



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E040 OF 2021

THE CLERK, KISII COUNTY ASSEMBLY.....APPLICANT/APPELLANT

VERSUS

RAGES KERUBO.....1ST RESPONDENT

VINCENT MOGONCHO ONYANGO.....2ND RESPONDENT

VICTOR OKINDO.....3RD RESPONDENT

DERRICK MASEGA.....4TH RESPONDENT

ISAIAH MATOKE.....5TH RESPONDENT

ARNOLD ONKOBE.....6TH RESPONDENT

THE DIRECTOR HUMAN

RESOURCES MANAGEMENT, KISII COUNTY.....7TH RESPONDENT

THE COUNTY ASSEMBLY OF KISII.....8TH RESPONDENT

RULING

1.This ruling relates to a Notice of Motion application dated 15th October, 2021, and brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, B, 3A & 63(e) of the Civil Procedure Act, Section 12 of the Employment and Labour Relations Court Act and Articles 27(1), 48, 50(1) 159 and 162 (2) of the Constitution. The Applicant seeks Orders THAT:

i.Spent

ii.Spent

iii.Spent

iv.The Honourable Court be pleased to grant an order of stay of execution and/or implementation of the ruling and order made by the subordinate Court on 14th day of October, 2021 vide **KISII CMCC EL&RC CASE NO. 19 OF 2021** and in particular, the limb thereof directing the 7th and 8th Respondents herein to implement the directives issued by the Board vide letters dated 20th August, 2021 directing them to lift and/or rescind the interdiction letters that had been issued against the 1st-6th Respondents herein and a letter compelling the 8th Respondent to reinstate the Respondents’ salaries, benefits and allowances as they were prior to the impugned interdiction and release to them all their arrears, benefits and allowances which were withheld therein, together with all consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of the instant appeal.

v.The Honourable Court be pleased to grant an order of stay of proceedings and/or further proceedings vide **KISII CMCC E&LRC CASE NO.19 OF 2021** whatsoever and/or howsoever, pending the hearing and determination of the instant Appeal.

vi.The costs of this application be borne by the 1st-6th Respondents herein jointly and/or severally.

vii. The Honourable Court be pleased to grant such further and/or other orders as may be deemed just, appropriate and/or expedient to grant.

viii. Costs of this application do abide the Appeal.

2. The application is supported by grounds on the face thereof and an affidavit sworn by **James Omariba Nyaoga** on 15th October, 2021. The application is premised on orders issued vide a ruling delivered under **KISII CMCC E&LRC CASE NO.19 OF 2021** on 14th October, 2021, declaring the interdiction of the 1st – 6th Respondents unlawful and further ordering that the 7th -9th Respondents to commence fresh disciplinary proceedings against the 1st – 6th Respondent.

3. The 1st -6th Respondents opposed the application vide a replying affidavit sworn on 1st November, 2021, by one **Rages Kerubo**, the 1st Respondent herein.

4. The 7th -9th Respondent did not oppose the application.

5. The Respondents aver that the issues raised in the Applicant's Appeal are not arguable to justify the grant of stay orders. It is further argued that the Learned trial Magistrate exercised his discretion judiciously in granting the orders subject of this application, as the Respondents had established a prima facie case warranting the grant of the orders.

6. The Respondents further submitted that the application herein does not meet the threshold set under Order 42 Rule 6 to justify the grant of stay orders.

7. The Applicant and the 1st-6th Respondents filed submissions and which have been duly considered.

Determination

8. I have considered the application together with the grounds and affidavit in support thereof as well as the Respondents reply in opposition. The issue for determination is whether the application meets the threshold for granting of orders of stay.

9. The Applicant seeks that this court reinstates letters interdicting the 1st -6th Respondents' as well as stay their reinstatement back to the service of the 8th Respondent vide the orders granted by the lower court in **KISII CMCC E&LRC CASE NO.19 OF 2021**. The Applicant further seeks that the 7th Respondent is barred from implementing the decisions of the 8th Respondent. It is telling, as it is surprising, that the 7th and 8th Respondents have not opposed and/or supported the application, and have been joined in this suit as Respondents and not Applicants.

10. No reason(s) or basis has been put forward to justify the stay of the orders of the lower court. The question of whether the orders issued by the subordinate court are final in nature, is an issue to be determined upon hearing of the appeal filed in this matter.

11. The application as filed and the orders sought, does not meet the threshold set under Order 42 Rule 6 of the Civil Procedure Rules to warrant granting of the orders of stay of execution in as far as prayer number IV of the application is concerned. The Applicant has not proved substantial loss and neither is there proof that the appeal filed will be rendered nugatory if the orders of stay are not granted.

12. In regard to prayer number 5 of the application, it is evident that the Applicant has lodged an appeal against the impugned orders. Two or more suits concerning the same parties and the same issues, cannot proceed concurrently before different courts. For this reason, the prayer to stay the hearing and final determination of the suit before the subordinate court is allowed pending hearing and determination of the appeal.

13. In whole, the Court makes orders as follows:

i. Prayer Number 4 in the application dated 15th October, 2021, is declined.

ii. An order of stay of proceedings in **KISII CMCC E&LRC CASE NO.19 OF 2021**, pending the hearing and determination of the Appeal therein is granted.

iii. The Costs of this application shall abide the Appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Ochwal present for the Applicant/Appellant

Mr. Ochoki present for the Respondents

Christine Omollo – C/A