



**Korir v National Police Service Commission (Petition 10 of 2019)
[2022] KEELRC 13544 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13544 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION 10 OF 2019
DN NDERITU, J
DECEMBER 15, 2022**

BETWEEN

JAMES KIPTOO KORIR PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION RESPONDENT

RULING

I. Introduction

1. In a judgment delivered on November 25, 2021 the court (Wasilwa J) awarded the petitioner the following: -
 - a. Having found above, and having established that the Petitioner remained on the payroll until February, 2019 I find that he was only terminated when his salary was stopped in March, 2019 and I find he is entitled to be reinstated to the service from March, 2019 without loss of remuneration and promotion to date.
 - b. The respondent will also pay the Petitioner an equivalent of Kshs.2Million as damages for unfair and unjustified dismissal.
 - c. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.
2. On February 7, 2022 the respondent filed a notice of motion dated February 4, 2022 (the application) under a certificate of urgency seeking the following orders: -
 1. That this application may be certified as urgent and heard ex-parte in the first instance.



2. That this court grants stay of execution of judgment pending the hearing and determination of intended appeal in Nakuru ELRC Petition 10 of 2019, James Kiptoo Korir v National Police Service Commission;
 3. That this court grants stay of execution of judgment pending the hearing and determination of intended appeal in Nakuru ELRC Petition 10 of 2019, James Kiptoo Korir v National Police Service Commission pending the hearing and determination of the Appeal;
 4. that costs of this application be provided for.
3. The application is expressed to be brought under the provisions of article 159(2) of *the Constitution*, sections 1A, 1B, and 3A of the *Civil Procedure Act*, order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law and is based on the grounds on the face of it and supported by the affidavit of Sarah Muthiga, Advocate, sworn on even date.
 4. On February 15, 2022 this court issued temporary orders of stay in the following terms: -
 - i. That pending the hearing and determination of the Notice of motion dated February 4, 2022 a stay of execution be and is hereby granted in respect of the Kshs.2,000,000/=awarded to the Petitioner/Respondent in damages and costs.
 - ii. That for avoidance of doubts the stay does not affect the order of reinstatement.
 - iii. That the notice of motion dated February 4, 2021 be disposed of by way of written submissions.
 - iv. That the petitioner/respondent is granted 14 days to file and serve responses to the application.
 - v. That the respondent/applicant shall have 14 days to file and serve written submissions upon service as in (iv) above.
 - vi. That The petitioner/respondent shall have 14 days to file and serve written submissions upon service as in (v) above.
 - vii. That mention on April 5, 2022 to confirm compliance and take a date for ruling.
 5. In opposition to the application the Petitioner swore and filed a replying affidavit on March 29, 2022.
 6. On February 15, 2022 this court, with the concurrence from Counsel for both parties, directed that the application be heard by way of written submissions. Counsel for the respondent filed her written submissions on May 31, 2022 but Counsel for the petitioner had filed earlier on April 6, 2022.

II. Submissions by the Respondent's Counsel

7. Brenda Opiyo, learned Counsel for the respondent has identified one issue for determination in this application, that is whether the respondent may be granted the stay of execution as sought for in the application.



8. Counsel submits that the respondent is dissatisfied with the entire judgment of court and that a notice of appeal was filed on November 29, 2021. A copy of the said notice has been annexed to the supporting affidavit.
9. Counsel submits that a decree has been drawn and that the Petitioner may commence execution proceedings. She submits that if execution is carried out the appeal which raises serious triable issues of law and fact shall be rendered nugatory. Counsel submits that the application for stay was filed without undue or unreasonable delay.
10. Counsel has cited several decisions from the Court of Appeal, among them *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* (2013) eKLR, *Attorney General v Okiya Omtatah Okoiti & Another* (2019) eKLR, and *Butt v Rent Restriction Tribunal* (1982) 417 in an attempt to illustrate the circumstances and considerations that this court should take into account in deciding whether to grant or deny the stay.
11. Counsel submits that this court should consider whether the appeal shall be rendered nugatory if the order for stay is declined, and whether the intended appeal raises matters of public interest.
12. Counsel submits that the grounds in the notice of appeal prima facie demonstrate that the respondent has many factual and legal points on appeal and that is by itself evidence that if stay is denied the appeal may be rendered nugatory. Counsel submits that if stay is denied and the sum of Kshs.2 million or so is paid to the Petitioner the same may never be recovered and this shall render the appeal nugatory and merely academic.
13. On the basis of the foregoing Counsel submits to this court that stay should be granted.

III. Submissions By The Petitioner's Counsel

14. Miss Moenga, learned Counsel for the petitioner, submits that the interim order for stay issued by this court on May 15, 2022 was only in respect of the monetary award but not in regard to the order of reinstatement. In the replying affidavit the Petitioner deposes that he has not been reinstated and that the Respondent has not demonstrated good faith in filing the application for stay as the interim orders only affected the award of damages and not the order for reinstatement yet the Respondent has not reinstated the Petitioner.
15. Counsel has cited *Aggrey Lukorito Wasike v Kenya Power and Lighting Company Limited* (2016) eKLR to buttress the argument that there cannot be issued an order for stay of reinstatement as an order of reinstatement is self-executing and such an order may only be reversed on appeal.
16. For the foregoing reasons Counsel submits that the application for stay of execution should be denied and the application dismissed with costs.

