



**Kenya Union of Doestic, Hotels, Educaitional Institutions and Hospital Workers v Univerity Council, Technical University of Mombasa (Cause E002 of 2021) [2023] KEELRC 2557 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2557 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E002 OF 2021  
M MBARŪ, J  
OCTOBER 19, 2023**

**BETWEEN**  
**KENYA UNION OF DOESTIC, HOTELS, EDUCAITONAL INSTITUTIONS  
AND HOSPITAL WORKERS ..... CLAIMANT**  
**AND**  
**UNIVERITY COUNCIL, TECHNICAL UNIVERSITY OF  
MOMBASA ..... RESPONDENT**

**RULING**

1. The respondent, the University Council of Technical University of Mombasa filed application dated 14 July 2023 under the provisions of order 42 rule 6 and seeking for orders that;
 

Pending hearing and determination of the intended appeal to the Court of Appeal there be and is hereby issued an order of stay of execution of the judgment delivered on 29 June 2023 and all consequent decree and/or order ensuring therefrom.

Costs of this application to abide the outcome of the intended appeal.
2. The application is supported by the Affidavit of Prof. Laila Abubakar the Vice Chancellor of the respondent university and on the grounds that the judgment delivered herein on 29 June 2023 awarded the grievants a gratuity payment of Ksh.29,910,295.80 and if the claimant is allowed to execute the judgment and decree, the respondent will suffer substantial loss and appeal rendered nugatory because the amount awarded is colossal and will cripple operations of the respondent should execution proceed. The respondent is a public institution and relies on government funding and does not have an approved budget to immediately pay the award and the grievants who were awarded such gratuity no longer work for the respondent. They will not be in a position to refund the amount of the award. The respondent as a public institution is funded by the tax payers and if the amount is paid and later



- the appeal succeeds, it will be impossible to recover the money from the grievants. The respondent operates based on an annual budget and has not budgeted for the amount awarded.
3. Prof. Abubakar aver in the Supporting Affidavit that the respondent has an arguable appeal with high probability of success based on the grounds that the grievants did not qualify for gratuity payment under their respective contracts or under the CBA. There was no termination of employment to justify an award of gratuity pay. The judgment was made in favour of 67 grievants whose whereabouts are unknown and the respondent will not manage to trace them to recover the awarded amount if the appeal is successful.
  4. In reply, the claimant filed the Replying Affidavit of Hezron Onwong'a who aver that he is the Industrial Relations Officer and in conduct of this matter for the claimant. The employment of the grievants with the respondent was terminated and under the CBA, they were entitled to payment of gratuity which was awarded. The basis of the award of gratuity pay is anchored in law under the CBA negotiated by the parties and subject of enforcement. The grievants are law abiding citizens and no loss will be incurred if they are paid their due gratuity and the award noted as colossal is a lawful entitlement to 67 grievants who were listed in the suit and the respondent cannot claim at this point that these are unknown persons.
  5. Mr Onwong'a also aver in his Replying Affidavit that the instant application seeking stay of execution is filed in bad faith and in abuse of court process since the respondent filed a similar application in the Court of Appeal Being Civil Appeal No. E061 of 2023 and then withdrew it. The instant application should be struck out and costs awarded to the claimant.
  6. Both parties filed written submissions and attended court to highlight.
  7. The respondent as the applicant submitted that the factors the Court should consider in an application for stay pending appeal were discussed in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR that an applicant must move without unreasonable delay, establish sufficient cause, establish substantial loss and furnish security. The court should then exercise its discretion so as to give effect to the overriding objectives of the law.
  8. In this regard, upon the judgment delivered on 29 June 2023, the respondent moved immediately to secure its rights and filed the instant application on 14 July 2023. There exists sufficient cause to justify the orders sought as the judgment award is colossal and the grievants are 67 and their means to repay the judgment award to secure the appeal if success cannot be ascertained. To pay the award would cripple operations at the respondent which relies on public funds.
  9. With regard to security, the Respondent is a Government entity in the nature of a public university. Being a Government/public entity is itself an assurance and security that the grievants will be paid the decretal amount should the appeal fail. In the circumstances, it is not necessary that the Applicant be ordered to furnish security in the form of deposit of the decretal amount, bank guarantee or any other form of security.
  10. The Respondent has an arguable appeal with a probability of success based on the ground that the grievants did not qualify for gratuity payment under their respective contracts or under the CBA and there was no termination of their services but their respective contracts expired naturally by effluxion of time. To allow the respondent be heard on their appeal, orders sought should issue.
  11. In reply, the claimant submitted that payment of gratuity was negotiated in the CBA and the award in the judgment addressed such matter. Upon the signing of the CBA, the respondent ought to have budgeted for the gratuity pay at the end of employment and cannot be justified to assert that there are



