



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO. 212 OF 2017

PETERKEEN MWIU KIMWELI & 47 OTHERS.....CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES..... RESPONDENT

RULING

1. The application before court is the applicant's Notice of Motion application dated 17th November, 2020 filed by the applicant herein under certificate of urgency and through a Notice of Motion seeking the following orders;

1. THAT this application be certified urgent and service be dispensed with in the first instance and the same be placed before the duty Judge.
2. THAT this Honourable Court be pleased to stay the execution of the Court Judgment dated 24/9/2020 pending the hearing and determination of the application filed herein.
3. THAT this Honourable Court be pleased to order stay of execution of the Court Judgment and orders issued herein on 24th August 2020 and 27th October, 2020 pending the hearing and determination of the intended appeal before the Court of Appeal.
4. THAT the costs of this application be in the cause.

2. The application is supported by the following grounds.

1. THAT the claimants filed the claim against the respondent on issues wage disparity, unfair and unlawful nonpayment of salary arrears, unfair and unlawful under-payment of salaries as a result of job evaluation, violation of claimants' rights to fair administrative action, fair remuneration, fair labour practice and violation of the claimants rights to legitimate expectation.
2. THAT the respondent filed its defense and submitted that sometime in the year 2009, the respondent engaged PricewaterhouseCoopers Limited (PWC) to undertake job evaluation consultancy services, which was conducted, and the findings and recommendations were adopted by the respondent.
3. THAT in the year 2012 the Board of Trustees Managed awarded two incremental credits to cushion them against inflation. Subsequently, there occurred disparities in management salaries since some employees' salaries were hanging in between notches because of percentage increment (10%) contrary to the design of the salary structure that was based on notches and not percentages.
4. THAT the matter was heard and determined by way of written submissions and the court delivered its judgment on 24th August 2020 and held that the claimants were entitled to the alleged salary.
5. THAT the respondent being aggrieved by the said Judgment instructed its legal representatives to file a notice of appeal and apply for proceedings filing an appeal against the whole of the said Judgment on the grounds that the Judge erred in his findings.
6. THAT the grounds of appeal include the fact that learned Judge erred in law by holding that the claimants were entitled to salary underpayments hence should be paid while it was not an intentional act of the respondent to place the claimant in salary notches.
7. THAT the claimant has now filed a tabulation which has been adopted by the court without the participation of the respondent and any time from now the claimants may commence execution proceedings which may render the appeal nugatory.

8. THAT considering the circumstances of the case in that there exists employer-employee relations the grant of stay will not prejudice the claimant as failure to grant stay will automatically deny the Respondent the right to appeal as there is no other remedy available to the respondent in the circumstances.

9. THAT the Respondent is desirous of prosecuting the appeal and it will be in the interest of justice that the respondent be allowed to prosecute the appeal as it affects its operations.

3. The application is also supported by the supporting affidavit deponed by Ms. Regina Mua whose identity is not disclosed. The applicants have deponed that they were not satisfied with the Judgment of this court (J. Mbaru) delivered on 24/8/2020 and preferred an appeal. They aver that they requested for proceedings of the court.

4. The applicants aver that since the respondents are in their employment the stay will not prejudice them in any way and that if the appeal succeeds, the respondent will recover the money which if paid will cause industrial disharmony at the work place.

5. The respondent opposed this application through the replying affidavit sworn by the 1st claimant herein who indicated that he had authority to swear the said affidavit.

6. He deponed that though the applicants filed the Notice of Appeal on 26/8/2020 and so were expected to file the Memorandum of Appeal within 60 days as per Rule 82 of the Court of Appeal Rules. 7. I have considered the documents of the parties herein.

Order 42 Rule (2) of the Civil Procedure Act states as follows:-

(1).....

(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.

8. Despite all submissions by the parties, Order 42 Rule 6(2) is however the guiding principle to this court on whether or not to grant stay orders. In terms of speed, the application was filed without delay.

9. The applicants have also submitted that they will suffer irreparable harm if the stay orders are not granted. They have actually filed a notice of appeal and the only court to reject this appeal for not being filed in time is the Court of Appeal and not this court.

10. The fact of filing a Notice of Appeal is in my view a good reason to grant stay in order to preserve the substratum of the appeal and not render it a mere academic exercise if the appeal succeeds.

In view of the reasons above, I will grant orders of stay as sought pending the hearing and determination of the Appeal costs will abide the outcome of the appeal.

DATED and DELIVERED in open court this 19TH day of JANUARY, 2021.

Hon Lady Justice Hellen Wasilwa

Judge

19/01/2021