariably have reasonable grounds to further litigate the matter.
 - xvii. That if the decision is not stayed, there is a high likelihood that the Public Service Commission will discontinue the proceedings in the appeal before it, and this will render the appeal nugatory.
 - xviii. That there is no prejudice that would be suffered by the Respondents if the Public Service Commission was allowed to proceed and determine conclusively the appeal before it pending the appeal, because the Respondent may also move the court to stay execution of the determination of the Public Service Commission at the appropriate time.
 - xix. That if this court declined to stay the execution of this order, and the appeal succeeds, then the Public Service Commission will already have exhausted its jurisdiction and the appeal would be nugatory.
 - xx. That part of the prayers sought in the appeal before the Public Service Commission including reinstatement to the previous employment terms, is statutorily limited by the Employment Act to two years, and would therefore be spent by this limitation.
 - xxi. That this court may fashion an appropriate stay such that the respondents may not have the decision by the Public Service Commission be executable against them until after the appeal is heard and determined, and even if this court restrains itself for ripeness, the respondents have leave to move the appellate court at any time for an injunctive relief in the pendency of the appeal.
 - xxii. That in the interest of justice this court has jurisdiction to stay its decree in the manner prayed herein.
3. The Application was supported by the affidavit the claimant/ applicant reiterating the same grounds under the application as outlined above.
 4. The application came up for inter partes hearing on the 18th January 2023 when the respondent through its County Attorney Mr. Musiega that they would not be filing response, that what was challenged was a negative order and asked the court to decide. The Applicant informed the court they rely on their application and for the court to issue ruling based on his pleadings.

Determination

Issues for determination

5. The court identified the issue for determination in the instant application to be whether the application was merited.



6. The Application is hinged on section 16 of the *Employment and Labour Relations Court Act* 2011 and Order 42 Rule 6 of the *Civil Procedure Rules*.
7. Section 16 of the *Employment and Labour Relations Court Act* 2011 reads: “The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.”
8. The court finds that Section 16 *Employment and Labour Relations Court Act* 2011 was not relevant in the instant application as the orders sought are on stay and the applicant was not inviting the court to review its ruling. In any event the claimant indicated in his application that he intends to appeal the ruling of the court dated 24th November 2022. The court finds that the relevant provisions of the law with regard to the orders sought of stay of execution to be Order 42 (6) of the Civil Procedure Rules to wit:- ‘Stay in case of appeal [Order 42, rule 6.] (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (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.”
9. The court then proceeds to consider whether there is sufficient cause to stay the execution and further whether the application meets the criteria under Order 42 Rule 6(2) of the Civil Procedure Rules to wit:-
 - (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.”

Background to the application

10. The court sitting at Kisumu, vide Ruling of Justice Christine Baari dated 20th January 2022 on notice of preliminary objection by the respondent challenging the jurisdiction of the court held at paragraph 9 that, “This suit as filed offends the doctrine of exhaustion and this court lacks jurisdiction to entertain the same. I find and hold that the preliminary objection dated 4th October 2021 is merited”. The court further added under paragraph 10 of the ruling that the claimant to file appeal before the public service commission and the suit was stayed penning the hearing and determination of the appeal by Public Service Commission.
11. On the 8th April 2022 the court received a consent agreement dated 7th April 2022 signed by the claimant and the secretary/ CEO Vihiga County addressed to the Deputy Registrar which was adopted as judgment of the court on the 23rd May 2022 among other terms that the suit herein was marked as withdrawn.



12. On the 2nd September, 2022 post adoption of the consent the Claimant brought an application seeking the consent decree to be set aside and further pending the determination of the application the court to grant stay of execution to the extent that the Public Service Commission proceed with the hearing and determination of the matter that was before it.
13. The court having considered the position of both parties and their written submission delivered its ruling dated 24th November 2022 dismissing the application for lack of merit.
14. It is the said decision that the instant application seeks to stay pending appeal.
Order 42 Rule 6 (2) of the civil procedure rules limits the grant of stay on three issues 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. On the 1st limb of substantial loss and application being brought without unreasonable delay The Application was brought without unreasonable delay. On substantial loss the court is guided by the decision in In *Machira t/a Machira & Co Advocates v East African standard no.2* (2002) KLR 63 where it was held:- ‘In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.. where no pecuniary or tangible loss is shown to the satisfaction of the court , the court will not grant stay.’”
16. I have read the grounds of the application and failed to find pleading of substantial loss. The issues addressed touch on merits or arguability of the appeal basically challenging my ruling on the consent order. It is not the place of this court to determine the arguability of the intended appeal as that would be tantamount to re-opening the decided application. Such arguments are for the court sitting on appeal to consider if the stay is sought at that level.
17. The other limb of Order 42 rule 6 on security does not apply in the instant case.
18. The court in the instant case finds that the ruling dated 24th November 2022 sought to be challenged at the Court of Appeal was in the negative in the fact that the court dismissed an application seeking to set aside consent decree. The High Court had opportunity to consider a similar application to stay negative order being the lifting of temporary stay granted pending that outcome in *Catherine Njeri Maranga v Serah Chege & Another* [2017] eKLR where justice Mwongo dismissed the application on basis that the order sought to be stayed was negative. The Court upheld decision in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors* [2016] eKLR, where the Court of Appeal expounded on stay of execution stating: “16. In *Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows: “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).” In paragraph 17 of the High Court decision Justice Mwongo further upheld the same reasoning as applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed to wit , “The Order dismissing the application is in the nature of



a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

19. I uphold the foregoing decisions of the Court of Appeal cited in Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR and further uphold the foregoing High Court decision and hold that my ruling of 24th November 2022 in dismissing the application dated 31st August 2022 with no order as to costs was a negative order incapable of execution hence there is nothing to stay.
20. The application dated 6th December 2022 is dismissed for lack of merit.
21. No order as to costs.

It is so ordered.

WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 16TH FEBRUARY 2023.

J. W. KELI,

JUDGE.

In the presence of:-

Court Assistant – Brenda Wesonga

Claimant/ Applicant:- Dr. Eboso Mweresa

