



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.133 OF 2018

ESTHER NJERI MAINA.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING

The ruling herein relates to two (2) applications dated 4th November, 2020 filed by the respondent, Kenyatta University and application dated 5th November, 2020 filed by the petitioner, Esther Njeri Maina.

Application dated 4th November, 2020 is seeking orders that;

1. *Spent.*
2. *Spent.*
3. *Pending hearing and determination of Nairobi Court of Appeal Civil Appeal No.261 of 2020 Kenyatta University –vs- Esther Njeri, this court be pleased to grant stay of execution of the judgement delivered by ... on 15th April, 2020 and the resultant decree thereof.*
4. *The respondent/applicant be at liberty to apply for such further orders and/ or directions as the court may deem fit and just to grant.*
5. *The court make such further and/or alternative orders as necessary to not only met the ends of justice but to safeguard the subject matter of the application and also of the appeal.*
6. *Costs b provided for.*

The application is supported by the annexed affidavit of Prof. Fatuma Chege and on the grounds that upon delivery of judgement herein on 15th April, 2020 the respondent was dissatisfied and filed Nairobi Court off Appeal No.261 of 2020 challenging the court decision directing the respond to convert and issue the petitioner with a written contract of employment on permanent and pensionable terms. A stay of execution was also granted until COVID-19 pandemic was constrained and which remains in force.

The petitioner has threatened to proceed with execution of the judgement claiming that the order granted on 8th October, 2020 where the respondent was directed to pay the petitioner salary amounts to lifting of the stay of execution orders and hence the respondent is forced to move and seek stay of execution pending the hearing and determination of the filed appeal which has high chances of success.

In her affidavit, Prof. Chege avers that as the Deputy Vice Chancellor (Administration) of the respondent she has authority to reply herein and supports the application seeking stay of execution pending the hearing and determination of Nairobi Civil Appeal No.261 of 2020 challenging the legal import of section 37 of the Employment Act. The court in the judgement of 15th April, 2020 failed to appreciate those causal employees such as the petitioner as employed in context as the respondent is an academic institution running semesters when it requires more staff and other times does not. The judgement in its effect is to compel the respondent to treat the petitioner favourably compared to 3000 other workers employed under similar terms as the petitioner.

Prof. Chege also avers that the application seeking stay of execution has been filed without delay and upon obtaining copies of the judgement and certified proceedings and where stay of execution is not allowed the respondent shall suffer loss and damage.

In reply, The petitioner filed her Replying Affidavit and avers that she worked as a casual employee of the respondent from the year 2009 to 15th April, 2020 when the court declared her as a permanent and pensionable employee and upon such judgement the respondent applied for stay of execution which was granted and the court directed that execution to proceed once the COVID – 19 pandemic was contained and the universities reopened.

The universities re-opened on 12th October, 2020 and there is no reason why employment contract should not be issued. Where stay of execution is allowed, the respondent should be directed to issue the petitioner with a 3 years contract with full benefits.

The petitioner also avers that she has since written to the respondent and seeking to have her written contract of employment and for a promotion and confirmation of her employment.

Stay of execution granted was lifted on 8th October, 2020 and which allowed the petitioner the right to seek the implementation of the judgement herein.

On 1st October, 2020 the court directed the respondent to pay the petitioner her due wages and there is no compliance. From May, 2020 the petitioner is owed ksh.19, 233 per month and there is default of payment and there is contempt of the court orders.

The petitioner also avers that the appeal filed and the grounds thereto have zero chances of success and the application seeking stay of execution should be dismissed with costs.

The respondent filed a Supplementary Affidavit of Prof. James Kung'u and who avers that he is the acting Deputy Vice-Chancellor (Administration) and in support of the averments by Prof. Chege in support of the application herein.

In the ruling of the court delivered on 30th July, 2020 the court affirmed that stay of execution was still in force. Such order has not been set aside. The respondent university has not reopened as alleged by the petitioner as the Minister has only allowed phased re-opening in strict adherence to Ministry of health protocols.

The respondent has paid the petitioner for days worked and nothing owes. On the filed appeal, the court should allow stay of execution for the same to be heard on the merits.

The petitioner filed her Supplementary Affidavit and avers that she wrote to the respondent on 1st October, 2020 seeking to proceed with execution and on 8th October, 2020 the court noted that there was disobedience by the respondent and hence execution should proceed. Such lifted the stay existing until such date.

The phased-reopening of universities did not affect the respondent as learning has been on-going. Even when closed, lecturers and nonteaching staff continued to be paid. The faculty under which the petitioner serves will be relocating to Kitui in January, 2021 and all salary payments have been harmonised and for these reasons application seeking stay of execution should be dismissed with costs.

