



**Inaweti v Teacher Service Commission (Cause 100 of 2018)
[2022] KEELRC 1759 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1759 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 100 OF 2018**

**S RADIDO, J
JUNE 29, 2022**

BETWEEN

JOHNSTONE INAWETI CLAIMANT

AND

TEACHER SERVICE COMMISSION RESPONDENT

RULING

1. The Teachers Service Commission (the Commission), through a Motion dated 21 April 2022, seeks an order staying the execution of this Court's judgment/decree given on 30 March 2022, pending the lodgement and determination of an appeal before the Court of Appeal.
2. The Commission filed its submissions on 5 May 2022, while the judgment holder filed a replying affidavit and submissions on 13 May 2022.
3. In seeking the order of stay, the Commission listed various grounds, but the Court will restrict itself to the elements derived from the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, being a demonstration of substantial loss, timeous filing of the application and provision of due security for the due performance of the decree.
4. The judgment sought to be appealed against was delivered on 30 March 2022, and the stay application was filed on 5 May 2022. The Court finds that the application was filed timeously.
5. On the ingredient of substantial loss, the supporting affidavit in support of the Motion deposed in paragraph 5 thus:

That were the Claimant/Respondent to enforce the said judgment in its present form, the applicant will suffer irreparable loss and damage as the applicant will not be able to recover the decretal sum and costs from the Claimant/Respondent in the event the appeal is successful.



6. The Courts have over time given guidance on what a party asserting substantial loss should demonstrate.
7. The Court of Appeal addressed a situation where it was contended that a judgment holder would not be able to refund the decretal sum if a stay order was not granted in Civil Application No. NAI 344 of 1999, *Caneland Ltd & 2 Ors v Delphis Bank Ltd*:

Where the allegation is that the Respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree.

8. The Commission did not disclose the reasonable source of its contention that the judgment holder would not be able to refund the decretal sum if a stay order was declined.
9. In Nairobi (Milimani) HCCC No. 795 of 1997, *Samvir Trustee Limited v Guardian Bank Limited*, the High Court expressed itself as hereunder:

Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.

10. In the case at hand, the orders which the Commission asserts would lead to it suffering substantial loss if not stayed were orders:
 - i. To restore the Claimant to the register of teachers.



- ii. To compute and pay the Claimant the equivalent of 12-months' gross salary as compensation based on the gross wage for June 2015 being the last month served fully.
 - iii. To pay the Claimant all terminal dues, he would have been entitled to upon normal retirement.
11. Apart from contending that it would be occasioned substantial loss, the Commission has not disclosed how restoring the judgment holder to the register of teachers or paying him the compensation and accrued pension would occasion it a substantial loss.
 12. The Court would also like to note that judgment holders pension accrued, and the law has set out eligibility criteria which the Commission did not challenge considering the finding that the dismissal of the judgment holder was found to be unfair.
 13. The Commission did not offer to provide any security for the due performance of the judgment decree.
 14. Considering the above, the Court finds the Motion under consideration without merit, and it is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant A.B.L. Musiega & Co. Advocates

For Respondent Faith Kaluai, Advocate

Court Assistant Chrispo Aura