no funds to pay the same. Gratuity pa is anchored in law and in the CBA bidding the parties and the intended appeal is only meant to deny the grievants their due pay and to frustrate their judgment.

12. Where the court is to allow the orders sought, the judgment award to be secured by payment of half the award to the grievants and the balance be deposited in joint interest earning account or in court.

### **Determination**

13. As correctly submitted by the respondent, an applicant seeking stay of execution of the judgment must satisfy the conditions given under order 42 rule 6 of the *Civil Procedure Rules*. The main 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. Where there is no appeal but an intention to appeal, a successful party holding a valid judgment has a legitimate expectation to enjoy the fruits of his judgment.
14. Indeed, whether to grant or refuse an application for stay of execution pending an intended appeal is discretionary. On the one hand, a party with a right of appeal should be secured so as to enjoy such right. On the other hand, a party with a valid judgment and order of the court should be allowed to enjoy the fruits of his judgment.
15. The respondent has attached its Notice of Appeal and a Memorandum of Appeal without the filing details. As the attachment stands, it is but an intention to appeal.
16. Having moved the court without delay is not the sole condition to be satisfied. As the respondent asserts, the judgment sum of Ksh. 25,910,295.80 is gratuity pay to 67 grievants who each worked for specific periods and the schedule and details of employment are in the Memorandum of Claim and replicated in the body of the subject judgment sought to be stayed. Under the CBA, the respondent committed to pay gratuity at end of employment and the security for such benefit ought to have been secured on a monthly basis with the payment of the due wage. Such an amount ought to be separate and accounted for and the case that the respondent does not have a budget for such an amount, does not give them good standing to enjoy the orders sought.
17. Whether to give security or not, the standing of the respondent as a public institution is not a sufficient consideration on the face the judgment herein. In *Samvir Trustee Limited v Guardian Bank Limited* the court is giving emphasis to the sanctity of a judgment once issued held that;

The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion.

18. With regard to satisfying the grounds of what substantial loss that may be suffered pending the respondent addressing its intended appeal, the matter sought to be preserved must be gone into. It is not sufficient to state that the judgment award is excessively high. What is being sought to be preserved?
19. In the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 the court in addressing a similar matter held that;



... the gist of the conditions set out in order xli rule 4 (now order 42 rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...

Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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. ...

19. In this case, to secure the claimant, conditional order of stay is necessary.
20. The respondent is seeking that costs should abide the outcome of the appeal. There is but an intended appeal. It has not been actualised. For this purpose, parties are still engaged under these proceedings and costs for the instant application ought and should be addressed herein. The Respondent shall therefore meet the claimant's costs assessed at Kshs. 50,000.
21. Accordingly, application dated 14 July 2023 considered; a conditional order of stay is hereby issued; of the judgment sum of Kshs. 25,910,295.80 the respondent shall deposit 50% thereof in a joint interest earning account held by the claimant and the respondent within the next 30 days after which, the order of stay herein shall lapse. The claimant is awarded costs of Kshs. 50,000.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet Muthaine

..... and .....

