



**Chiuri v Laikipia University & 3 others (Cause E012 of 2021)
[2023] KEELRC 1774 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1774 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E012 OF 2021
HS WASILWA, J
JULY 25, 2023**

BETWEEN

PROF. LOIS WANJIKU CHIURI CLAIMANT

AND

LAIKIPIA UNIVERSITY 1ST RESPONDENT

VICE CHANCELLOR, LAIKIPIA UNIVERSITY 2ND RESPONDENT

**THE CHAIRPERSON OF THE COUNCIL, LAIKIPIA UNIVERSITY 3RD
RESPONDENT**

THE COUNCIL, LAIKIPIA UNIVERSITY 4TH RESPONDENT

RULING

1. Before this Court for determination is the Respondents /Applicants' Notice of motion dated 30th March, 2023 filed under certificate of urgency and brought pursuant to Section 3A of the [Civil Procedure Act](#), Order 42 Rule 6 & Order 51 Rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of law, seeking for the following Orders; -
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to stay execution of the Decree/ Judgement delivered on 6th March, 2023 pending hearing and determination of the Intended Appeal at the Court of Appeal.
 4. That costs of and incidental to this Application abide by the results of the said Appeal.
2. The Applicant stated that Judgement in this suit was delivered on 6th March, 2023 in favour of the claimant with no stay Orders issued as such the claimant/ Respondent herein is free to execute the



- Judgement at any time and has in fact threatened the Respondent with contempt of Court for non-compliance with the terms of judgement.
3. The Applicant is aggrieved by the entire judgement and has filed a notice of Appeal and is in the process of filing a record of Appeal.
 4. He stated that the amount to be paid to the decree holder is a colossal amount and the Applicant being a public body whose budgetary allocation is per financial year, will suffer immensely unless stay of execution orders are granted.
 5. It is stated that the Applicant is willing to provide reasonable security for due performance as the Honourable Court may direct. He added that the security to be awarded to factor in the circumscription of monetary allocation to public institutions every year.
 6. The Application is supported by the affidavit of Imelda Wanjau, the 1st Applicants' legal officer, who reiterated the grounds of the Application and added that the Appeal raises serious questions of law with high chances of success.
 7. She stated that the amount to be paid is in excess of 14 Million plus costs which cannot be realized now considering that the 1st Applicant is a public university whose resources are limited and depends on financial allocations that is limited to that allocated in an approved budget per financial year. Further that the Applicant has processed the Respondent's gratuity which was not contested.
 8. It is her case that this Court is clothed with powers to order for stay of execution and urged it, in the interest of justice, to allow the Application as prayed.
 9. The application is opposed by the Respondent who filed a replying affidavit sworn on the 11th April, 2023. She stated that the Applicant has not indicated the particular loss it will suffer in case the Orders of the Court are complied with. She added that in the event that she is reinstated, her salary will be sufficient to refund the decretal sum in case the Appeal succeeds.
 10. It is also contended that the decretal sum continues to accrue interest each day. Further that the Respondent has not stated the security its willing to provide for due performance of the decree.
 11. She avers that costs have not been taxed and a decree has not been issued to kick start execution proceedings. Thus the application herein is premature.
 12. The Application was canvassed by written submissions.

Applicant's Submissions.

13. The Applicant submitted on only one issues; whether the conditions for grant of stay of executions pending Appeal have been met. It was argued that the conditions pre-requisite for grant of stay orders are provided for under Order 42 Rule 6 of the *Civil Procedure Rules*.
14. On substantial loss, it was submitted that the essence of an application for stay is to preserve the subject matter of litigation and to avoid a situation where a successful appellant is left with paper judgement. Therefore, that substantial loss is what is to be preserved by maintaining status quo. In this they relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the Court held that; -

“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.”



15. It was submitted that even though the Respondent alleged that the Application is premature, the fact that there is a live Judgement, it can be executed any time, because there are no stay Orders. He added that even though taxation had not been done, the Respondent had on several occasions demanded for the said sum of money and threatened to cite the Applicant's CEO for contempt of Court Orders.
16. It was submitted that if the Applicant enforced the Orders given by this Court in the judgement, the same would negate the aim of the Appeal and render it nugatory.
17. On whether the application was filed without unreasonable delay, it was submitted that the application herein was filed on 4th April, 2023, 28 days from the date of delivery of the Judgement, therefore that the application was filed timeously. In this they relied on *M'ndaka Mbiuki v James Mbaabu Mugwiria*[2016] eKLR.
18. On security for due performance, the Applicant relied on the case of *Kenya Commercial Bank Limited v Suncity Properties Limited & others* [2012] eKLR where the Court held that; -

