



**Teachers Service Commission v Nyangau (Civil Appeal E004 of 2022)  
[2022] KEELRC 13575 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13575 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CIVIL APPEAL E004 OF 2022  
HS WASILWA, J  
DECEMBER 20, 2022**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPLICANT**

**AND**

**REDFERN GEKONYE NYANGAU ..... RESPONDENT**

*(Application for stay of execution of judgement of Hon. Benjamin Limo Delivered via email on 16th February, 2022 in cause 125 of 2018 pending the hearing and determination of the Appeal)*

**RULING**

1. Before this court for determination is the appellant's application, notice of motion dated August 24, 2022, filed under certificate of urgency pursuant to article 159 of the Constitution, sections 3A of the Civil Procedure Act, order 42 rule 6(1) & 8, order 51 rule 1 of the Civil Procedure Rules, section 21(1) & (3) of the Government Proceedings Act and all other provisions of the law, seeking for the following orders; -
  - 1) Spent.
  - 2) That this honourable court be pleased to order stay of execution of the judgement of Hon Benjamin B. Limo delivered on the December 16, 2022 in Nakuru CMEL No. 125 of 2018 and all other consequential orders pending the hearing and determination of this application.
  - 3) That the honourable court be pleased to order stay of execution of the judgement of Hon Benjamin B Limo delivered on December 16, 2022 and all consequential Orders pending the hearing and determination of Nakuru ELRC appeal number 4 of 2022.
  - 4) That the costs of this application be provided for.



2. The application is based on the fact that the honourable Benjamin B Limo delivered judgement in favour of the claimant as against the respondent in Nakuru CMEL number 125 of 2018, which the respondent/ applicant herein is dissatisfied with the entire judgment and filed this appeal in this court.
3. That the appeal raises substantial and weighty issues of law with high probability of success as such need consideration which can only be done when stay is granted to maintain the substratum of the appeal.
4. It is stated the court reinstated the claimant back to the teaching service and if stay of execution of the judgment is not granted the reinstatement will injure the reputation of teaching service and it will be impossible to undo a reinstatement order. Furthermore, that the decretal sum of kshs 3, 980, 450 awarded might not be refunded by the respondent because he is a man of straws.
5. It is averred that section 12 of the Teacher Service Commission Act, as read with article 260 of the Constitution exempt the TSC from depositing security for costs as provided for under order 42 rule 8 of the *Civil Procedure Rules* because the commission is capable of satisfying the decree if the appeal does not succeed. It is stated further that the funds to satisfy the decree is drawn from public coffers which ought to be preserved at all times due to public interest consideration.
6. The applicant is apprehensive that the appeal will be rendered nugatory if stay orders is not granted by the court.
7. It is the applicant's contention that it has met all the condition pre-requisite to granting of stay orders provided for under order 42 rule 6 of the *Civil Procedure Rules*, as such the application should be granted as prayed.
8. The application was further supported by the affidavit of Evaleen Mitei, the respondent's acting director in charge of field services, deposed upon on the August 24, 2022. The affidavit reiterated the grounds of the application and in addition stated that they have filed the notice of appeal and requested copies of the proceedings to be able to file the record of appeal.
9. The affiant added that the applicant is apprehensive that the respondent will execute the decree because there are no stay of execution orders. Additionally, that if stay is not granted the appeal will be rendered Otiose and an academic exercise.
10. The applicant also raised the fact that a similar application had been filed before the trial court which was dismissed contrary to the law, leading to the filing of this application in this court.
11. The application is opposed by the respondent who filed a replying affidavit sworn on the September 7, 2022 contending that the application herein is bereft of any merit and an abuse of court process because it is res judicata having filed a similar application in the trial court which was dismissed by the said Hon Benjamin Limo on July 13, 2022.
12. The respondent avers that the trial court on July 13, 2022 delivered its ruling in clear terms with regard to stay of execution of reinstatement and averred that reinstatement remedy is a self effacing remedy which is not capable of being stayed. That the applicant has failed to appeal against the said ruling but instead filed the current application seeking similar orders which were denied by the trial court contrary to the express provisions of section 7 of the *Civil Procedure Act*.
13. The respondent also took issue with the time in which the applicant has taken to file the current application. Furthermore, that there is nothing on record to demonstrate the likelihood that the appeal will be successful.



