



Kenya Union of Clinical Officers v Kirinyaga County Service Board; Public Service Commission of Kenya & another (Interested Parties) (Miscellaneous Cause E002 of 2021) [2023] KEELRC 416 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 416 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS CAUSE E002 OF 2021
ON MAKAU, J
FEBRUARY 15, 2023

BETWEEN

KENYA UNION OF CLINICAL OFFICERS APPLICANT

AND

KIRINYAGA COUNTY SERVICE BOARD RESPONDENT

AND

PUBLIC SERVICE COMMISSION OF KENYA INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. This ruling relates to the Notice of Motion dated 24th November 2022 brought under Article 50, and 159 (2) of *the Constitution*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Section 1A, 1B and 3A of the *Civil Procedure Act*. The motion seeks for stay of the order and all further proceedings of Honourable Justice D.K.Marete made on 31st October, 2022 pending hearing and determination of its appeal. It also seeks costs of the application.
2. The application is premised on the grounds set out on the body of the motion and the Supporting Affidavit sworn on 24th November, 2022 by the applicant's County Attorney Ms Carolyn Kinyua. In brief that applicant's case is that it filed request for review of the decision by the 1st Interested Party but the respondent filed the impugned decision in court for adoption and enforcement; that it then filed a Notice of Preliminary Objection to the adoption of the impugned decision before the review by the 1st interested party but the court dismissed the objection by a ruling delivered on 31st October, 2022; that the applicant filed notice of appeal to challenge the said ruling; that the appeal/review process under Section 77 (5) of the County Government Act has not been exhausted; that the appeal before Court of Appeal has prospects of success as the applicant was condemned unheard contrary to Article



47 and 50 of the Constitution and that the respondent will not suffer prejudice if orders sought by the application are granted.

3. The respondent has opposed the application vide the Grounds of Opposition verified by an Affidavit. In brief it contends that the application amounts to forum shopping and it is subjudice in view of an earlier application dated 8th November 2022 filed before the Court of Appeal being Civil Application E091 of 2022; that the application is in fact a disguised application for review and/or appeal against the decision on Preliminary Objection dated 6th July 2021, that the only thing left in the matter is for the court to rule on the main Application dated 23rd June 2021; that the appeal lacks merits as there is no right of Appeal against the ruling of 31st October 2022; that the application is only a delaying tactic as the application does not meet the threshold for granting stay pending appeal; that Section 77(5) of the County Government Act and 9(2) of the Fair Administrative Act do not act as stay of the Commission's decisions and as such the decision of the Commission made on 14th April, 2021 ought to be implemented as per Section 88(4) of the Public Service Commission Act.

Submissions

4. Mrs. Beacco Advocate argued the application for the applicant. She reiterated the facts set out in the supporting affidavit and contended that the application has met the legal threshold for granting stay pending appeal. First she contended that the application was made without undue delay. Secondly she contended that the applicant has a pending appeal before the 1st Interested Party and the right to be heard in that appeal is fundamental right. That the said appeal should be heard first before the impugned decision is enforced.
5. Mr. Ataka Advocate for the respondent opposed the application. He contended that court cannot stay an order dismissing a preliminary objection since there is nothing to stay. The court cannot await for so called review process before the Public Service Commission. The applicant has not pursued the review application at the Public Service Commission but wants to go to the Court of Appeal. The applicant has also not explained why it abandoned the application before the Court of Appeal which also seeks stay order.
6. He further submitted that the threshold for granting stay has not been met and the order being stayed has not been extracted. Reliance on the case of Kenya Wildlife Service v James Mutembei (2019) eKLR and Peter Kariuki Mburu v Neema Shah (2021) eKLR.
7. Finally the counsel urged that the applicant will suffer no prejudice since it will be heard in the application dated 23rd June 2021 for adoption and enforcement of the Commission's decision. He urged the court to consider that the grievants have been out of job for 3 years.
8. In a rejoinder, Mrs. Beacco submitted that the Court of Appeal Application No. E091 of 2022 was abandoned. She reiterated that the application has met the threshold for stay pending appeal as the County will suffer substantially if reinstatement is ordered to officers whose position were filled. The applicant will also suffer substantially if its right to hearing in the review proceedings before the Public Service Commission is denied by the enforcement of the impugned decision.

Determination

9. The issue of another application at the Appellate court was raised from the bar and it was responded to from the bar. I treat it as fully rebutted. Consequently, the issues for determination are:-
 - a. Whether the applicants have right of appeal in respect of the ruling delivered on 31st October, 2022.



- b. Whether the application meets the threshold for granting stay pending appeal.

Right of Appeal

10. The respondent contends that the applicant has no right of Appeal in respect of the order appealed from. I have perused Section 17 of the *Employment and Labour Relations Court Act* which provides that:-

“(1) Appeals from the court shall in the Court of Appeal in against any judgment, award, order or decree issued in accordance with Article 164(3) of *the Constitution*.” (emphasis added)

11. The above provision does not seem to place any barrier to anyone wishing to appeal against any decision of this court. The Respondent has not cited any law or judicial precedent that bars an aggrieved party from appealing against a decision made by this court with respect to a preliminary objection. Therefore the answer to the first question is in the negative.

Threshold for granting stay pending Appeal

12. There is no contest that the relevant law to this question is Order 42 Rule 6 of the Civil Procedure Rules which provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

13. The first element to establish from the above Rule is promptness. The applicant must show that the application was made without undue delay. In this case the Ruling appealed from was made on 31st October, 2022 and the application was filed on 5th December 2022. The time taken before bringing the



application was 35 from the date of the impugned decision. Putting into consideration the arguments presented by the parties, I am satisfied that 35 days was not an inordinate delay.

14. The second and most essential element to consider is whether the applicant will suffer substantial loss if stay of impugned decision is declined. In this case the applicant has cited right to be heard in their application for review by the Public Service Commission, and the impracticability of the reinstatement order by the Public Service Commission which the respondents have brought to this court for enforcement. The said right to be heard on the review proceedings pending before the PSC will be forever taken away from the applicants if stay is withheld. The review proceedings are anchored on Section 77 of the County Government Act and Section 88 of the *Public Service Commission Act* and are not yet exhausted.
15. The court, therefore finds that the applicant has a right under section 17 of the ELRC Act to pursue an appeal to agitate for the right to be heard in the review proceedings before the Public Service Commission. That right of appeal can only be protected by granting stay of execution.
16. The last factor is security, but in this case the same is not relevant because the order appealed from is not in respect of a decree but an interlocutory order and proceedings.
17. In the end, I find merits in the application and grant stay of proceedings herein pending the hearing and determination of the appeal. The stay is on condition that the applicant files record of appeal within 60 days of this ruling. Costs of the application shall be in cause. This ruling shall apply to Misc. Application No.E003 of 2021 Kenya National Union of Medical Laboratory Officers v Kirinyaga County Public Service Board, Public Service Commission and the Attorney General.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF FEBRUARY, 2023.

ONESMUS N MAKAU

JUDGE

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