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be always be balanced.”
19. Similarly, that the total award is in excess of 14 Million, which figure is colossal and considering that the Applicant is a public University that receives its funds from the exchequer per financial year and also that the budgetary allocation for the current financial year is appropriated, the Applicant will have difficult in complying with an order for monetary security. Further that they are exempted from giving security for due performance as expressed under Order 42 Rule 8 of the Civil Procedure Rules. To support this position, they relied on the case of Teachers Service Commission V Benson Kuria Mwangi [2020] eKLR where the Court held that;-

“Being a public institution, there is public interest in granting the orders of stay as the decretal sum is payable from public funds. I have considered the grounds of appeal attached as appendix 8 to the application and I am satisfied that the appeal is not frivolous. Being a public institution, the applicant is not required to deposit security by virtue of Order 42 Rule 8 of the *Civil Procedure Rules*.”
20. The Applicant submitted that in the event that the Court insist on deposit of a monetary figure then to order deposit of 50 of the determined figure of of Kshs 4,460,967.12 as appearing in paragraph 4 of the judgement.
21. In conclusion, the Applicant urged this Court to balance the interest of the parties and be persuaded by the decision in *Butt v Rent Restriction Tribunal* [1979] and allow the Application.

Respondent's Submissions.

22. The Respondent submitted on two issues; whether the Applicant has met the conditions required for grant of stay of execution and who should bear costs of this Application.
23. The Respondent reiterated that the conditions for grant of stay of execution pending appeal are provided for under Order 42 Rule 6 of the *Civil Procedure Rules* and cited the case of *Congress Rental*



South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2019] eKLR, where the Court held that:-

“In dealing with issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of applicant as a successful party in the appeal... Substantial loss in its various forms was stated to be a cornerstone of jurisdiction for granting a stay. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR; Hon. Platt, Ag. JA stated as follows:-

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

24. They also relied on the case of *Nicholas Mutuku Mwasuna V Patricia Mueni Kilonzo*[2022] eKLR where the Court held that relied on the case of In *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that:-

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.”

25. Similarly, that by mere fact of indicating that the sum in issue is colossal is not in itself a justification that substantial loss will be visited on the Application. Further that they have not indicated the loss they will incur if the Respondent is reinstated back to employment and allow to continue working as the Appeal proceeds.
26. On sufficient cause, it was submitted that no cause has been shown as to why stay of execution Orders should issue, in any case that the Applicant has not exhibited a draft of the Memorandum of Appeal before to court for it to consider whether the Appeal is one that is arguable. In this they relied on the case of *Francis K Chabari & Another v Mwarania Gaichura Kairubi* [2022] eKLR.
27. On security for due performance, the Respondent highlighted the purpose of security by citing the case of *Arun C Sharma v Ashana Raikundalai t/a Raikundalai & Co Advocates & 2 others* [2014] eKLR and submitted that the Applicant has at one point agreed to pay 50% of the definite decretal sum as pronounced in the Judgement but at another point sought refuge of Order 42 Rule 8 of the *Civil Procedure Rules* to run away from depositing security. In this the Respondent cited the case of



Doshi Iron Mongers Limited v Kenya Revenue Authority & Another [2020] eKLR where the Court held that:-

“In this matter however, the applicant goes beyond the usual standpoints and takes the position that the creating statute gives it the identity of a government and thus it enjoys protection accorded to government under Rule 8 of Order 42 not to be asked to provide security for the due performance of the decree. I think this should be the starting point for the determination. My view in this matter has been and remains that a statutory body once created must keep the stature and identity designed by parliament and should not get the excuse of running back to be shielded by the big and heavy government shadow... or that reason, I am bound by the Court of Appeal [2] to add my voice to those of my brothers, Mbogoli Msagha[3], David Majanja[4], J.B. Ojwang[5] and Osieno JJ[6] and hold that a statutory corporation, unless the creating statute says otherwise, is not an appendage or department of the Government as contemplated under the *Government Proceedings Act*. One need not invite the application of the *Government Proceedings Act* when parliament in its own wisdom has expended time and public resources to enact a statute to regulate the body so desired to be created”. I continue to hold that to be the position of the law and I am unable to depart from the same just like the judge in *Kenya Revenue Authority v Jackson Ruiru* (supra) also held. That should now be the settled position of the law in the area.”

