



**Muikia & 11 others; Kenyatta University (Respondent) (Cause
E516 of 2020) [2023] KEELRC 1218 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1218 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E516 OF 2020
NJ ABUODHA, J
MAY 19, 2023**

IN THE MATTER OF

**DR. JOSEPH MUTURI MUIKIA 1ST CLAIMANT
DR. GEORGE K. KARANJA 2ND CLAIMANT
DR. THOMAS BUNDOTICH MUTAI 3RD CLAIMANT
DR. EDWIN NJUKI MWATHI 4TH CLAIMANT
DR. GABRIEL KAMAU WAARI 5TH CLAIMANT
DR. KEVIN MUGAMBI MBAKA 6TH CLAIMANT
DR. MARTIN GETE WAWERU 7TH CLAIMANT
DR. HARBAKSH SINGH JANDU 8TH CLAIMANT
DR. JOYCE MBOGO 9TH CLAIMANT
DR. MONISARA WAITHERERO WAHIHIA 10TH CLAIMANT
DR. BILHA KIAMA MURAGE 11TH CLAIMANT
DR. ANTHONY KAMAU NJUGUNA 12TH CLAIMANT**

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. By a motion dated December 19, 2022 the Respondent/Applicant in this matter sought in the main that an order of stay of execution of the judgment of this Hon. Court (Mbaru, J) delivered on



November 30, 2022 pending the hearing and determination of the intended appeal to the Court of Appeal.

2. The application was premised on the grounds among others that:
 - i. Vide her Judgment delivered on November 30, 2022, the Honourable Lady Justice Mbaru agreed with the Claimants herein and entered Judgment, in their favour against the Respondent in the following terms: -
 - a. A declaration that the Claimants are entitled to arrears in allowances with effect from January 1, 2017
 - b. The Claimants are entitled to payments of allowances by virtue of their employment as medical doctors/practitioners in public health facility of the Respondent specifically the Doctors emergency Call Allowances, extraneous allowance, risk allowance and non-practice allowance.
 - c. As at June 30, 2020, the Respondent owes the Claimants a total sum of Kshs 41,190,000.00.
 - d. The aforesaid sum of Kshs 41,190,000.00 to be paid within 30 days from the date of Judgment after which time, the same shall be paid with interest at Court rate and until paid in full v
 - e. The Claimants shall be paid costs of the suit
 - ii. The Respondent was given only 30 days to comply with the aforesaid far-reaching, weighty and radical directions. For example, the aforesaid colossal amount of Kshs 41,190,000.00 ought to be paid on or before December 29, 2022 if one assumes that the Christmas period is to be factored in counting the days..
 - iii. In making the aforesaid Judgment, the learned Judge erred in several material ways as demonstrated in the draft Memorandum of Appeal attached to the Supporting Affidavit hereto. The Respondent intends to Appeal to the Court of Appeal against the said Judgment.
 - iv. Implementing the aforesaid Judgment would cause considerable difficulties to the Respondent yet the Respondent has a highly meritorious appeal. In particular: -
 - a. The Respondent would be forced to include colossal additional allowances in its monthly wage bill
 - b. The Respondent would be forced to pay the aforesaid amount of Kshs 41,190,000.00 within 30 days.



Respondent's calculations, such additional allowance amount to approximately Kshs 864,000.00 per month.

- b. The Respondent would be forced to pay the aforesaid amount of Kshs 41,190,000.00 within 30 days. This would be in the Christmas holiday when most operations at the University are closed.
- c. In the event the Respondent pays the aforesaid colossal amounts only for its Appeal to be upheld, it will be difficult to recover such huge amounts from the Claimants. This may result in loss of scarce public funds.
- viii. That in view of the foregoing, the public interest is in favour of granting stay of execution.

4. The Claimants opposed the application and filed a replying affidavit through Dr. George K. Karanja who stated in the main that:

- i. That I oppose the Application as lacking in merit, an abuse of the court process only meant to delay the execution of the decree and frustrate the Claimants/Decree Holders herein from enjoying the fruits of the judgment of this Honourable Court.
- ii. That the Applicant/Judgment Debtor herein has come to this Honourable Court with unclean hands having acknowledged receiving the funds for payment of the Claimants' dues which is the subject of this suit and the intended Appeal herein from the Government of Kenya.
- iii. That in this regard, the refusal and or delay by the Applicant to pay the Claimants the said funds is dishonest, unreasonable and flagrant disobedience of court orders and violations of the Claimants' employment rights which should not be countenanced by this Honourable Court.
- iv. That furthermore the Applicant/Judgment Debtor has expressly stated that they are capable of paying the whole of the decretal amount and as such there is absolutely no legal reason, and or justification to delay the settlement the decretal amount as no substantial loss shall be occasioned to the Applicant/Judgment Debtor if the Application is declined.
- v. That it is undeniable evidence on record that the Decretal Sum of Kshs 41,190,000/= and other funds for settlement of the all the Claimants Allowances had been released to the Respondent and as such the intended appeal is unmerited and in bad faith only meant to delay and unfairly and unlawfully deny the Claimants their allowances and means of livelihood.
- vi. That the further delay in payment of the Claimants Allowances if the instant Application is allowed will be extremely oppressive, unfair, unjust and prejudicial to the Claimants/Decree Holders herein who have and are still offering their professional services, time and energy in the employment of the Applicant



