



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO.31 OF 2013**

**KENYA MEDICAL RESEARCH INSTITUTE.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**INDUSTRIAL COURT OF KENYA (as then constituted under Section 12 of the**

**Labour Industrial Act [repealed].....2<sup>ND</sup> RESPONDENT**

**AGNES MUTHONI & 34 OTHERS.....1<sup>ST</sup> INTERESTED PARTY**

**UNION OF NATIONAL RESEARCH AND**

**ALLIED INSTITUTES STAFF OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

The petitioner, Kenya Medical Research Institute filed application and Notice of Motion dated 28<sup>th</sup> October, 2020 and filed under the provisions of section 3 and 12 of the Employment and Labour Relations Court Act and seeking for orders that;

1. Spent.

2. Spent.

3. Pending the fresh inter parties hearing and determination of this petition, this court be pleased to issue an order of stay of execution and/or enforcement of the Ruling and Orders this court issued on 13<sup>th</sup> October 2020 for the release of the sum of Ksh.50,569,000.00 plus accrued interest comprising the 1<sup>st</sup> Interested Parties' basic pay from 17<sup>th</sup> December 2009 to 17<sup>th</sup> July 2015 deposited in a joint interest earning account in the names of the Petitioner's and 1<sup>st</sup> Interested Partys' advocates being account No.010xxxxxxxxxx held at Sidian Bank Limited.

4. The court be pleased to set aside, vary and/or otherwise discharge the Orders of this court issue don 13<sup>th</sup> October 2020 for the release of the sum of Ksh.50, 569,000.00 plus accrued interest comprising the 1<sup>st</sup> Interested Parties' basic pay from 17<sup>th</sup> December 2009 to 17<sup>th</sup> July 2015 deposited in a joint interest earning account in the names of the Petitioner's and 1<sup>st</sup> Interested Partys' advocates being account No.010xxxxxxxxxx held at Sidian Bank Limited.

5. Costs of this application be provided for.

The application is supported by the Supporting Affidavit of Prof. Yeri Kombe and on the grounds that by application dated 7<sup>th</sup> July, 2020 the 1<sup>st</sup> Interested Party sought for an order of review of the judgement delivered on 18<sup>th</sup> October, 2019 in this petition where the court determined that it was *functus officio* and further the 1<sup>st</sup> Interested Party sought for the release of Ksh.50,569,000.00 plus accrued interest comprising the 1<sup>st</sup> Interested Parties' basic pay from 17<sup>th</sup> December 2009 to 17<sup>th</sup> July 2015 deposited in a joint interest earning account in the names of the Petitioner's and 1<sup>st</sup> Interested Partys' advocates being account No.010xxxxxxxxxx held at Sidian Bank Limited and which monies were deposited in satisfaction of the grant of a conditional order of stay of execution in the petitioner's favour through ruling delivered on 9<sup>th</sup> September, 2016.

In the court ruling on 13<sup>th</sup> October, 2020 the court allowed the 1<sup>st</sup> Interested Party application and for the release of the monies deposited in the joint account.

The petitioner is apprehensive that the court erred in making the order of release of monies deposited in the joint account. The ruling of 9<sup>th</sup> September, 2016 was made pending the hearing and determination of the Petitioner's Civil Appeal No.220 of 2016 Kenya Medical Research Institute versus The Hon. Attorney General & 3 others and which appeal was compromised by an Order of the Court of Appeal made on 17<sup>th</sup> June, 2017 by which the Court of Appeal directed that this petition be remitted to the court for re-hearing. This petition is yet to be heard and no judgement has been delivered to date. As such there is no justification for the court to order for the release of the monies deposited in the joint account at this stage.

Unless the application is allowed the petitioner will not be able to recover the deposited funds from the interested parties in the event the petition is allowed.

In his affidavit, Prof. Kombe avers that he is the director general of the petitioner and support the application seeking for orders that the court do set aside, vary and or discharge the orders issue don 13<sup>th</sup> October, 2020 allowing for the release monies plus accrued interest comprising the 1<sup>st</sup> Interested Parties' basic pay from 17<sup>th</sup> December 2009 to 17<sup>th</sup> July 2015 deposited in a joint interest earning account in the names of the Petitioner's and 1<sup>st</sup> Interested Partys' advocates being account No.010xxxxxxxxxxx held at Sidian Bank Limited.

The monies were deposited following ruling delivered on 9<sup>th</sup> September, 2016 pending hearing and determination of an appeal filed by the petitioner and where the parties agreed to have the petition re-heard by the court and by judgement delivered on 18<sup>th</sup> October, 2019 the court made a determination that it was *functus officio*.

On the application by the 1<sup>st</sup> Interested Party dated 7<sup>th</sup> July, 2020 the court issued notice for delivery of judgement whereas what was due was a ruling and the petitioner served the respondent and 1<sup>st</sup> Interested Party with the same. On 13<sup>th</sup> October, 2020 the court did not deliver the judgement but instead delivered ruling on application dated 7<sup>th</sup> July, 2020 and allowed the same effectively releasing monies held in the joint account of the parties.