28. Accordingly, that it was submitted that the 1st Applicant is a body corporate, independent from the Government and if indeed he was an appendage of the Government then the Honourable Attorney General could have been sued on its behalf under the *Government Proceedings Act*. Based on the fact that the 1st Applicant can be sued in its own capacity, the Respondent submitted that the provisions of Order 42 Rule 8 of the *Civil Procedure Rules* does not apply to it and they should thus be compelled to give security.
29. The Respondent also urged this Court to allow it partially execute the Judgement in line with provisions of section 94 of the *Civil Procedure Act*. Also that the order of reinstatement take effect immediately as was stated in the case of *Aggrey Lukorito Wasike v Kenya Power and Lightings Company Limited* [2016]eKLR where the Court held that:-

“An order of reinstatement is not a positive order that requires the employer to do anything other than comply as ordered. Once the court finds that the termination or dismissal or other removal was illegal or unfair or unjustified, the employer is obligated to immediately comply by allowing the employee to resume work and if the employer fails to do so, the employer is nevertheless liable to pay the salary of the employee. Thus, having reflected upon the subject, the court considers that the following principles would apply whenever this court makes an order of reinstatement:

1. A reinstatement order takes effect immediately as it is self executory and only subject to the terms imposed in the order itself.
2. The employer is bound to comply with a reinstatement order by allowing the employee to resume duty as reinstated and to pay full salary and other due benefits from date of the impugned removal or dismissal (being the date of the reinstatement) and to continue paying until the lawful termination of the employment or until the date the reinstatement order is reversed by this court on review or by the Court of Appeal following a relevant appeal.



3. If the employer fails to comply with a reinstatement order by allowing the employee to resume duty, the employer is nevertheless liable to pay the employee's salary from the effective date of the impugned dismissal or termination (being the date of the reinstatement) and to continue paying until the lawful termination of the employment or until the date the reinstatement order is reversed by this court on review or by the Court of Appeal following a relevant appeal.
 4. If the Court of Appeal or this court upon review reverses the order of reinstatement, the employer's duty to pay the reinstated employee effectively stops or ends and the employer is no longer required to retain the employee who had been reinstated in continued actual service.
 5. If the Court of Appeal upon appeal or this court upon review reverses the order of reinstatement, the employee is not required to return the salary or the pay that the employee had received prior to the reversal of the reinstatement order.
 6. If during the pendency of appeal or an application for review, the employer failed to allow the employee to actually resume duty (upon the order of reinstatement) for the period between the order of reinstatement and the date of the order's reversal on appeal or review, the employee will still recover the salaries or wages for that period despite the reversal of the order of reinstatement; the only exception to such recovery being, if it is shown that the delay by the employer to comply with the reinstatement order pending appeal or review was not due to the employer's unjustified action or omission to allow the employee to resume work, or, the employee for unjustified action or omission, failed to resume work as per the order of reinstatement."
30. It was argued that the application herein is seeking to delay the reinstatement of the Respondent till she attains her retirement age and in effect defeat the entire Judgement to the detriment of the Respondent who is now 65 years and about to reach the retirement age. The Respondent argued that it is only fair that she paid her salary arrears for all the months and gratuity that is not objected, then the damages be deposited in a joint interest earning account.
 31. On costs of this Application, the Respondent submitted that Section 12(4) of the [Employment and Labour Relations Court Act](#) and Rule 29 of the [Employment and Labour Relations Court\(Procedure\) Rules, 2016](#) provides for costs and urged this Court to award it costs for this Application. In this he relied on the case of [Titus Muriuki Ndirangu v Beverly School of Kenya Limited](#) [2022] eKLR.
 32. In conclusion, it was submitted that stay of execution orders are granted on discretion of a court and based on justifiable grounds which the Applicant must prove. The Applicant having failed to demonstrate the conditions for stay, do not deserve the said Orders, instead that the Application herein should be dismissed, but in the event that its allowed, partially execution of the Judgement be ordered as submitted above.
 33. I have examined the averments and submissions of the parties herein. The applicants seek stay of execution on this court's judgment dated 6/3/2023 pending Appeal.
 34. Order 42 Rule 6(2) states 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”.

- 35. Indeed the guiding factors for stay of execution is as above. The applicant has complied with the issue of filing this application timeously having filed the same on 30th March, 2023 after delivery of the Judgement on 6/3/23.
- 36. The applicant has also filed an Appeal before the Court of Appeal which in my view is a good indication of loss they may suffer if the Appeal succeeds and is rendered nugatory.
- 37. The last issue to consider is security which the applicants have stated that they are willing to provide as ordered by court.
- 38. In the circumstances of this application and in order to balance the interests of the parties herein, I will allow the application for stay on condition that the entire decretal sum is deposited in an interest earning account held in joint names of counsels on record within 90 days.
- 39. In default execution may proceed.
- 40. Cost to abide the outcome of the Appeal.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kabiru for Claimant/Respondent – present

Aoko holding brief for Kisila for Applicant – present

Court Assistant – Fred

