



**Muthui & 9 others & 9 others v Speaker County Assembly of
Nyandarua & 2 others (Employment and Labour Relations Petition
28 of 2021) [2022] KEELRC 12897 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12897 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION 28 OF 2021
HS WASILWA, J
OCTOBER 11, 2022**

BETWEEN

ELIZABETH WANJIKU MUTHUI & 9 OTHERS & 9 OTHERS PETITIONER

AND

SPEAKER COUNTY ASSEMBLY OF NYANDARUA 1ST RESPONDENT

NYANDARUA COUNTY ASSEMBLY SERVICES BOARD 2ND RESPONDENT

NYANDARUA COUNTY ASSEMBLY 3RD RESPONDENT

RULING

1. This ruling is in respect of the 2nd respondent/applicant's application dated July 20, 2022 filed under certificate of urgency on July 21, 2022 pursuant to order 42 rule 6 of the [Civil Procedure Rules](#) and all other enabling provisions, seeking the following orders;
 1. Spent.
 2. Spent.
 3. That pending hearing and determination of the intended appeal, this honourable court be and is hereby pleased to issue an order of stay of execution of the judgement delivered on June 27, 2022 and the subsequent decree and all consequential orders arising therefrom.
 4. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on July 20, 2022, by Gideon Mukiri Muchiri, the acting clerk and the accounting officer of the County Assembly of Nyandarua and based on the following grounds: -



- (a) That the applicant is aggrieved by the judgement of the court delivered on the June 27, 2022 and had lodged a notice of appeal and requested for copies of the typed proceedings to enable it prepare its record of appeal.
 - (b) It is stated that the orders of the court cannot be implemented as the positions of the 2nd, 3rd and 4th respondent, which the court reinstated, have all been filled. Further that the 4th respondent was MCA candidate for Shamata Ward.
 - (c) That the applicant has an arguable appeal with high chances of success and if stay is not granted the entire intended appeal will be rendered nugatory.
 - (d) The applicant indicated his willingness to deposit security for performance of the decree and abide by any other orders and conditions that this court will impose on granting this application.
3. In opposing the application, the 1st petitioner, Elizabeth Wanjiku Muthui, swore a replying affidavit on her behalf and of behalf of the other petitioners on the September 30, 2022, based on the following grounds;
- a) That there is no urgency demonstrated by the applicant in seeking the stay orders because the parties have not taken any steps towards execution of the judgment. he added that the parties are before the deputy registry for taxation of their bill of cost.
 - b) It is stated that there is no evidence before court that demonstrates that the intended appeal will be rendered nugatory if the stay orders are denied. It is stated that the basis of seeking stay is on the fact that the positions of the 2nd, 3rd and 4th respondent were filled. in this the respondents aver that the said position was indeed filled through internal appraisals and promotion as such the applicant should e compelled to seek for alternative position of similar rank for the respondents herein to give effect to the said judgement.
 - c) Contrary to the allegation by the applicant. The application seeking conservatory orders was collapsed and heard together with the main petition and not abandoned as alleged.
 - d) It is stated that reinstament order is self-executory and is only based on terms that can be imposed in the said orders. He added that reinstament is not a positive order that can be stayed pending appeal.
 - e) The affiant maintained that the applicant has not stated the prejudice it will suffer if stay orders are not granted.
4. The parties herein disposed of the application by way of written submissions.

Applicant submissions

5. The applicant submitted that order 42 rule 6 of the [*Civil Procedure Rules*](#) provides for the conditions precedent in granting of an order of stay are that: The application is brought without inordinate delay, the applicant demonstrates that he will suffer substantial loss unless stay is ordered, and the applicant is willing to give security as the court may deems fit to order.



6. Further conditions are set out in the case of *Butt v Rent Restriction Tribunal [1982] KLR 417*, wherein the Court of Appeal held that:

- a) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
- c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d) The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- e) The court in exercising its powers under order 42 rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.'

7. On delay, the applicant submitted that judgment in this petition was delivered on June 27, 2022, a notice of appeal was filed on June 30, 2022 while this application was filed July 21, 2022, which was 24 days after the judgment. Therefore, that the delay is not inordinate in the circumstances.

