



**Kipketer v Teachers Service Commission (Cause 147 of 2018)
[2022] KEELRC 85 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 85 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 147 OF 2018
NJ ABUODHA, J
JUNE 8, 2022**

BETWEEN

MONICAH JEPKORIR KIPKETER CLAIMANT

AND

TEACHERS SERVICE COMMISSION DEFENDANT

RULING

1. Through an application dated 9th November, 2021 the applicant sought orders among others that the court orders stay of execution of its judgment and all consequential orders delivered on 2nd November, 2021 pending the lodging, hearing and determination of the Appeal.
2. The application was based on grounds among others that:
 - a) Being dissatisfied with the Judgment of this Court, the Applicant has lodged a Notice of Appeal at the Court of Appeal within the Statutory period and made a formal request for typed proceedings.
 - b) The intended appeal raises weighty issues of law and will rendered nugatory if a stay of execution of the aforesaid Judgment is not granted.
 - c) In the event the said Judgment is enforced in its present form, the Applicant is likely to suffer irreparable loss and damage which it may not recover should the intended appeal be successful.
 - d) The Applicant has an arguable appeal with high chances of success necessitating the preservation of the substratum of the instant matter.
 - e) The applicant being a government institution will be able to satisfy the courts decree in the event its appeal is unsuccessful.



3. The Application was further supported by the affidavit of Evaleen Mitei who deponed on the main that:
- a) That I am the Deputy Director in charge of Discipline at the Teachers Service Commission, the Applicant herein and I am, by virtue of my position, conversant with the matters and circumstances giving rise to this matter hence competent and duly authorized to make and swear this affidavit on behalf of the applicant.
 - b) That I am aware that this Honourable Court delivered its Judgment on the dispute on 4th November, 2021 and awarded the Respondent the following reliefs:-
 - i) Three months' salary in lieu of Notice of Ksh.191,718/=
 - ii) Six months; salary as compensation for unfair termination Kshs.383,436/=
 - iii) Claimant to be restored to the Registrar of Teachers; and
 - iv) Costs of the suit with interests from the date of Judgment.
 - c) That the applicant being aggrieved by the Judgment of the Court immediately filed a notice of appeal dated 8th November, 2021 and formally sought typed proceedings and Judgment to enable it lodge an appeal and against the Court's Judgment.
 - d) That I am advised by the said Counsel on record for the Applicant which advice I verily believe to be true that the Respondent is likely to enforce the said Judgment as there is no Order of stay of execution in force to protect the interests of the applicant.
 - e) 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.
4. The respondent opposed the application and filed a replying affidavit in which he stated among others that:
- a) That the application and the orders being sought by the Respondent/Applicant are frivolous, vexatious, untenable and amounts to an abuse of the Court process.
 - b) That this Honourable court made a meticulous judgment in my favour after going through the evidence on record, the submissions from both parties herein.
 - c) That the Applicant has failed to demonstrate the threshold for stay of execution pending appeal.
 - d) That in the normal circumstances as envisaged under Order 42 Rule 6 of the [Civil Procedure Rules](#), a party seeking orders of stay must persuade the court that:
 - i) It has an arguable appeal with high chances of success.
 - ii) The appeal is not frivolous
 - iii) If stay not granted the intended will be futile exercise or rendered nugatory
 - iv) Furnish security
 - e) That the applicant has not demonstrated by way of draft grounds of appeal to show whether the intended appeal indeed raises weighty issues of law and fact with high chances of success.



- f) That a mere Notice of Appeal is not plausible enough to persuade this Honourable Court to issue an order of stay of execution against the courts Judgement.
- g) That the judgment delivered in my favour involves a money decree to wit:-
- (i) Three (3) months' salary in lieu of notice Ksh.191.718/=
 - (ii) Six (6) months' salary as compensation for unfair termination – Ksh.383,436/= totaling to Ksh.574,254/= plus costs.
- h) That I am legally informed that in any judgment concerning money decree, the party has to either give security for due performance deposit the entire amount on court or pay half ½ of the money decree to me through my advocate on record and other half into a joint interest account pending the intended appeal.
5. In submissions in support of the application Ms. Kaluai for the applicant submitted that the applicant had an arguable Appeal with likelihood of success which shall be rendered nugatory if a stay of execution was not granted. Further that in the event that the judgment was enforced the applicant would suffer irreparable loss which it may not recover should the intended appeal be successful as the respondent may not be able to refund the entire decretal sum and costs of the suit. Counsel further submitted that the respondent had not filed any affidavit of means to demonstrate her capability to refund the sum of approximately Ksh.575,154/= being decretal sum and costs.
6. The respondent through Mr. Rioba on its part submitted that the applicant had not met the conditions for grant of stay of execution set out under Order 42 rule 6. That is to say it had not demonstrated that it would suffer substantial loss, the application had been brought without unreasonable delay and further that the applicant had not furnished security for the performance of the decree. Being a discretionary remedy, the applicant had not demonstrated that they approached the Court of equity with clean hands.
7. As submitted by both parties, the principle that guides the Court in an application for stay of execution are contained in order 42 rule 6 of the *Civil Procedure Rules*. That is to say the Court must be satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay and further 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.
8. The Judgment of the Court sought to be appealed from was delivered on 2nd November, 2021 and this application filed on 9th November, 2021. The application was therefore brought timeously. On the question of substantial loss Counsel for the applicant submitted that the respondent had not filed an affidavit of means to show she would be in a position to refund the decretal sum should the applicant's Appeal succeed. This according to Counsel would render the Appeal nugatory and occasion the applicant substantial loss.
9. The Court of Appeal in the case of *National Industrial Credit Bank Ltd. -v- Aquires Frameis Wasike & Another* [2006] eKLR. observed in material part as follows:
- “This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back



the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

10. The applicant alleged that the respondent would not be able to refund the decretal sum should the appeal succeed. The respondent in rebuttal alleged by way submission and not in the replying affidavit, that she was a person of means and had filed an affidavit of means to demonstrate her capability to refund the decretal sum. According to Counsel, the claimant was a graduate teacher/Lecturer engaging in private tuition and other consultancy work hence capable of refunding the decretal sum in the unlikely event that the appeal succeeds. No such affidavits were available on record.
11. The applicant although has not demonstrated in what way it has an arguable appeal against the judgment of the Court however this does not seem to be the principal consideration under Order 42 rule 6. The Court will therefore from the foregoing grant the respondent unconditional stay of execution pending the hearing and determination of the Appeal.
12. It is so ordered

DATED AT ELDORET THIS 8TH DAY OF JUNE, 2022

DELIVERED THIS 8TH DAY OF JUNE 2022

ABUODHA J.N

JUDGE