Prof. Kombe also avers that the court erred in issuing the order of release of funds deposited in a joint account of the parties as the ruling delivered on 9<sup>th</sup> September, 2016 was to allow the herring and determination of Civil Appeal No.220 of 2016 and which appeal was compromised by an Order of Court of Appeal on 17<sup>th</sup> June 2017 and directions that the matter be remitted back to the court for re-hearing.

This petition is yet to be heard afresh and no judgement has been delivered to date. There is no justification for the order for the release of the monies deposited in the joint account of the parties at this stage.

In reply, the 1<sup>st</sup> Interested Party filed Notice of Preliminary Objections and the Replying Affidavit of Garland Biko Livondo and on the grounds that the application by the petitioner is incompetent and filed contrary to the portions of Rule 33 (6) of the Employment and Labour Relations Court (Procedure) Rules; the issue of stay in this matter is *res judicata* and vexatious having been addressed previously;

- a. In Industrial Cause No.37(N) of 2010 stay was granted pending appeal on 29<sup>th</sup> October, 2020;
- b. In High Court Petition No.201 of 2010 temporary order of stay was allowed ex parte on 24<sup>th</sup> December, 2009;
- c. In this matter stay was granted vide application dated 13<sup>th</sup> August, 2013 following application on equal date; and
- d. Stay pending appeal was allowed following application dated 10<sup>th</sup> November, 2015 and ruling on 9<sup>th</sup> September, 2016 with regard to conditions for stay of execution.

In the Replying Affidavit, Mr Livondo avers that the instant application is meant to frustrate the Interested Party who have been in court for the last 10 years. the petitioner failed to serve the application upon the Interested Party who only learnt about on the eFiling system and the same is in abuse of court process.

Mr Livondo also avers that Rule 33(6) of the Court Rules are mandatory with regard to an application for review which the petitioner has not adhered to. A decree and order being sought for review is not attached.

Stay of execution is not sought for any appeal which has previously been allowed and this is the 6<sup>th</sup> time the petitioner is seeking for stay of execution in this matter. The same is *res judicata*.

Mr Livondo also avers that the suit was filed 10 years ago by the Interested Party in Industrial Cause no.37(N) of 2010 against the petitioner and on 13<sup>th</sup> May, 2010 the court delivered judgement directing for the reinstatement of the Interested Party but the petitioner filed an appeal Civil Appeal No.15 of 2011 before the Court of Appeal and upon which the Interested Party filed objections as the court lacked jurisdiction and which was upheld by the Court of Appeal vide ruling dated 10<sup>th</sup> May, 2013.

The petitioner had filed High Court Petition 201 of 2010 where they obtained stay of execution and obtained orders of stay but withdrew the petition.

The petitioner then filed the instant petition and applied for stay of execution. The matter was referred before a 3 judge bench and upon hearing it dismissed the same on 16<sup>th</sup> July, 2015. The petitioner filed application seeking stay of execution pending appeal vide application dated 11<sup>th</sup> November, 2015 and which was allowed on 9<sup>th</sup> September, 2016 on condition that the salaries for the Interested Party be deposited in a joint interest earning account within 30 days as otherwise the stay would lapse and the petitioner did not comply and exceeded time by 16 more days without leave of the court.

The petitioner did file Civil Appeal No.220 of 2016 in the Court of Appeal and which was compromised by an Order of 19<sup>th</sup> July, 2017 at the Court of Appeal. The matter was referred back to the court for re-hearing following decision on Supreme Court in Republic versus Karisa Kyengo Petition No.5 of 2015 and the Chief Justice appointed a fresh bench but it was agreed by consent on 26<sup>th</sup> February, 2018 for hearing to proceed by a single judge and who delivered judgement 18<sup>th</sup> October, 2019.

Mr Livondo also avers that in the court judgement, the court upheld the earlier decision of the court delivered on 16<sup>th</sup> July, 2015 but erroneously held that the court was *functus officio* under the mistaken belief that the matter was before the Court of Appeal.

On good basis, the court in its ruling on 13<sup>th</sup> October, 2020 held that there were good reasons to allow for a review of the judgement and it was correct to order for the release of funds held in the joint account of the parties as the orders of stay had been spent as parties had been heard and judgement delivered on 18<sup>th</sup> October, 2019. There is nothing requiring for the funds to be held by the petitioner as there is a final determination of the matter and application should be dismissed with costs.

The 2<sup>nd</sup> Interested Party filed Replying Affidavit by Zachariah Achacha the secretary general and who avers that under rule 33 an application for review should be for a mistake, error on the record, clarification or for any other good reasons which is lacking in the instant application by the petitioner and hence lacks merits and should be dismissed with costs.

