



REPUBLIC OF KENYA



KENYA LAW
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**Putwai v Narok Diploma Training College (Petition E005 of 2022)
[2023] KEELRC 858 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 858 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E005 OF 2022**

**HS WASILWA, J
APRIL 18, 2023**

BETWEEN

PURITY NOLODI PUTWAI PETITIONER

AND

NAROK DIPLOMA TRAINING COLLEGE RESPONDENT

RULING

1. Before me for determination is the Respondent/ Applicant's notice of motion dated February 21, 2023, filed under certificate of urgency pursuant to Articles 48,50 & 162 of the Constitution, Sections 12(3) & 26 of the Employment and Labour Relations Court Act, order 42 rule 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, section 43 of the Court of Appeal rules and all other enabling provisions of the law, seeking for the following orders; -
 - a. Spent.
 - b. Pending interpartes hearing, this honourable court be pleased to issue temporary order staying the sentencing of the chief principal Narok Diploma Teachers Training college scheduled for the February 28, 2023.
 - c. That this honourable council be pleased to stay the sentencing of the respondent/ applicant pending the hearing and determination of the respondent/ applicant intended appeal to the Court of Appeal.
 - d. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the motion and the supporting affidavit of Joseph Oloishorua Ole Ngadayu, the Chief principal of Narok Diploma Teaching Training College, deposed upon on the February 21, 2023.



3. The affiant states that this Court found him guilty of contempt of Court orders in its ruling of February 7, 2023 and directed him to appear for sentencing on February 28, 2023.
4. He states that he was found in contempt because, his advocates on record failed to annex some crucial documents in his replying affidavit sworn on December 9, 2022, which if furnished to the Court, could have a different outcome.
5. Among the documents he sent to his advocate to annex on the replying affidavit are proceedings of the disciplinary committee conducted by the Applicant's Board of management and auditors report prepared by the ministry of education auditors detailing the gross illegalities committed by the Respondent herein during her work tenure.
6. He maintained that these documents could have had some immense bearing on the ruling of the Court delivered on the February 7, 2023, if their advocates annexed to the replying affidavit.
7. He stated that as soon as their advocates on record noted that the said documents had not been annexed, they filed an application under certificate of urgency on February 6, 2023 for consideration before the Court delivered its ruling, but the Court did not consider the said Application rendering herself on the application on record and intimating that the application has been overtaken by events.
8. He stated that the failure by the court to consider its application of February 6, 2023 is in violation of their rights under the constitution and the ruling delivered on the February 7, 2023 should be set aside.
9. The deponent stated that the earlier orders of the Court in the ruling of October 4, 2022 did not reinstate the petitioner back to employment, but the subsequent orders of February 7, 2023 did conflicting on its previous orders, therefore ought to be set aside.
10. The deponent stated that the Court did not allow prayer 3 of the application dated June 21, 2022 in its ruling of October 4, 2022, therefore the applicant herein did not breach any orders of the court by not reinstating the petitioner.
11. On the issue of back wages, the deponent stated that all employees of the Applicant were sent home on unpaid leave, occasioned by Covid-19 pandemic aftermath, which was communicated to all employees and the school shut down. Therefore, the claim of back wages cannot arise in the circumstances. Furthermore, that the Petitioner had been paid all her wages in full prior to the said unpaid leave.
12. The affiant maintained that it has not disobeyed any court Orders and thus the contempt proceedings before Court should be set aside, in any case that if any orders were defied then the right body to be held in contempt is the board of management of the Applicant, that can be sued, and not the principal.
13. The applicant prayed for the application to be allowed and the annexures adopted herein to allow him mount a successful appeal in accordance with rule 75(1) of the *Court of Appeal rules*. Additionally, that they have already filed a notice of appeal.
14. He prayed for the application to be allowed to enable him pursue this issue in the Court of appeal and enjoy his constitutional right of appeal.
15. The application is opposed by the Respondent who filed a replying affidavit deposed upon on the 24th February, 2023. The Respondent stated that the ruling in this matter was delivered by this Court on the October 4, 2022 in her favour, which orders were served upon the Applicant herein but the Applicant failed to comply with the Court orders, informing the contempt of Court application which was also allowed on February 7, 2023.



16. The Respondent urged this Court to deny the applicant audience, until he purges the contempt. Further that the applicant has not demonstrated that the appeal is arguable but that the Application herein has been used as a delay tactic, to further stall this matter to her detriment.
17. Directions were taken for the application to be disposed of by written submissions.

Applicant's submissions.

18. The applicant submitted on two issues; whether the Respondent has met the threshold for stay of sentencing pending appeal and whether stay pending appeal should issue.
19. It was submitted that the purpose of stay is to preserve the subject matter while balancing the interest of the parties. To support this argument, they relied on the case of *RWW V EKW*[2019] EKLRC where the Court held that:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

20. They also relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where it was held that;

“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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

21. On that basis, the applicant submitted that it has satisfied the conditions required before stay of execution pending appeal is allowed and prayed for the application herein to be allowed as prayed.
22. The applicant also submitted that it did not deliberately disobey the court orders as held by this court and stated that the documents which the court required were furnished to the court in their application of February 6, 2023. He added that the applicant acted swiftly when it found out it had not annexed the said documents on their replying affidavit as such the Court should indulge them because they were vigilant. In this they relied on the case of *Samuel M. NMweru & Others V National Land Commission & 2 others* [2020] eKLR where the Court held that:-

“It is an established principle of law that^[45] in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the



Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.”

23. Accordingly, it was submitted that the applicant failed to successfully rebut the assertions by the Respondent because of inadvertence in annexing the supporting documents stated above. He urged the Court to consider its submissions and allow the application herein. Furthermore, that the Respondent will not be prejudiced in any way if the orders sought herein are allowed by this Court.

Respondent’s submissions.

24. The Respondent submitted on only one issue; whether the application is merited. It was argued that the Respondent herein will suffer irreparable harm if the orders for stay of sentencing is granted, because the applicant has not purged the contempt neither has he paid her all the back wages as orders by the court in its judgement.

25. It was submitted that there is unexplained delay in filling this Application. Moreover, that the Applicant has not offered any security for due performance of the orders of this Court to warrant the issuance of the Orders sought. he added that this Court cannot ascertain the argueability of the alleged appeal because the Applicant has not annexed a draft copy herein for this Court’s consideration in allowing or declining the stay orders. To support its argument, she cited the case of Luka Lunayo v NYPD Restaurant & 2 others [2018] Eklr where the Court held that;

“On issue of stay, since there is no appeal filed and following the denial of leave to appeal by this Court, the stay cannot hang in the air. The stay ought to be hinged upon certain occurrences. It is therefore my finding that the Application for stay and for leave to appeal is not merited and the same is dismissed accordingly.”

26. Accordingly, it was submitted that the application has not met the threshold under Order 42 Rule 6 of the Civil Procedure Rules, for issuance of stay orders and urged this court to dismiss the same with costs.
27. I have examined all the averments and submissions of the parties herein. I note that the applicants herein filed a notice of Appeal before this court on the February 17, 2023 meaning that they seek to appeal this courts judgment and ruling of February 7, 2023.
28. That being the case, it would be a miscarriage of justice for this court to deny the applicants the stay orders they seek which may render the appeal nugatory.
29. I will therefore allow the application for stay sought pending the hearing and determination of the appeal.
30. Costs to abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY THIS 18TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Onduso for Respondent – present

Guserwa for Applicant - present

Court Assistant – Fred