14. In addition to the replying affidavit, the respondent raised a preliminary objection dated September 7, 2022 based on the following grounds; -
- 1) That the application offends the provisions of section 7 of the *Civil Procedure Act* chapter 21 laws of Kenya.
  - 2) That the application as filed is res judicata in nature, the honourable court having delivered its ruling on the July 13<sup>th</sup>, 2022 in respect of the applicant's application to hear and determine this application.
  - 3) That the honourable court is thus functus officio and has no jurisdiction to hear and determine the application.
  - 4) That the application does not disclose any new and important evidence.
15. In response to the preliminary objection raised by the respondent, the applicant filed a further affidavit deposed upon on the October 7, 2022, by Dr Julius O Olayo, the director human resource management and development at teachers service commission. In his affidavit, the affiant reiterated that they have an arguable appeal and in addition stated that the appeal raises issue such as the legality of reinstating the respondent to employment after the lapse of 3 years from the time of dismissal, awarding reliefs which were not pleaded in the claim, failing to consider the evidence tendered by the respondent, the applicability of criminal charges on disciplinary process, justification of ordering main and alternative prayers for compensation and reinstatement among others issues raised in the appeal.
16. With regard to the preliminary objection raising the principle of *res judicata*, the applicant stated that order 42 rule 6 of the *Civil Procedure Rules* allows a litigant to make an application for stay of execution in the appellate court even when a similar application had been made in the trial court and denied, as such that the doctrine of *res judicata* does not apply in this case. He thus urged this court to consider the application on merit.
17. The application and the preliminary objection were heard by way of written submissions with the applicant filing on the October 13, 2022 and the respondent on the October 21, 2021.

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

18. The applicant submitted that it has met all the conditions required for grant of stay of execution pending appeal provided for under order 42 rule 6 of the *Civil Procedure Rules* which requires it to demonstrate that substantial loss may result if stay is not granted; that the application has been made without unreasonable delay and lastly to provide security for costs. On that basis they submitted with regard to irreparable loss that the Respondent having been out of employment may not be in a position to refund the decretal sum, it being a colossal sum. In any case that the respondent did not file any affidavit of means to demonstrate his financial worth to rule out his financial status. To support this argument, they cited the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR where the court held that;

“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 a respondent or the 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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

19. On whether the applicant is capable of refunding the decretal sum, the applicant cited the case of Justine Nguna Kitonyo v Teachers Service Commission [2021] eKLR where the court held that;-

“With respect to the question whether the claimant would be in a position to refund the decretal sum, in the event the respondent succeeds on appeal, the claimant was equivocal. First, the claimant did not file an affidavit of means and second and more significantly, he did not disclose details of his monthly income as a teacher in a private school. Indeed, the claimant depones that he is a sole bread winner and has been waiting for the decretal sum to fend for himself and his family. All this left the court in doubt as to whether the claimant could actually refund the decretal sum, if the respondent’s appeal finally succeeds.”
20. Based on the above case law, the applicant submitted that it is in the interest of justice that the application for stay should issue to avoid hardship being visited upon the respondent when the appeal succeeds.
21. On unreasonable delay, the applicant submitted that judgement in the trial court was rendered on the February 16, 2022 and their application for stay at the trial court was filed on March 21, 2022 about a month later which ruling was delivered via email on the July 13, 2022 informing their decision to file the current application on August 24, 2022, immediately after perusing through the court file realizing their application had been dismissed. On that note, the applicant submitted that the delay in filing the current application was not inordinate in the circumstances.
22. On security for costs, the Applicant submitted that pursuant to section 21 of the Teachers Service Commission Act as read with article 260 of the Constitution, the applicant being a government organ is exempted from depositing security for costs as contemplated under order 42 rule 8 of the Civil Procedure Rules. To support his argument, the Applicant cited the case of Teachers Service Commission V Benson Kuria Mwangi [2020] eKLR where the Commission was exempted from depositing security for being a public institution.
23. On the appeal, the applicant submitted that the appeal raises issues with immense chances of success and therefore an order of stay of execution is warranted. On the arguable ability of the appeal, the applicant cited the case of Kenya Medical Lab Technicians & Technologies Boards v Prime Communications Limited [2014] eKLR where the court defined what constituted an arguable Appeal and stated that;-

“In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the court (see Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd and Others Civil Application No 124 of 2008). And besides, an appeal is considered arguable even if it raises a single bona fide only.”
24. On that basis, the applicant submitted that the memorandum of appeal raises issues that is worth consideration by this court and therefore it has met the ground on arguable ability of its appeal.
25. On the preliminary objection raise on the issue of *res judicata*, the applicant submitted that order 42 rule 1 of the Civil Procedure Rules allows an appellate court to consider stay of execution application afresh even in instances that the same had been heard and determined in the trial/lower court. To



support that argument they cited the case of *Patrick Kalava Kulamba & Tristan K Limited v Philip Kamosu and Rhoda Ndanu Philip*, where the court held that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

26. Accordingly, that the preliminary objection raised is misconstrued on the *res judicata* rule and that the said principle is not applicable in this case.

