



REPUBLIC OF KENYA



KENYA LAW
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**Cheng'oli & 2 others v Kenya Universities Staff Union (Petition
E026 of 2021) [2023] KEELRC 3115 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E026 OF 2021
MA ONYANGO, J
NOVEMBER 24, 2023
IN THE MATTER OF ARTICLES 27,41(1) & (5) 159 (1) &
(2), 162(2), 165, 230(4) & (5) AND 237 OF THE
CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF THE LABOUR REATIONS ACT (2007)**

BETWEEN

**FRANCIS CHENG'OLI 1ST RESPONDENT
MARK OTUNDO 2ND RESPONDENT
ANN KAARIA 3RD RESPONDENT**

AND

KENYA UNIVERSITIES STAFF UNION APPLICANT

RULING

1. The application dated 19th May 2022 has been filed by the Applicant seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. That pending hearing and determination of the intended appeal filed to the Court of appeal; this court be pleased to order stay of execution of the judgment and decree issued on 18th March 2022 and all consequential orders therein
 - iv. That such other orders be made are as just and expedient in the interest of justice



- v. That the costs of the application be provided for
2. The application is expressed under the provisions of Order 42 Rule 6(1) & (2), Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 and Section 3A of the [Civil Procedure Act](#) and all enabling provisions of the law.
 3. The application is based on the grounds stated on the face of the application and the annexed affidavit of Charles Mukhwaya, the Secretary General of the Applicant.
 4. Essentially the grounds relied upon by the Applicant are inter alia that:- this court issued judgment against the Applicant on 18th March 2022; that the Applicant herein being dissatisfied with the judgement of this court filed a Notice of Appeal; that the Applicant through their advocates on record have begun compiling the record of appeal and in effect have requested for the certified typed proceedings through email correspondences with the Deputy registrar of the Employment Court; that the applicant has an arguable and meritorious appeal with a likelihood of success since the appeal raises serious, weighable and triable issues of both fact and law that ought to be heard in the interest of justice; that the applicant is bound to suffer irreparable loss and damage unless this court grants the orders sought; that the Respondents will not be occasioned nor suffer prejudice if the application is allowed as prayed; that the applicants appeal having a very chance of succeeding will be rendered nugatory unless the court grants the Applicant orders of stay of execution; that in the judgment delivered by this court under paragraph 69, the court noted that order 5,6,8 and 9 have been overtaken by events and as such, the court made no orders as the elections were carried out and new officers registered; that the new officers registered for the applicant are apprehensive that a competent court of jurisdiction may be moved for purposes of revocation of the registration of the new officers registered from the elections and that this will in effect render all the work done by the elected members nugatory and rubbish their efforts. Lastly, that it is not in the interest of justice that the new officers registered by virtue of the elections that were already carried out be revoked or stood down as it would implicate retrospective application of the law.
 5. The Respondents opposed the application vide a Replying Affidavit dated 21st October 2021 sworn by the 1st Respondent. He deposes that judgment was entered in the matter on the 18th March 2022 and that the Applicant then filed a Notice of appeal dated 22nd March 2022; that the Notice of Appeal lodged by the Applicant does not meet the threshold of a Notice of appeal as stipulated in the [Appellate Jurisdiction Act](#) both in substance and in form; that upon filing of the Notice of Appeal by the intended Appellant, they should file and serve a Memorandum of Appeal and record of Appeal within 60 days from the date of filing the Notice of Appeal; that the Applicant herein has failed to file a Memorandum of Appeal as required by law and that the Applicant's officials are benefitting from the illegal constitution to stay in office by delaying the hearing of their appeal; that to further illustrate the delay tactic being employed by the applicants since the filing of the Notice of Appeal and request of proceedings on the 22nd March 2022, it took them 31 days to file a letter requesting for proceedings which shows a lack of desire in prosecuting their appeal; that the failure by the applicants herein to institute the Appeal deems that they have withdrawn the appeal pursuant to section 83 of the [Appellate Jurisdiction Act](#); that it was after the party and part bill of costs was taxed that the Applicant sought for stay and that for seven months nothing has been done to prosecute the appeal. Lastly, the Respondents aver that the instant application is meant to delay the petitioners from moving the courts to remove the illegally elected officials from office and thus the court was urged to dismiss the instant application with costs.
 6. The court directed that the application be canvassed by way of written submissions. On 29th November 2022, parties informed the court that they had filed written submissions.



7. I have carefully considered the application dated 19th May 2022 and the affidavits both in support and against the same. I have further considered the submissions by both parties. I find that the only issue for my determination is whether the Applicant has met the criteria for grant of orders of stay pending appeal.
8. Stay of execution is provided for under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) as follows;
 - (2) No order for stay of execution shall be made under sub rule (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.
9. In summary, an applicant seeking orders of stay has to demonstrate the following;
 - a. Substantial loss may result to the applicant unless the order was made
 - b. The application was made without delay
 - c. Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
10. The power of the court to grant stay of execution pending appeal is a discretionary one and like every aspect of discretion must be exercised judicially. The Court of Appeal in [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 gave guidance on how a court should exercise such discretion and held;
 1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.”
11. The Applicant has stated that it will suffer substantial loss if a competent court of jurisdiction is moved to revoke the registration of its new officers registered from the elections which will in effect render all the work done by the elected members nugatory and rubbish their efforts to date.
12. This explanation in my view is a clear demonstration that substantial loss would result if the orders sought by the Applicant do not issue.
13. The next issue is whether the application has been brought without unreasonable delay. The judgement in which the Applicant seeks to appeal against was delivered on 18th March 2022. The instant application was brought two (2) months after delivery of the said judgment. It is therefore evident that the instant application was filed on time without any undue delay.



14. In the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreizt Maternity v James Karanga Kabia* Civil Appeal No 63 of 1991, it was observed:

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

15. In the instant application what the applicant seeks to stay are declaratory orders. In this court’s judgment delivered on 18th March 2022, the court declared the amendments to the *Constitution* of the Applicant. In the case of *Johana Nyokwonyo Buti v Walter Rasugu Omariba & 2 Others* (2011) eKLR the Court of Appeal held thus:

“...a declaration/declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force, that is, it does not require anyone to do anything.”

16. Similarly, in the case of *Katiba Institute v President of Republic of Kenya & 2 Others; Judicial Service Commission & 3 others (Interested Parties)* [2020] eKLR the court had this to say:

“The issues raised in this petition, therefore, fall squarely within the doctrine of a fresh cause of action arising out of a declaration as was stated in the Chief RA Okoya case, quoted with approval in the Okiya Omtata case, where the court said:

“First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, e.g. to pay damages or refrain from interfering with the plaintiffs’ rights, such order being enforceable by execution if disobeyed.

Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.

Second: A declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it.”

17. As in the cases cited above, there is nothing for the Petitioners herein to execute as the court’s orders were only declarations and orders of nullification. As pointed out in the replying affidavit of Francis Cheng’oli, the only way the applicants can execute this court’s orders are by moving the court in fresh proceedings to remove the elected officials from office.

18. It is for these reasons that I find the application dated 19th May 2022 without merit. The application is accordingly dismissed with costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 24TH DAY OF NOVEMBER 2023.

M. ONYANGO

JUDGE

