



**Mutiso v Teachers Service Commission (Cause 570 of 2019)
[2023] KEELRC 1682 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1682 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 570 OF 2019**

JK GAKERI, J

JULY 12, 2023

BETWEEN

VICTOR SAMMY MUTISO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. Before the court for determination is the Respondent/Applicant's Notice of Motion dated March 22, 2023 seeking Orders That;
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to stay execution of the judgement, decree and all consequential orders of Hon Justice Dr Jacob Gakeri delivered on March 13, 2023 in Nairobi ELRC No 570 of 2019 pending the hearing and determination of the intended Appeal.
 4. The costs of this application be provided for.
2. The application is based on the grounds set out on its face and the Affidavit of Catherine Kerich sworn on March 22, 2023.
3. The affiant deposes that the applicant intended to appeal the decision in ELRC 570 of 2019 delivered on March 13, 2023 and the intended appeal raises profound weighty issues of law with high chances of success.
4. That the Respondent is likely to enforce the judgement as there is no order to stay of execution.



5. The affiant states that if the Respondent enforced the judgement, the applicant would suffer irreparable loss and damage as the decretal sum involves millions of tax payers funds and the Respondent may be unable to refund the sum of Kshs 2,517,845/=, the approximate decretal sum.
6. That the appeal will be rendered nugatory as the amount may be irrecoverable from the Respondent.
7. That the applicant is a constitutional body and proceeding against it are proceedings subject to the [Government Proceedings Act](#).
8. That the Claimant/Respondent stands to suffer no loss or prejudice or injury if the orders sought are granted as he will have the opportunity to defend the appeal and the applicant being part of Government is capable of satisfying the decree of the court, if the appeal is unsuccessful.
9. The affiant filed this application in good faith for a fair and just determination of the suit and it is in the interest of justice that the application herein be allowed.

Response

10. In his Replying Affidavit sworn on April 11, 2023, the Claimant/Respondent deposes that the instant application is malicious, ill-advised and an abuse of court process intended to delay a concluded matter.
11. That the court has discretion to stay execution of decree or order for sufficient cause and the applicant had not demonstrated the same and in particular substantial loss to be suffered if the application is not allowed as the Claimant/Respondent's inability to refund the decretal sum had not been substantiated.
12. That the Claimant/Respondent was able and willing to refund the decretal sum if the appeal succeeded.
13. That the applicant would still be compensated by way of damages.
14. The affiant states that the court is enjoined in determining the instant application to balance the interests of both parties and in particular the applicant's right of appeal and the Respondent's right to enjoy the fruits of his judgement.
15. That allowing the instant application would prejudice the applicant as it would exacerbate the unfair termination of employment and the application is unmeritorious.

Applicant's Submissions

16. Counsel for the applicant submitted on the right of appeal as well as the requirements of Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#).
17. On the right of appeal, counsel relied on Article 164(3) of the [Constitution of Kenya, 2010](#) and Section 17 of the [Employment and Labour Relations Court Act, 2011](#).
18. Counsel submitted that the appeal raised substantial and/or weighty issues of law.
19. The sentiments of Nduma J in [African Safari Club Ltd v Safe Rentals Ltd](#) [2010] eKLR were relied upon to reinforce the Submission.
20. As regards arguability of the appeal, reliance was made on the sentiments of the Court of Appeal in [Kenya Medical Lab Technicians & Technologists Board v Prime Communications Ltd](#) [2014].
21. Counsel outlined the nine (9) intended grounds of appeal to urge that the applicant had made a case for preservation of the substratum of the appeal.



22. On the fulfilment of the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*, counsel urged that the applicant would suffer irreparable loss owing to the Claimant's inability to refund the sum of Kshs 2,517,845/= which would raise audit queries. That the Respondent had not filed an affidavit of means and had thus not discharged the burden of proof.
23. Reliance was also made on the decision in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR on the applicant's burden of proof.
24. Counsel submitted that the application was made on March 23, 2023 and the judgement was delivered on March 13, 2023 and without unreasonable delay.
25. Finally, on security for costs, counsel urged that since the Respondent is a Government organ, it is exempted from depositing security for costs under Order 42 Rule 8 of the *Civil Procedure Rules, 2010*.
26. That the Respondent had perpetual succession and capacity to satisfy the court's decree and the Claimant was assured of the fruits of his judgement.
27. Counsel urged that the applicant had met the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.

Respondent/Claimant's Submissions

28. Counsel identified a single issue for determination, namely; whether the court should grant the order of stay of execution.
29. Counsel cited the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* to urge that the power of the court to grant an order of stay of execution was discretionary and the applicant had not demonstrated sufficient cause.
30. On substantial loss, counsel relied on the decision in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR to submit that the applicant had not discharged the burden of proof that it will suffer substantial loss as was the case in *Kenya Shell Ltd v Benjamin Karuga Kibiru & another* [1986] eKLR.
31. Counsel urged that the Claimant stood to suffer more prejudice having been on interdiction from November 2015 to February 2018.
32. On the timing of the application, counsel conceded that it was filed without unreasonable delay having been filed 10 days after the judgement sought to be appealed against.
33. As regards security for costs, the decision in *Congress Rental South Africa v Kenyatta International Convention Centre Cooperative Bank of Kenya Ltd & another (Garnishee)* [2019] eKLR was relied upon to urge that the offer for a security should come from the applicant and neither inferred or implied nor left for the court.
34. Counsel submitted that although some courts have taken the position advanced by the applicant that it was a government organ and thus not required to provide security, other courts have required security such as in *Teachers Service Commission v Ezekiel Muchesi* [2019] eKLR where the Court of Appeal required security and *Teachers Service Commission v Ashford Tours and Travel Ltd* [2021] eKLR.
35. Finally, it was submitted that security is recoverable by the applicant if the appeal was successful.