### **Respondent’s submissions.**

27. The respondent submitted that the opposition to the application is on the basis that the applicant has not satisfied the conditions for grant of the orders of stay of execution pending appeal under order 42 rule 6 of the *Civil Procedure Rules* more specifically the grounds on substantial loss. It was argued that the respondent had not demonstrated any loss it will incur in case the stay orders are denied and since the said grounds is one of the main grounds that must be demonstrated, the orders sought have not been justified on that basis. to support its case they citing the case of *Daniel Chebutul Rotich & 2 others v Emirates Airlines* [2009] eKLR where the court defined substantial loss that:-

““Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.”

28. It was argued that the loss that a party is likely to suffer must be demonstrated not merely mentioned or stated as was held in *Charles Wabome Getbi v Angela Wairimu Getbi* . Civil Appl No 302 of 2007 [2008] eKLR held that:

“... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them”

29. From the foregoing, it was submitted that the applicant has not substantiated exactly what loss it will incur if the decretal sum is paid to the respondent or if the respondent is reinstated pending appeal. furthermore, that the prayer granted by the trial court being reinstatement is self-executing and incapable of being stayed. He cited the case of *Matilda Tenge Mwachia v Kenya Industrial Estate Limited and another* [2020] eKLR where this court vacated interim stay orders and ordered for the respondent to comply with orders of reinstatement.

30. This was also held in the case of *Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya)* [2015] Eklr where the court held that:-

“In considering whether to stay the order of reinstatement or not, I have also considered article 23(1) of the *Universal Declaration of Human Rights* which provides for the right to work, to free choice of employment and to protection against unemployment. Article



2(6) of the Constitution domesticates as part of our laws any treaties and conventions ratified by Kenya. The Constitution further protects the freedom of expression, against forced labour and the right to economic and social rights which can be construed to include the right to work... As expressed by the respondent, the applicant is at liberty to redeploy the grievant to other stations or duties that a graduate clerk such as the grievant can undertake. Reinstatement is in any event a statutory remedy and I find it appropriate here.”

31. Also in the case of Aggrey Lukorito Wasike v Kenya Power Lighting and Company Limited where Ongoya J held that:-

“A reinstatement takes effect immediately as it is self-executory and only subject to the terms imposed in the order itself. The employer is bound to comply with a reinstatement order by allowing the employee to resume duty as reinstated and to pay full salary and other due benefits from date of the impugned removal or dismissal (being the date of the reinstatement) and to continue paying until the unlawful termination of the employment or until the date the reinstatement order is reversed by this court on review or by the Court of Appeal following a relevant appeal.....”

32. Based on the above case law, the respondent submitted that the orders sought especially with stay of reinstatement cannot be granted in light of the reason given by the court sitting in various forums.

33. On whether the application was made without unreasonable delay, the respondent submitted that the application was filed late in time in light of the fact that the ruling of the court was delivered on July 13, 2022.

34. On security for costs, the respondent submitted that the court ought to balance the interest of both parties in making a decision on security for costs pending appeal and while at it be guided by the overriding objectives of this court. Further that the court ought to ensure that a successful litigant is allowed to enjoy the fruits of their judgement as was held in Machira t/a/ Machira and co advocates v East African Standard [2002] KLR 63 where it was held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

35. On the preliminary objection raised, the respondent maintained that the application is res judicata as the same application was litigated upon in the trial court and the court dismissed the said application after hearing it on merit. In support of their case, they cited the case of Independent Electoral Boundaries and Commission v Maina Kiai and 5 others [2017] eKLR where the court held that:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;



- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in  
The former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

36. The respondent submitted based on the above findings that the subsequent application filed is not an appeal of the one filed in the trial court as such is res judicata for all intents and purposes.
37. In light of the foregoing, the respondent submitted that the applicant has failed in justifying its case for the grant of the orders sought in the application and therefore the application should be dismissed with costs.
38. I have considered the averments of the parties herein. The applicant respondent raised a preliminary objection that the application is res-judicata having been raised before the final court and having been denied.
39. Indeed the law governing stay is empowered in order 42 rule 6 (1) & (2) of the [Civil Procedure Act](#) which states as follows;

“6. Stay in case of appeal [order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless—
  - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) 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”.

40. My reading of this order is that a stay can be made to the court being appealed to which can consider such application and make such orders thereon as it may deem just.

41. The issue of res-judicata in this case does not arise.



42. Now considering the merit of the application, it is evident that the applicants have filed an appeal. They approached this court timeously.
43. In order to preserve the substratum of this appeal, I will allow the application for stay pending hearing and determination of the appeal.
44. Costs will abide the hearing of the appeal.

**Ruling delivered virtually this 20<sup>TH</sup> day of DECEMBER, 2022.**

**Hon LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Mulaku holding brief for Anyuor for the Applicant – present

Daye for Respondent – present

Court Assistant – Fred