IV. Issues For Determination

17. This court has carefully gone through the application, the supporting affidavit, the replying affidavit, and the submissions by Counsel for both parties as analyzed and summarized above. In the considered view of this court there is only one issue for determination in the application - Has the respondent presented a proper case in the application for this court to grant stay of execution?

V. Determination

18. The applicable law on stay of execution in this application is found in order 42 of the *Civil Procedure Rules*. Stay of execution is a discretionary remedy but the court is nonetheless bound to exercise that



- discretion judiciously devoid of caprice or whims. Order 42 rule 6(2) provides that stay of execution may be granted where 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 that such security as the court orders for the due performance of such decree or order as may ultimately be binding has been provided by the Applicant.
19. Further, under order 42 rule 6(1) the filing of an appeal is not of itself a stay of execution or the only or the most important ground upon which a stay of execution may be granted.
 20. In the judgment delivered on November 25, 2021 the court made two substantive orders. Firstly, that the petitioner be reinstated, and secondly, the respondent was ordered to compensate the petitioner in the sum of Kshs.2 million as damages for unfair and unjustified dismissal. A decree was issued on December 3, 2020 (sic!). The proper date of the decree should be December 3, 2021 as there is a clear error apparent on the face of the decree in regard to the date.
 21. The application for stay was filed on February 7, 2022 and in the opinion of this court the period of about two months that passed between the time that the judgment was delivered and the filing of the application cannot be termed as unreasonable or inordinate delay.
 22. The respondent has pleaded and submitted that the petitioner may not be able to refund the decretal sum if the same is paid to him. The petitioner has not responded to this serious allegation in his replying affidavit or even in the submission by his Counsel.
 23. The Respondent is a constitutional commission and hence a public body with perpetual succession and thus at whatever point that it is ordered to pay the decretal sum, upon exhausting the appeal process, it should be ready to satisfy the same.
 24. However, this court concurs with Ongaya J. in *Aggrey Lukorito Wasike v Kenya Power and Lighting Company Limited* (Supra) on the implications of an order of reinstatement. No explanation has been offered by the respondent as to why it has not reinstated the petitioner as ordered by court in the judgment. An order of reinstatement cannot wait for an appeal to be heard and determined as that would be prejudicial and detrimental to the Petitioner.
 25. Other than stating that the respondent is appealing the judgment there is no reason whatsoever proffered by the respondent on what prejudice or difficulties it would suffer in reinstating the petitioner. If the respondent is of the view that the petitioner is not fit to serve as a traffic police officer it has powers to deploy and designate him in any other department or section pending the hearing and determination of the appeal.
 26. Clearly, under order 42 of the *Civil Procedure Rules* it is not the duty of this court to consider the merits and demerits of the appeal. The factors to be considered by this court in an application for stay are distinguishable from those to be considered in the Court of Appeal under the rules of that court. While this court may have at the back of the mind issues such as public interest, the risk of rendering the appeal nugatory, irreparable loss, et al, this court is first and foremost reliant on the provisions of order 42 of the *Civil Procedure Rules* as alluded to above. The primary objective is to do justice as provided for under section 3 of the *Employment and Labour Relations Court Act*, among other laws.
 27. In the entire circumstances of this matter this court is inclined to stay execution in regard to the monetary part of the decree, but not the part on reinstatement, pending the hearing and determination of the appeal.



28. The stay is conditional that the respondent shall prepare and file the record of appeal in the next 60 days from the date of this ruling. Failure to comply with this condition shall automatically lapse the stay granted herein.
29. The respondent is ordered to comply with the order of reinstatement of the Petitioner within the next 30 days failure to which the Petitioner shall be at liberty to take an appropriate action to enforce that part of the judgment and decree.

V. Costs

30. The application has succeeded partially and in the circumstances this court makes no order as to costs.

VII. Disposal

31. This court issues the following orders-
 - a. This court hereby issues a stay of execution of the decree in this petition in regard to the monetary part thereof only, pending the hearing and determination of the intended appeal subject to the conditions below.
 - b. The said stay is conditional that the respondent shall prepare the record of appeal and file the intended appeal within 60 days of the date hereof.
 - c. Failure to comply with (b) above shall lapse the stay order automatically.
 - d. There is no stay granted in regard to the order of reinstatement and the Respondent is hereby ordered to reinstate the petitioner within 30 days of the date hereof failure to which the Petitioner shall be at liberty to take an appropriate action to enforce that part of the judgment.
 - e. There is no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF DECEMBER, 2022.

DAVID NDERITU

JUDGE

