



**Owour v Catholic University of Eastern Africa (Petition 86 of 2019)  
[2023] KEELRC 2807 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2807 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 86 OF 2019  
MA ONYANGO, J  
NOVEMBER 2, 2023**

**BETWEEN**

**MAURICE AJWANG OWOUR ..... PETITIONER**

**AND**

**CATHOLIC UNIVERSITY OF EASTERN AFRICA ..... RESPONDENT**

**RULING**

1. Before the court for determination are two applications filed by the Respondent, both brought by way of Notice of Motion dated 24<sup>th</sup> November 2021 and 9<sup>th</sup> November 2022 respectively.
2. The Application dated 24<sup>th</sup> November 2021 is brought under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules 2010 and seeks for orders that:
  - i. Spent
  - ii. Spent
  - iii. That a stay of execution of the Judgment delivered on 12<sup>th</sup> November 2021 before this court is hereby granted pending hearing and determination of the intended Appeal by the Respondent.
  - iv. That the costs of this Application be in the cause.
3. The application is premised on the grounds set out on the face thereof to wit; that on 12<sup>th</sup> November 2021, this court delivered judgment in respect of the main suit herein in the absence of the Respondent's advocates on record; that the aforesaid judgment had been scheduled to be delivered on notice to parties herein; that on the aforesaid date on 12<sup>th</sup> November 2021, the respective court assistant only informed the Respondent's advocates of the intended delivery of judgment some few minutes before its delivery via a phone call to join the online session; that the Respondent's advocate's attempt



to join the aforesaid online session via the court link which had been provided by the said court assistant proved futile as there was no active court session; that the Respondent's advocates numerously reached out to the respective court assistant via phone calls and text messages to be provided with the proper court link but this also proved futile, that subsequently, the aforesaid judgment was delivered in the absence of the Respondent's advocates; that the Respondent dissatisfied with the aforesaid judgment hereby seeks stay of execution of the judgment; further, that the Respondent herein has already filed a Notice of Appeal in the matter and thus if the stay of execution of the judgment as sought is not granted, the aforesaid appeal will be rendered nugatory.

4. The application is supported by the annexed affidavit sworn on 24<sup>th</sup> November 2021 by Erick Omondi Njiri, the Respondent's Human Resource Manager. The said affidavit reiterates the contents in the grounds set out in the application.
5. The application is opposed. The Petitioner filed a response dated 10<sup>th</sup> December 2021 in which he contended that the Notice of Appeal is an afterthought without any foundation, is ill advised and an abuse of the court process. He avers that the application is just a time wasting gimmick and a fishing expedition rolled in one.
6. The application was canvassed by way of written submissions. Both parties filed their respective submissions.
7. Before that application was determined, the Respondent filed another application dated 9<sup>th</sup> November 2022 brought under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure Rules, 2016 and all enabling provisions of the law) seeking for orders that;
  - i. Spent
  - ii. Spent
  - iii. That the Honourable court be and is hereby pleased to review and/or set aside its orders dated 26<sup>th</sup> September 2022 and all consequential orders flowing therefrom,
  - iv. That the costs of this application be provided for.
8. The application is supported by the affidavit of Eric Omondi Njiri, the Respondent's Human Resource Manager in which he states that the Petitioner made an oral application on the 26<sup>th</sup> September 2022 for orders that the Respondent be compelled to pay the Petitioner's gratuity and shortfall of salary for the months of February and March 2019 which order was the first order in the judgment delivered by this court on 1<sup>st</sup> November 2021.
9. Mr. Njiri depones that on 26<sup>th</sup> September 2022, this court issued orders directing the Respondent to pay the Petitioner's gratuity and shortfall of salary for the months of February and March 2019 as they were uncontested.
10. The Respondent states that this court in its judgment did not specifically grant the Petitioner gratuity as claimed by the Petitioner on the 26<sup>th</sup> September 2022 and that the Respondent had paid the claimant all his dues and therefore does not owe the Petitioner any money.
11. Mr. Njiri depones that in the said order, the court erred in finding and stating that the Petitioner's gratuity and shortfall of salary of February and March 2019 were uncontested yet the Respondent intended to appeal against the whole judgment of the court delivered on 12<sup>th</sup> November 2021.
12. The Respondent maintains that there was no agreement or consent filed in court by the parties admitting the shortfall of the Petitioner's salary for the months of February and March 2019.



13. According to the Respondent, there is need for this court to review and/or set aside its orders dated 26<sup>th</sup> September 2022 on the basis that the shortfall of the petitioner's salary for the months of February and March 2019, which sum amounts to Kshs 430,896 is contested by the Applicant.
14. It is averred that the Respondent will suffer substantial loss if the orders sought herein are not granted as the Petitioner will proceed and execute the orders against the Respondent.
15. The Petitioner did not file a response to the application.

### **Determination**

16. I have considered both applications, the rival affidavits as well as the submissions on record. In my view, the following are the issues for determination: -
  - i. Whether the Respondent has met the requirements for grant of orders of stay of execution pending the hearing and determination of the Appeal; and,
  - ii. Whether the Respondent has made out a good case to justify the grant of orders for review.