Determination

36. The singular issue for determination is whether the Notice of Motion herein is merited.



37. This ruling turns on whether the applicant merits the order of stay of execution of the judgement delivered on March 13, 2023 pending the hearing and determination of the intended appeal.
38. The principles governing the grant of order of stay of execution are well settled.
39. Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010* empowers both the court whose decision is appealed against and the court to which the appeal is preferred to hear and determine applications for stay.
40. Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* prescribes the conditions an applicant must fulfil for the grant of an order of stay of execution namely;
- (i) Substantial loss.
 - (ii) Without unreasonable delay.
 - (iii) Security for the due performance of the decree.
41. It is trite law that whether a court shall grant or refuse the order of stay pending appeal is a matter of discretion which must be exercised judiciously and within the mandatory provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*.
42. In *RWW v EKW* [2019] eKLR, the court stated as follows;
- “Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court, when granting the stay, however, must balance the interests of the Applicant with those of the Respondents.”
43. In this case, the Applicant states that it stood to suffer irreparable loss and damage as the decretal sum was a substantial amount of money and consisted of public funds as the Claimant had no capacity to repay.
44. The Respondent on the other hand deposes that he had capacity to repay the sum but tendered no supportive evidence.
45. That the applicant had not demonstrated substantial loss.
46. In determining the issue of substantial loss, the court is guided by the sentiments of the court in *James Wangalwa & another v Agnes Naliaka Cheseto* (supra) as follows;
- “No doubt in law, the fact that the process of execution has been 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 Civil Procedure Rules. 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 jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
47. (See also *Kenya Shell Ltd v Benjamin Keruga Kibiru & others* (supra) and *Pan African Insurance Co Ltd v International Air Transport Association* HCCC No 86 of 2006).



48. From the averments and evidence on record, the court is satisfied and finds that the applicant has demonstrated that it stood to suffer substantial loss if the appeal was successful.
49. As to whether the application was made without unreasonable delay, the court is persuaded that the applicant acted with reasonable dispatch having filed the Notice of Motion within 10 days of delivery of the judgement on March 13, 2023.
50. Finally, on security for the due performance of the decree, the applicant relied on Order 42 Rule 8 of the [Civil Procedure Rules, 2010](#) which states that;

"No security to be required from Government and no such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defense of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."

51. Counsel for the applicant urged that since the applicant is a government institution with perpetual succession, it was in a position to satisfy the court's decree if the appeal is unsuccessful and the Respondent's fruits of judgement were assured.
52. It is common ground that the applicant is one of the Commissions established by Article 237(1) of the [Constitution of Kenya, 2010](#) as an Independent Commission, a body corporate capable of suing and being sued in its corporate name and reports to the President and Parliament.
53. The applicant is a Commission with financial and administrative independence. It has rights and is subject to obligations, with power to hold, acquire, charge and dispose of movable and immovable property.
54. Under Section 3(1)(b) of the [Teachers Service Commission Act, 2012](#), the Commission is mandated to discharge its functions under the [Constitution](#) and the Act as may lawfully be done or performed by a body corporate.
55. The applicant commission is allocated funds by the National Assembly for all its activities.
56. The fact that it has perpetual succession as a government organ does not translate to ability to satisfy court awards.
57. In *Teachers Service Commission v Ezekiel Muchesi* (supra), cited by the Claimant's counsel, the Court of Appeal granted stay of execution, provided the applicant (in a similar case) deposited Kshs 500,000/=.
58. A similar holding was made in *Teachers Service Commission v Ashford Tours and Travel Ltd* [2021] eKLR.
59. As explained by Gikonyo J in *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates*;

"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant . . . I presume the security must be one which can serve that purpose."

60. In such an application, it is the duty of the applicant to demonstrate its readiness to provide security as was held in [Focin Motorcycle Co Ltd v Ann Wambui Wangui & another](#) [2018] eKLR as follows;

"Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide



security or propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground.”

61. In *Godfrey K Rukorito v Teachers Service Commission* [2020], Nduma J dismissed the application for stay on the premise that;

“The applicant did not demonstrate good faith in this matter and has not offered any security for performance of the judgement.”

62. In the instant application, the applicant neither offered to provide security nor demonstrated willingness to provide the same but relied exclusively on Order 42 Rule 80 of the *Civil Procedure Rules, 2010*.

63. Guided by the decisions above and flowing directly from the foregoing, it is clear that the instant application is for dismissal and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JULY 2023

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