- vii. That there is no evidence that the Claimants/Decree Holders are persons of straw not capable of refunding their respective decretal sums in the unlikely event that the Appeal succeeds to warrant the grant of the orders sought by the Applicant.
 - viii. That as conceded by the Applicant, the Claimants/Decree Holders are still employed by the Respondent and cannot therefore disappear with the said decretal sum thereby making this instant application unnecessary and unwarranted.
 - ix. That without prejudice to the foregoing, I verily believe and I am advised by my Advocates on record which advise I believe to be true and correct that this is a money decree and if the court is inclined to grant stay of execution pending appeal, which is vehemently opposed, the same ought to be on condition for deposit of security for costs pending appeal.
 - x. That the Honourable Court should direct and order the Applicant/Judgment Debtor to immediately deposit the entire decretal sum of Kshs 41,190,000/= which arrears now amounts to Kshs 42,678,000/= as at December 2022 together with the costs thereof in a joint interest earning escrow account in the names of both parties law firms as security for grant of the stay of execution pending appeal.
5. In support of the application, Mr. Thuo for the Respondents submitted among others that it was imperative that there be a stay of execution of the judgment herein pending appeal so as to ensure the appeal is not rendered nugatory and also prevent the Applicant from incurring substantial loss. In this respect Counsel relied on the case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR.
 6. On whether the application has been made without unreasonable delay, Counsel submitted that the Respondent filed the present application on December 19, 2022 while the judgment was delivered on November 30, 2022. There was therefore no unreasonable delay.
 7. On the question of substantial loss, Counsel submitted that the purpose of an application for stay was to preserve the subject matter in dispute as that the rights of the Respondent who is exercising the right of appeal are safeguarded and the appeal if successful is not rendered nugatory. According to Counsel, if stay was not granted the Respondent's right of appeal would be defeated. This was because of the colossal sum of the monthly allowances of Kshs 864,000/= and the accrued Kshs 41,190,000/= if paid there was no guarantee that the Claimants would be able to repay. The Claimants had not filed any affidavit of means to confirm their financial means or status hence there was a risk of failure to compensate the Respondent should the appeal succeed. In this regard, Counsel relied on the case of *G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.
 8. In the instant case, the Applicant averred that it stood to suffer substantial loss of over Kshs 42,000,000/= as well as costs and interest should stay of execution not be granted. Further the Claimants have not demonstrated that they would suffer any substantial loss of the application is allowed.
 9. On the issue of public interest Counsel submitted that the Respondent was one of the public universities largely funded by taxpayers and its core business is to provide education to all Kenyans. There was no denying that the Respondent just like all public universities in Kenya was undergoing



challenging times. The challenges were as a result of reduced government funding to public universities and near collapse of the parallel degree program. The information was in public domain.

10. Counsel thus submitted that in essence of the sum was not recovered; public interest would be defeated, as this would put to halt hundreds of operations within the university. In this respect Counsel submitted the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR and further argued that the instant case transcended the litigation interest of the parties as it affected the general public who pay taxes that are sued to run the day to day operations of the Respondent.
11. The Claimants on the other hand submitted that the Applicant had not met or satisfied the conditions set for grant of the orders sought. That is to say, the Respondent had not met the conditions set by Order 42 Rule 6 of the *Civil Procedure Rules*. In this respect Mr. Muga for the Claimants relied on the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR and *Kassan Kanji Nhirani & another; v Jane Njeri Kimani & another* [2020] eKLR.
12. On substantial loss, Counsel submitted that the Respondent had not demonstrated that substantial loss would be occasioned to it if the order of stay were not granted. First, the Respondent/Applicant admitted that it was capable of paying the entire decretal sum should the intended appeal not succeed. Counsel relied on the case of *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR 63, Mr. Muga further submitted that the Respondent admitted at the trial that it had received from the government the funds forming part of the Claimants' dues herein. Further the Respondent had conceded that the Claimants were still its employees and were earning very good salaries and allowances. This according to Counsel was a clear admission that the Claimants were not men and women of straws incapable of repaying the decretal should the appeal succeed.
13. Mr. Muga further submitted that the Respondent had not provided the pre-requisite security for grant of the order of stay as required under order 42 Rule 6(2)(b). In this regard, Counsel relied on the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR and the case of *In re Estate of Richard Churko Stephen 'alias' Richard Churko Guyo (Deceased)* [2021] eKLR.