#### **i. Whether the court the Respondent has met the requirements for grant of orders of stay of execution pending the hearing and determination of the Appeal**

17. Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides for the circumstances when the court may order stay of execution of a decree pending an appeal. The applicant is required to demonstrate that:
  - a. Substantial loss may result to the applicant unless the order was made;
  - b. The application was made without unreasonable delay;
  - c. 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.

18. In the case of RWW v EKW [2019] eKLR, the court observed as follows;

“The 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

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 Appellant with those of the Respondent.”

19. In this case, the court entered judgment in favour of the Petitioner. There is likelihood that should the orders of stay not issue the Petitioner is likely to execute against the Respondent and thereby occasioning the Respondent substantial loss. This is because the Petitioner did not in his response to the Application demonstrate to the court that he will be in a position to refund the said sum should the appeal be successful. I am therefore persuaded that substantial loss has been proved.
20. I am also satisfied that the filing of the application was timeous. The judgment which is the subject of the appeal was delivered on 12<sup>th</sup> November 2021 and the instant application was filed on 24<sup>th</sup> November 2021.



21. With regard to the issue of security for due performance, this court has discretion to issue appropriate orders to meet the ends of justice.
22. Flowing from the above, I find and hold that the Respondent has satisfied this court on the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

**ii. Whether the Respondent has made out a good case to justify the grant of orders for review.**

23. The law on review is provided for under Rule 33(1) of the Employment and Labour Relations Court (Procedure) rules, 2016

24. Rules 33(1) provides:

33.

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- (b) on account of some mistake or error apparent on the face of the record;
- (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason.

25. In the instant case, the Respondent's reason for seeking review of the orders of this court of 26<sup>th</sup> September 2022 is that the court erred in issuing an order compelling the Respondent to pay the Petitioner's gratuity and shortfall of salary for the months of February and March 2019 as they were uncontested.

26. It is the Respondent's contention that the prayer for gratuity and shortfall of salary for the months of February and March 2019 were indeed contested and further that there is no agreement or consent between the parties herein admitting the shortfall in the petitioner's salary for the months of February and March 2019.

27. In the judgment of this court delivered on 12<sup>th</sup> November 2021 the court made the following orders-

“Remedies

... The Petitioner prayed for the remedies set out at the beginning of this judgement.

57.

- i. He is entitled to payment of Deanship allowance for February and March which I award
- ii. No evidence was adduced to prove the prayer for payment of financial supervision arrears from 2008 to 2011 and 2015 to 2019
- iii. No evidence was adduced to prove the prayer of payment for project supervision from 2015 to 2019



- iv. The salary for 1<sup>st</sup> March 2019 is payable and I award the petitioner the same
- v. The salary for April 2019 and March 31<sup>st</sup> 2022 is not payable as the petitioner's contract expired on 31<sup>st</sup> March 2019 and hence there is no evidence to prove that the same was renewed
- vi. In any event, no services were offered to the Respondent and hence is no basis for grant of salary from 1<sup>st</sup> April 2019 to March 2022
- vii. The petitioner's contract did not provide for gratuity and the same is not payable
- viii. Having found that the petitioner's contract was prematurely terminated without compliance with due process, I award him four months gross salary as compensation in the sum of Kshs 1,074,000

### **Conclusion**

In Conclusion, I award the Petitioner the following;

- i. The shortfall in his salary for February and March 2019.....Kshs 430,896
  - ii. Compensation .....Kshs 1,432,000
  - iii. The Respondent shall ....."
28. It is clear from the judgment and particularly order (i) and (ii) that the court did not awarded the Petitioner gratuity.
29. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd vs Ndungu Njau.
- “A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
30. From the impugned order made on 26<sup>th</sup> September 2022, the court record shows that the matter was in court to confirm filing of submissions in the application made by the applicant for the stay of execution of the judgment delivered on 12<sup>th</sup> November 2021. The petitioner orally made the following application;
- “I have also filed and served my submissions. However, I would make a plea that in the meantime, the respondent be compelled to make payments which are not in contest, that is gratuity and shortfall of salary for February and March 2019 with interest from 20/5/2019.”



31. It is evident from the above that the Petitioner misled the court that the issue of gratuity and shortfall of salary for February and March 2019 was not contested and it is on this basis that the court made the order compelling the Respondent to pay the same.
32. Taking into account the totality of the above analysis, I am satisfied that there was no consensus between the parties herein as to the issue of payment of shortfall of salary for February and March 2019 and that no gratuity was awarded to the Petitioner by the Court. In the circumstances, the order made on 26<sup>th</sup> of September 2022 was an error apparent on the face of the record. That is reason enough to justify the review of the orders of 26<sup>th</sup> September, 2022.
33. In the end, I find both applications dated 24<sup>th</sup> November 2021 and 9<sup>th</sup> November 2022 to be meritorious and allow them. I therefore make the following orders:
  - i. There shall be stay of execution of the judgment delivered on 12<sup>th</sup> November, 2021 pending determination of the Appeal filed by the Respondent; and,
  - ii. the orders of 26<sup>th</sup> September 2022 are hereby set aside.
34. The stay of execution is however with a rider that the Applicant deposits the entire decretal sum in court or in a joint interest earning account in the name of the Petitioner who acted in person and the counsel for the Respondent/Applicant within 60 days.
35. There shall be no orders for costs of the applications.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