### **Determination**

On the application, the affidavits and written submissions by the petitioner; The substantive orders sought by the petitioner are that this petition should be heard afresh; that there be stay of execution and enforcement of the ruling and orders of 13<sup>th</sup> October, 2020 directing for the releases of funds deposited in the joint account of the parties; and that these orders of 13<sup>th</sup> October, 2020 be set aside, varied and or discharged on the grounds that on 7<sup>th</sup> July, 2020 the 1<sup>st</sup> Interested Party filed application seeking for a review of the court judgement delivered on 18<sup>th</sup> October, 2019 where the court determined that it was *functus officio* and the application had also sought for the release of the funds deposited in the joint interest earning account held by both parties.

The guiding principles for the grant of stay of execution are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

*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.*

In this case, stay of execution is sought to allow the court to hear the petition afresh. Unlike under Order 42 Rule 6 provisions which regulate stay of execution pending the hearing of an appeal, the petitioner in this instance is seeking to have the petition heard afresh and that the funds deposited in the joint interest account held by the parties to remain in force. See **Victory Construction versus BM (a minor suing through next friend one PMM) [2019] eKLR.**

Further, a court will allow the setting aside, vary and or discharge of its orders under the provisions of Rule 33(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The conditions given are that;

*1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—*

*(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;*

*(b) on account of some mistake or error apparent on the face of the record;*

*(c) if the judgment or ruling requires clarification; or*

*(d) for any other sufficient reason.*

A review of the court order is only allowed where there is discovery of new matter, there is mistake, need for clarification and for any other sufficient cause. Once a review is allowed, Rule 33(6) of the Court Rules fall into motion;

***(6) An order made for a review of a decree or order shall not be subject to further review.***

What is apparent to the court with regard to the instant application is that the 1<sup>st</sup> Interested Party by application dated 7<sup>th</sup> July, 2020 applied for a review of the judgement delivered on 18<sup>th</sup> October, 2019 and the petitioner in reply partly supported the same. There is ruling delivered on 13<sup>th</sup> October, 2020 where the court addressed application dated 7<sup>th</sup> July, 2020 and held that there was a valid judgement of the court and the court is not *functus officio* and hence proceeded to direct at paragraph 33 and 34 that;

*.. . In respect of directions on how the amounts deposited in court ought to be dispensed with to that extent. I review the earlier order of the court finding the court to be functus officio and state that the court is not functus officio in respect of directing on issue of monies deposited in court following stay orders granted.*

*In the same vain, this court directs that the sum of Ksh.50,569,000/= plus accrued interest deposited in Account No.01036150005841 held at Sidian Bank Limited pursuant to an order of this court as a condition of stay pending Appeal No.220 of 2013 should be released to the interested parties herein there being no Appeal pending in any Court since then.*

On this basis should the court set aside, vary or discharge these orders?

Should the court allow for a stay of execution of these orders and allow fresh hearing of the petition?

The parties herein have filed various matters and culminating in **Civil Appeal No.220 of 2016 – Kenya Medical Research Institute versus The Hon. Attorney General & others.**

To secure the appeal, the petitioner filed application seeking stay of execution and by ruling delivered on 9<sup>th</sup> September, 2016 the court granted a conditional stay of execution and directed the petitioner to deposit the salaries due to the 1<sup>st</sup> Interested Party in a joint interest earning account held by the parties.

By Consent Order of 19<sup>th</sup> June, 2017 the Court of Appeal remitted that matter back to this court for re-hearing.

upon the order of the Court of Appeal, the matter was addressed and judgement delivered on 18<sup>th</sup> October, 2019.

Whether the petitioner agree or disagree with the findings of the court, there exists a valid judgement herein delivered by the court on 18<sup>th</sup> October, 2019. To apply and seek for a fresh hearing on this foundation is abuse of court process. The judgement was reviewed following application dated 7<sup>th</sup> July, 2020 and ruling delivered on 13<sup>th</sup> October, 2020 the subject of this instant application seeking fresh hearing and stays of execution.

On good basis, the court in its ruling on 13<sup>th</sup> October, 2020 held that there were good reasons to allow for a review of the judgement and for the release of funds deposited in the joint interest earning account held by the parties.

The court finds no new evidence, error, mistake or any sufficient cause to justify another review herein. The court having reviewed the judgement of 18<sup>th</sup> October, 2019 and made a finding therefrom, to revisit the same without good cause is in abuse of court process.

As noted above, upon the matter being remitted back to this court from the Court of Appeal, there is judgement herein and the petitioner has not done anything since 18<sup>th</sup> October, 2020 if they were aggrieved. The petitioner moved the court with application seeking for a review. Such has since been addressed with finality.

To seek the court to hear the matter afresh and an order of stay of execution is in gross abuse of court process. Litigation must come to an end. The counter application seeking stay of execution at every stage of these proceedings is not justified. Post judgement and without any good cause to seek for similar orders and a further review is without good cause.

**Accordingly, application dated 28<sup>th</sup> October, 2020 is found to be without merit and in abuse of court process and is hereby dismissed. costs to the interested parties. The orders issued on 13<sup>th</sup> October, 2020 stand.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistance: Okodoi

..... and .....