



REPUBLIC OF KENYA



**Osieko & 3 others v Ooko & 2 others (Employment and Labour Relations
Petition 25 of 2021) [2022] KEELRC 14679 (KLR) (23 March 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14679 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS PETITION 25 OF 2021**

S RADIDO, J

MARCH 23, 2022

**IN THE MATTER OF CONTRAVENTION OF RIGHT TO FAIR
LABOUR RELATIONS, FAIR ADMINISTRATIVE ACTION, AND
RIGHT AGAINST INHUMAN AND DEGRADING TREATMENT**

BETWEEN

**NASHON OLIECH OSIEKO 1ST PETITIONER
RAPHAEL MUYONGA 2ND PETITIONER
RACHEL MAYAKA 3RD PETITIONER
IMELDA NUBIA 4TH PETITIONER**

AND

**FRANCIS OOKO 1ST RESPONDENT
HARUN KIRUI 2ND RESPONDENT
MUHORONI SUGAR CO LIMITED (IN RECEIVERSHIP) 3RD RESPONDENT**

RULING

1. For determination is a Motion dated December 15, 2021, by the Respondents seeking orders:
 - (1) .
 - (2) .
 - (3) That this Honourable Court be pleased to order a stay of execution of the Court judgment and orders issued herein on December 1, 2021 pending the hearing and determination of the intended appeal before the Court of Appeal.
 - (4) That the costs of this application be in the cause.



2. The grounds in support of the application were that the intended Appeal would be prejudiced if execution proceeded; the application had been brought without inordinate delay; that the Respondents could not humanly provide security to the 1st to 3rd Petitioners because they could not do any more after reporting to the police about the security status and that the Petitioners could not be paid as they were not providing any services.
3. In the supporting affidavit, the 1st Respondent, a Receiver Manager with the 3rd Respondent, admitted that the 1st to 3rd Petitioners were still employees, and could not be paid their remuneration because they were not offering any services.
4. The 1st, 2nd and 3rd Petitioners filed replying affidavits in opposition to the Motion on February 7, 2022.
5. In the view of the Petitioners, the application was an abuse of the court process because the Respondents had filed a review application on December 21, 2021, and an application for review could not run concurrently with an Appeal; that a stay could not issue against a finding of the fact that the Petitioners were employees of the Respondents; the application had been made in bad faith because the Respondents had not paid accrued salary arrears and that no security had been offered.
6. In their submissions, the Respondents submitted that there was a risk the Petitioners would leave employment unceremoniously if the judgment were executed, leaving them with no avenue of recovering the decretal sum if the Appeal were to succeed.
7. The Respondents also submitted that there were challenges paying other employees' wages, and it would be discriminatory to pay the Petitioners in lumpsum.
8. The Respondents further drew the attention of the Court to the doctrine of no work, no pay as a fundamental axiom in industrial relations, and the book Law of Master and Servant in South Africa by Norman Scoble was cited.
9. The Court has considered the material placed before it.

Inordinate delay

10. The Respondents filed a Notice of Appeal and the instant Motion within days of the judgment. The question of inordinate delay does not therefore arise.

Substantial loss

11. On the question of substantial loss, the Respondents admitted that the Petitioners are still employees (the Court had given reasons in the judgment why it ordered that the Petitioners' salaries be paid).
12. The Court is unable to buy into the Respondents' argument that the doctrine of no work, no pay applies in the instant case.
13. The Petitioners have always been ready and willing to work, but the Respondents have failed to fulfil their obligation to create a safe and secure work environment to enable them to work.
14. Considering that the Respondents have admitted and continue to admit the existence of an employment relationship with the Petitioners, this Court does not buy into the argument by the Respondents that if the salaries are paid, they would be occasioned (a) substantial loss.
15. The Motion is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23RD DAY OF MARCH 2022.



Radido Stephen, MCI Arb

Judge

Appearances

For applicant N.E. Mogusu & Co. Advocates

For Respondents The Federation of Kenya Employers

Court Assistant Chrispo Aura

