



**Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers v Kisii University Council (Cause E013 of 2020) [2022] KEELRC 1696 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1696 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E013 OF 2020**

**HS WASILWA, J  
MAY 19, 2022**

**BETWEEN**

**KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS  
AND HOSPITAL WORKERS ..... CLAIMANT**

**AND**

**KISII UNIVERSITY COUNCIL ..... RESPONDENT**

**RULING**

1. Before me for determination, is the Respondent/Applicant's Notice of motion dated November 19, 2021 brought under certificate of urgency pursuant to Articles, 48, 50 and 162 of *the Constitution*, sections 12(3)(viii) and 20 of the *Employment and Labour Relations Court Act*, Order 41 Rule 6 of the *Civil Procedure Rules* and the Inherent jurisdiction of this This Court. The Respondent sought for Orders That; -
  - a. This Honourable Court be pleased to certify this application as urgent for hearing ex parte in the first instance for grant of prayer (b) herein.
  - b. Pending inter partes hearing hereof this Honourable Court be pleased to issue a temporary order staying the sentencing of the Vice Chancellor of the Respondent/Applicant scheduled for November 30, 2021.
  - c. This Honourable Court be pleased to stay the sentencing of the Vice Chancellor of the Respondent Applicant pending hearing and determination of the Respondent/Applicant's (intended) appeal to the Court of Appeal.
  - d. Costs of this application be provided for.



2. The basis upon which the Orders are sought is that this Court vide its ruling delivered on the November 16, 2021 found the Vice Chancellor of the Respondent/Applicant guilty of contempt of Court and ordered him to appear before this Court on the November 30, 2021 to answer to the said charges.
3. It is stated that the Applicant is aggrieved by the Orders of the Court and filed a Notice of Appeal on November 18, 2021 in accordance with Rule 75 of the *Court of Appeal Rules*.
4. It is contended that if stay is not granted the intended appeal will be rendered nugatory and an academic exercise. The Applicant added that the Claimant/Respondent would not be prejudiced by the stay Orders rather that its Vice chancellor is the one whose freedom will be curtailed when an Appeal is intended before the Court of Appeal.
5. The Applicant then urged this Court to allow the stay in the interest of Justice.
6. This Court directed parties to dispose of the application by way of written submission however the Claimant/ Respondent did not file a response to this Application, neither did it file any submissions. The Applicant on the other hand filed its submissions on the March 8, 2022.

### **Applicant's Submissions.**

7. The applicant submitted that they are seeking for stay of this Court's Orders to pursue their intended appeal which will be rendered nugatory if the stays is not granted. In support of its argument the applicant relied on the case of *Katangi Developers Limited v prafula Enterprises Limited & another* [2018] eKLR and the case of *Mbarak Said Ali & another Sultan Palace Development Limited* [2021] eKLR where the Court held that :-

“...Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

8. On whether this Court has power to stay sentencing, the Applicant submitted to the affirmative and relied on the case of *Nation Media Group v Child Welfare Society of Kenya* [2021] eKLR where the Court held that;-

“In the case of *Mandavia v Rattan Singh S/o N. Singh* [1962] E.a. 730, Newbold J.A (as he then was) made reference to the case of *Wiltshire –v- Fell* (3) [1959] where the Court held:-“...the committal order which has been made must stand and can only be revoked on appeal. That does not in any way take away from the learned judge the power to vary the effect of the order, or to suspend its operation, or in any way remove his control of the case.”

In the case of *Kasturilal Laroya v Mityana Staple Cotton Co Ltd & another* [1958] EA 194, the Court of Appeal of East Africa & Sir Audley McKijack, CJ made the following observation at page 196:-

“Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the late Master of the Rolls in the case of *Re Clement* seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a



judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."

In the result, therefore, I find that the conduct of the Respondents (on the assumed facts) does not amount to an obstruction of the course of justice to prejudice to the decree holder's interests, and the mere fact that there has been disobedience to an order of the Court does not, in those circumstance render the Respondents liable to be dealt with as for a contempt." The applicant's employees have already been found guilty of contempt of Court. They are likely to suffer the consequences of that finding. The Court should not be in a hurry to punish the contemnors before they finalize their constitutional right of appeal.

9. The Applicant also relied on the case of *Julius Mugo Gachagua v Peter Mabinda Kanyora* [2020] eKLR where the Court cited the supreme Court decision in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR and held that; -

"Indeed, if this Court declined to maintain the status quo, the High Court would proceed to take mitigation, and then sentence the Applicants. There is a likelihood, in that case, that the Applicants would be incarcerated, and the substratum of the Appeal-cause would have been spent. In the event that this Court eventually finds in favour of the Applicants, it would be impossible to compensate them by way of costs. In the alternative, if the Court finds in favour of the Respondents, no harm would have been occasioned to them'..." The superior Courts have held that in matter such as this one, issuance of Orders of stay of mitigation and sentence, pending an Appeal against the Order that held an Applicant to be in contempt, would be appropriate in the circumstance. The provision of Article 163(7) of *the Constitution* state that the decision by the Supreme Court has immediate and binding effect on all other Courts to wit this Court is bound by the said decisions and I stand guided.

44. In the premises thereof and since stay of execution involves all processes, an Order for stay of on mitigation and sentencing hearing, pending determination of the Appeal is herein granted. The same shall rest in abeyance, and the status quo shall be maintained, pending the determination of the Appeal."

10. Accordingly, the Applicant submitted that it has satisfied all the conditions pre-requisite of stay of execution orders and urged this Court to allow the Application as prayed.
11. I have considered this application and the applicants submissions filed before me. The applicant has demonstrated that they filed a Notice of Appeal on November 16, 2021.
12. In the event that this Court proceeds to sentence the applicant and the appeal succeeds reversing the gains of the Appeal may be rendered unsustainable.
13. I therefore allow the application for stay of sentencing of the contemnor pending the determination of the Appeal.
14. Costs of this application to abide the Appeal.



**RULING DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Gitonga for Claimant – present

Nyamurongi for Respondent – present

Court Assistant - Fred