Determination

14. Whether or not to grant a stay of execution is a matter entirely within the discretion of the Judge seized of the application. Like all other discretions within the power of a Judge, it must not be exercised capriciously but judiciously with the ultimate goal of doing what is just in the circumstances.
15. As admitted by both Counsel in the matter, the operative framework for grant or refusal of an order for stay by the Trial Court from whose judgment it is intended to appeal is governed largely by Order 42 Rule 6 of the *Civil Procedure Rules*. However, it is the Court's view that the provisions of this order are not exclusive. The order as observed being discretionary, the Court is of paramount, guided generally by article 159 and more particularly Article 159(2)(a), (b) and (d) of the *Constitution*. That is to say justice shall be done to all irrespective of status, shall not be delayed and shall be administered without undue regard to procedural technicalities.
16. This Court tried the matter and reached the decision intended to be appealed from. In the Court's view, it delivered what it considered the best decision in the circumstances. It would therefore be uncomfortable for the Court to glean over its decision and may be come to the conclusion that it may have been wrong in reaching the decision it reached so the appeal might be successful. The fault in the judgment is more visible to the intended appellant than it might be to this Court and the successful party.



17. In the circumstances, in granting a stay, this Court in most cases may just be enabling the unsuccessful litigant to feel they have had their day full within our judicial hierarchy.
18. Order 42 Rule 6(2) provides 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.
19. From the above, it is clear that the trial Court is least concerned with the success or otherwise of the appeal hence my previous observations. The concern of the trial Court is with regard to substantial loss, promptness of the application and the furnishing of a binding security for the performance of the decree or order that the appellants court might ultimately make.
20. Concerning the promptness of the application, the Applicants have acquitted themselves well in this regard. The judgment was delivered on November 30, 2022 and the Motion herein filed on December 19, 2022. This cannot by any manner of interpretation be construed as unreasonable delay.
21. On the issue of substantial loss, this Court takes the view held by fellow Judges of this Court and other superior courts that executing a valid judgment of a court of law does not amount to substantial loss since a decree of a court unless stayed or overturned, is a debt and obligatory as against the judgment debtor.
22. What the Court tries to guard against is the creation of a state of affairs that would irreparably affect or negate the very core of the Applicant's appeal if successful.
23. The Applicant has argued that the decretal sum is substantial and further that being a public university its operations are largely funded by money allocated to it from public funds.
24. The Court has carefully considered the submissions by the Applicants on the issue of substantial loss and quite agree that the decretal sum is by no means a small amount of money and paying the same out has the potential of disrupting its other operations besides the Claimants apart from asserting that they were the Applicant's employees earning good salaries did not file any affidavit of means to substantiate their assertion that they would have no problem refunding the decretal sum if paid to them and the appeal later on becomes successful. To this extent, the Court agrees with the Applicant that there would be likelihood of substantial loss.
25. On the issue of binding security for the performance of any decree or order the Court may ultimately make, the Court will take judicial notice that the Respondent is one of the largest and oldest public universities with assets spanning across the major towns and cities in the country. Being a public educational institution of higher learning, it is highly unlikely that it would close shop soon. Further being heavily funded by the government, the judgment herein by extension is a liability to the government under an appropriate vote. Besides, even if execution was to be the last resort, the Respondent has enough resources to be attached in satisfaction of the decretal sum.
26. The converse would be to order that the decretal sum which by no means is a small sum of money be placed in a interest earning account in the names of Counsel for the parties. The practical dilemma of such an order would be to tie a significant portion of the Respondent's financial resources against



a background where it is within the public domain that public universities are not having the best of financial health.

27. The foregoing having been said, the Court finds that the most appropriate order that commends itself is to grant the Respondent/Applicant an unconditional stay of execution pending the hearing and determination of the intended appeal herein.
28. The Respondent is hereby ordered to prepare, file and serve the record of appeal on the Claimants within 60 days of this ruling in default execution shall issue.
29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH MAY DAY OF MAY 2023

ABUODHA J N.

JUDGE

In the presence of:-

Muga for the Claimant

Thuo for the Respondent