The second application dated 5th November, 2020 by the petitioner is seeking that;

1. *Spent.*
2. *The 1st, 2nd and 3rd interested parties be compelled to process the petitioner's employment contract as per the court decree issued 15th April, 2020 and a copy of the employment contract be deposited in court within 5 working days.*
3. *The 1st, 2nd and 3rd interested parties be cited for contempt of court for disobeying the court orders of 15th April, 2020 and 31st July, 2020 and confirmed on 8th October, 2020 and be summoned to court forthwith to show cause why they should not be committed to civil jail for disobeying court orders.*
4. *Costs be provided for.*

The application is supported by the petitioner's affidavit and on the grounds that the 1st interested party is the vice chancellor of the respondent, the 2nd interested party is the Deputy vice chancellor administration while the 3rd respondent is the acting registrar, administration. The respondents and interested parties were duly served with the Court Decree and orders a require din law and have failed to process the employment contract for the petitioner and proceeded to direct the head of department to block the petitioner from accessing her place of work in complete defiance of the court orders herein. The respondent and the interested parties have continued to deny the petitioner her wages and benefit to date.

There is disobedience of court orders herein and the orders sought should be granted directing the respondent and the interested parties to process a contract of employment and deposit it in court and be cited for contempt.

In reply, the respondent filed the Replying Affidavit of Prof. James Kungu and who avers that the petitioner's application is against the *res judicata* rules having filed a similar application as herein and is in abuse of court process.

The 1st, 2nd and 3rd interested parties have not been enjoined herein as parties to this petition and the respondent has enjoined stay of execution since 15th April, 2020 and such should not be overturned through an irregular application which is based on a misapplication of the

law.

The stated interested parties have not been served with the alleged orders and there since judgement on 15th April, 2020 the court allowed stay of execution and which orders have not been lifted. The orders directing for payment of the petitioner's salary has been complied with as she has already been paid for days worked. There is a pending appeal challenging the judgement herein and hence the application seeking stay of execution pending the hearing of the same.

Parties addressed the application by way of written submissions.

The petitioner submitted that she was allowed to proceed with execution of the judgement and decree herein and the respondent has not proved what prejudice it shall suffer if stay of execution is not allowed and so she should be allowed to enjoy the fruits of her judgement as held in the case of **Machira t/a Machira & Co. Advocates versus East African Standard [2002] eKLR**.

The appeal has zero chances of success as she has been continuously serving the respondent from the year 2009 until 15th April, 2020 when the court directed the respondent to issue her with a contract of employment on permanent and pensionable terms. The respondent renders essential services and the services. The petitioner was at work despite COVID-19 pandemic. Despite being ordered to pay the due salaries, the respondent has failed to comply and should not enjoy further orders of this court.

There is no proof of what loss the respondent shall suffer if the orders sought of stay of execution are not granted as held in **Kenya Shell Limited versus Kibiru [1986] eKLR** and the appeal has no chance of success as the same is frivolous. Where the judgement is executed there shall be no prejudice to the respondent as the petitioner shall be rendering services.

The respondent submitted that the petitioner I an employee of the respondent having started her employment as a casual worker intermittently for a period of time when she was given a fixed term contract of 3 months which she signed and when the petition was filed, the petitioner was under a fixed term contract.

The effect of the judgement delivered on 15th April, 2020 in converting the petitioner's employment from fixed term to permanent and pensionable has been challenged in Nairobi Civil Appeal No.261 of 2020 Kenyatta University versus Esther Njeri Maina.

Upon delivery of judgement the court granted a stay of execution until COVID-19 was contained and on 30th July, 2020 the court dismissed the petitioner's application on contempt and that the respondent should pay the petitioner.

The petitioner has filed another application alleging contempt of court which is *res judicata* as a similar application has been filed and dismissed pursuant to section 7 of Civil Procedure Act as held in **Accredo AG & 3 others versus Steffano Uccelli & another [2019] eKLR**. By filing to similar applications, the petitioner has gone contrary to the principles of *res judicata*.

The respondent also submitted that there is irregular joinder of interested parties herein as there was no leave or application for joinder of the interested parties as held in **Mutitika versus Baharini Farm [1985] eKLR**.

The alleged breach of order issued on 15th April, 2020 is based on facts that the court allowed stay of execution until COVID-19 was contained which is still being addressed and hence the subject of contempt is ambiguous and stay of execution has not been lifted. The orders of 31st July, 2020 related to contempt application and the orders of 8th October, 2020 related to the payment of the petitioner's salaries.

The respondent or the alleged interested parties have not been served with any order to justify application for contempt.

The respondent also submitted that stay of execution should be allowed pending the hearing and determination of Nairobi Civil Appeal No.261 of 2020. Order 42 rules 6(2) of the Civil Procedure Rules allow for stay of execution where an applicant is able to satisfy that an application is filed without delay and to ensure the ends of justice have been achieved as held in **Beatrice Ndunguri Mwai & another versus Sicily Wawira Titus & another [2020] eKLR**.

The respondent shall suffer substantial loss and damage if stay orders are not granted as the petitioner has been working under fixed term contract which the court has directed be converted to permanent and pensionable terms and the core subject matter of the appeal and therefore if paid any more salaries the subject of the appeal shall be lost.

The respondent is willing to deposit security for the due performance of the decree save the appeal has high chances of success and stay orders should be granted for the respondent to be heard of the appeal.