8. With regard to substantial loss, the applicant submitted that, the respondents especially the 1st, 7th, 8th & 9th petitioners have not demonstrated their ability to refund the decretal sum, which is a colossal sum, if the appeal succeed. It was argued that if the appeal succeeds the applicant risks losing substantial sums of money with respect to the decretal sum together with costs and interest. Additionally, that the appeal will be rendered nugatory if the stay orders sought herein is declined. The application also argued that since the 2nd respondent is a public body, they are likely to lose public funds if stay is not ordered and the decree executed. It then urged this court to exercise its discretion in favour of the 2nd respondent to protect public resources. To support their argument they relied on the case of [RWW v EKW \[2019\] eKLR](#), addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

' The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.'



9. On security for performance of the decree, the applicant relied on the case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & another [2018] eKLR*, it was stated that:

' Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.'

10. Accordingly, it was argued that the 2nd respondent is willing to provide security towards the performance of the said decree.

Respondent's submissions.

11. the respondent submitted on two issues; whether the appeal and the application will be rendered nugatory and the applicant will suffer irreparable loss and damage and who bears the cost of the application.
12. On the first issue it was submitted that the applicant will not suffer any irreparable loss and damage because the application and the applicants' herein have not satisfied the principles sets out by law on the test for grant of stay of execution as set out in the case of *Tours & Travel Limited Nairobi HC Winding up Cause No. 43 of 2000* and *High Court of Kenya Civil Case No 74 of 2011 Christopher Ndolo Mutuku vs CFC Stanbic Limited [2015] eKLR*. Where the Court set out the following principles in determining whether to grant stay of execution:
- a) Whether an applicant has established that he /she has a prima facie arguable case;
 - b) Whether the applicant has filed expeditiously' and
 - c) Whether the applicant has established sufficient case to the satisfaction of the court that is in the interest of justice to grant the orders sought.
13. On whether the applicant has established a prima facie case, the respondent contends that the court made a sound decision in finding in favour of the petitioner and argued that the petitioners were indeed unfairly and unjustly dismissed because there was no due process that was followed and neither were they accorded an opportunity to be heard.
14. It is the respondent's contention that the appeal is not arguable. He submitted that an appeal is deemed arguable if is not frivolous and raises a bona fide issue (s) deserving full consideration by the court. In this he relied on the *case of Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA No Nai 72 of 2001* the Court held that:
- ' even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues. The grounds of appeal outlined in the notice of motion and supporting affidavit by Gideon Mukiri Muchiri are frivolous and unsatisfactory. The applicant is on a fishing expedition to ensure that the fruits of the High Court judgement are not realized any time soon.'
15. The respondent further submitted that since the appeal is not arguable and stand very little chances of success, the applicant stands to suffer no prejudice if the stay order sought is not granted. He added



that an order of reinstatement is immediately self-executory and the same is not amenable to an order of stay of execution pending appeal.

16. It was submitted that the trial judge correctly made a finding that the respondents were not taken through fair administrative action and the judge did not err in making an order for reinstatement. Also that the applicant has not demonstrated any irreparable loss it stands to suffer if stay is not granted and how the stay order will prevent the respondent from enjoying the fruits of his judgment. To support this position, the respondents relied on the case of *Housing Finance Co. of Kenya Limited -v- Sharok Kheri Mohamed Ali Hirji & another [2015] eKLR* the court held that the presence of a strong ground of appeal does not by itself justify an order for stay of execution.
17. The respondent in conclusion urged this court to disallow the application and grant them costs of this application.
18. I have examined the averments and submissions of the parties herein.
19. Basically, the applicants seek stay on the ground that they have preferred an appeal. The applicant demonstrated that they indeed filed a notice of appeal and that they are willing to deposit security in court as a pre-condition for the stay.
20. However as stated in various case law before court – see *JSC & Another v Lucy Njonca (CA 486 of 2019) 2021 KECA 366 (KLR) Kiage Kairo & Sichale JJA*, the Court held that;

' I have already found that the order of reinstatement with full salary and benefits did not require supplementation.'
21. My understanding is that a reinstatement order as granted in this case is self executing and requires nothing more to justify its execution.
22. This is the position concerning the application herein which cannot be stayed as it took effect the day the Judgment was delivered.
23. I find the application for stay therefore not merited and I dismiss it accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 11TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Langat for 2nd respondent applicant – present

Peter Wanyama for Petitioners – absent

Court assistant - Fred