Determination

On the two (2) applications, I will first address the second application where the petitioner is seeking to compel the 1st, 2nd and 3rd interested parties to process the her employment contract as per the court decree issued 15th April, 2020 and a copy of the employment contract be deposited in court within 5 working days. She is also seeking that the 1st, 2nd and 3rd interested parties be cited for contempt of court for disobeying the court orders of 15th April, 2020; on 31st July, 2020; and confirmed on 8th October, 2020 and be summoned to court forthwith to show cause why they should not be committed to civil jail for disobeying court orders.

As correctly submitted by the respondent, the joinder of the alleged interested parties is without application, leave or an order of the court. The suit herein is between the petitioner and the respondent and the addition of any *interested party* must be with leave and by an order of the

court.

Unlike an application for contempt where an alleged contemnor is cited and called to respond to an application for contempt as a respondent, an *interested party* is well defined under the constitution and case law.

In the case of **Mary Njeri Kabundi v Christine Mithiri Mbugua & 2 others [2020] eKLR** the court defined an *interested party* as follows;

An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. ...

The *interested party/parties* where not joined by the petitioner from the onset, go out and seek the court's leave to be enjoined in a suit to secure their interest/interests. A petitioner cannot *suit moto* go out fishing for *interested parties* and post judgement invite them to respond to a suit or matter in proceedings already complete. This is unlike a *respondent* who is clear and well stated and served with summons to appear and defend a claim. See **Harpal Singh Semhi & 4 others v Zehrabanu Janmohammed & 3 others; Sports Registrar & 9 others [2020] eKLR** and further, section 2 of the Employment and Labour Relations Court Act, 2011 on the definition of an *interested party* and *respondent* respectively.

In this regard, the addition of the alleged interested parties herein to render account on the judgement and decree herein being irregular, the orders sought cannot issue.

With regard to alleged contempt, the findings above on the misjoinder of the alleged *interested parties* the core application for contempt must be founded on service of the orders alleged to have been disobeyed and or that there was knowledge of the existence of such orders.

The petitioner's case is that judgement herein was delivered on 15th April, 2020 and the court allowed for stay of execution until the COVID-19 pandemic was contained. That the respondent has since done a phased re-opening and that by order dated 8th October, 2020 the respondent was directed to pay her salaries but the respondent has failed to do so and hence in contempt of court orders.

Under paragraph 5 of the Petitioners Supporting Affidavit sworn on 5th November, 2020 she avers that;

It is true the respondent officially reopened on 12th October, 2020.

On these single fact, the allegations that the respondent is in contempt of orders dated 15th April, 2020 and 8th October, 2020 and having reopened on 12th October, 2020 such alleged contempt is lost.

Contempt of a court order is not futuristic.

An order must issue, served upon the officer/person/entity responsible and identified for implementation first. Contempt cannot be contemplated into the future.

The court finds no merit in the petitioner's application dated 5th November, 2020.

On first application dated 4th November, 2020, under Section 17 of the Employment and Labour Relations Court Act, 2011, a party dissatisfied with any judgement, award, order or decree issued by this Court has an inherent right of appeal to the Court of Appeal in accordance with Article 164(3) of the Constitution. That right does not abet simply because a party has sought to orally have a stay of execution and the Court denied or allowed that application. That right subsists before the same Court upon good grounds advanced in a formal application giving reasons as to why the Court should consider granting such a stay of its orders pending an appeal.

The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal. See **Aviation & Allied Workers Union v Kenya Airways Limited, & 3 others [2013] eKLR** and in the case of **Trust Bank Limited & Anor v. Investech Bank Limited & 3 Others** – Civil Application No. Nai. 258 of 1999 (UR) the Court held that;

... [on] whether unless a stay is granted, the applicants' intended appeals will be rendered nugatory, the decree upon which a stay of execution is sought being a money decree, and since the respondent in our view, is a bank with a sound financial base, we do not think that the intended appeals, if successful, will be rendered nugatory unless the stay prayed for is granted. ...

The foundation of the stay of execution is the appeal filed by the respondent is the application of section 37 of the Employment Act, 2007 in the conversion of the petitioner's employment with the respondent to permanent and pensionable terms. These being legal matters now placed before the Court of Appeal in **Nairobi Civil Appeal No.261 of 2020**, the court herein moved, it is only fair and just that the pending appeal be addressed first.

Order 42 Rule 6(2) of the Civil Procedure Rules allow the court to grant stay of execution pending appeal where sufficient cause has been established by an applicant and where such application is filed without delay as done herein.

The respondent has acted expeditiously to file appeal following the orders of this Court. The time used to file **Nairobi Civil Appeal No.261 of 2020 – Kenyatta University versus Esther Njeri Maina** demonstrate the respondent is keen to be heard on the appeal.

Accordingly, application dated 5th November, 2020 is hereby dismissed. Application dated 4th November, 2020 is hereby allowed; there shall be stay of execution pending hearing and determination of Nairobi Civil Appeal No.261 of 2021 – Kenyatta University versus Esther Njeri Maina; and costs shall abide the appeal.

DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JANUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistance: Okodoi

..... and