



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 224 OF 2017

PETER WANGAI.....CLAIMANT/ RESPONDENT

VERSUS

EGERTON UNIVERSITY.....RESPONDENT/APPLICANT

RULING

1. Before this Court is the Respondent/ Applicant's Application dated 25th November, 2020 filed through the firm of Sheth & Wathigo Advocates seeking the following orders:-

a) Spent.

b) **THAT** this Honourable Court be pleased to issue a stay of execution of the judgment/ Decree issued herein on the 24th January, 2019 and any consequential orders, more specifically of 12th October, 2020 pending hearing and determination of this application inter-partes.

c) **THAT** this Honourable Court be pleased to extend time and grant the Respondent leave to lodge an appeal out of time against the Judgment/ Decree issued herein on the 24th January, 2019.

d) **THAT** there be stay of execution of the judgment/ Decree issued herein on the 24th January 2019 and any consequential orders, more specifically of 12th October, 2020 pending the hearing and determination of the intended appeal herein lodged.

e) **THAT** the costs of this Application be costs in the intended appeal.

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Janet C Bii, the legal officer of the Respondent/ Applicant, sworn on 25th November, 2020.

3. The Application has been opposed vide the Claimant/Respondent's Replying Affidavit sworn by Peter Wangai, the Claimant herein, on 8th December, 2020.

The Applicant/Respondent's Case

4. The Applicant avers that on 24th January 2019, this Honourable Court entered judgment in favour of the Claimant as against the Respondent in the following terms:

i. A declaration that the termination of employment was unfair.

ii. The claimant is hereby reinstated back to his position as senior lecturer Pathology Department without loss of benefits, and any lawful entitlement(s) to be paid within 30 days and in accordance with the applicable Collective Bargaining Agreement regulating the employment of unionisable employees of the Respondent.

iii. The claimant shall report back to work on 1st February, 2019 at 8:30 hours to the accounting officer and the vice chancellor for allocation of duties and,

iv. Costs of the suit.

In the alternative to the above;

v. The Respondent shall pay the claimant salaries due for 3 years.

vi. A compensation amounting to Three (3) Months salary at the last gross salary due on 19th January 2016.

vii. Costs of the suit.

5. The applicant herein states that it complied with the court Judgment and Decree and chose the first option and the Claimant was fully reinstated with all benefits and lawful entitlements.
6. The Respondent/ Applicant contends that it chose to comply with the 1st option of the judgment, instead of the 2nd option on the grounds that the 2nd option had adverse cost implication of Kenya Shillings Thirteen Million (Kshs.13, 000,000/=), that it was unable to meet at the time.
7. The applicant deposed that despite complying with the Court judgment and Decree of 24th January 2019, the Respondent herein moved the Court vide application dated 6th July, 2020, a year later, seeking to be paid back wages for the period of 6th July, 2016 to 1st February 2019 in addition to the reinstatement.
8. This Honourable Court allowed the Respondent/ Claimants application of 6th July 2020 on 12th October 2020 and the Applicant/ Respondent was ordered to pay back wages for the Respondent for the period commencing 6th July, 2016 to 1st February 2019.
9. Pursuant to the Ruling and Order of 12th October, 2020, the Applicant was aggrieved by the interpretation of the Courts judgment of 24th January 2019 and now seeks to appeal the entire judgment and consequential orders of 12th October 2020.
10. The Applicant contends that the Order of the Court is to the effect that the Respondent be paid back wages summing up to Kenya Shillings Twelve Million, Four Hundred and Twenty Four Thousand Three Hundred and Eighty Two and Forty Eight Cents (Kshs.12,424, 382.48/=) for a period when the Claimant was not offering any services to the Respondent.
11. The Applicant has also lodged a Notice of Appeal against the Ruling by this Honourable Court dated 12th October 2020 and has annexed the said Notice of Appeal and marked "JB-1"
12. The Applicant avers that the Ruling of 12th October 2020 was a mere clarification of the judgment of 24th January, 2019 and thus states that it is seeking leave of Court to Appeal against the judgment of 24th January, 2019.
13. The Applicant agrees that the period for lodging appeal has since lapsed and contends that this Court has unfettered discretion to grant leave to lodge appeal out of time.
14. The Applicant impresses upon this court to exercise its discretion in the wider interest of justice and grant the orders for extension of time to lodge the Appeal out of time and that this Court ought not be impeded by procedural technicalities.
15. The Applicant deposed that the stay of Execution granted has since lapsed and the Respondent has threatened with execution of the Judgment.
16. The Applicant urges this Court to allow this Application, as failure to allow it will render the Appeal nugatory and that it will suffer irreparable damage since it does not know the value and capability of the Respondent/Claimant in paying back the decretal award if the intended appeal succeeds.
17. The Applicant contends that this Application has been brought timeously and finally state that it is ready to furnish this Court with Security it deem fit.

The Claimant/Respondent's Case

18. The Claimant/Respondent avers that once judgment was delivered he duly complied with the Court's directions and reported to work on 1st February, 2019 and has been on duty since then, receiving his salary when due from February 2019 to date.
19. The Claimant/Respondent avers that he was not paid his back wages from 6th July 2016 to 1st February, 2019 as ordered by this Court, prompting him to send a demand letter dated 18th March 2019 and another reminder dated 9th May, 2019, marked as Respondents **annexure 1 & 2** respectively. The Respondent/ Applicant replied on 3rd June, 2019 through its legal Officer Janet Bii denying any arrears owing and due to him.
20. The Claimant/Respondent states he was forced to file a formal application on 6th July, 2020 seeking that the University be compelled to pay the arrears owing to him, being back wages, which application was allowed by this Honourable Court on 12th October, 2020.

21. It is averred that the Notice of Appeal attached to the Respondent/ Applicant Application is with regards to the Ruling delivered on 12th October, 2020 and alleges that an appeal has already been lodged by the Applicant herein.

22. He urges this Court to decline the Application for Stay stating that the Applicant has not given cogent reasons to persuade this court to grant leave to Appeal out of time and stay of execution.

23. Finally, the Claimant/ Respondent contends that an appeal does not lie in such a scenario nevertheless opines that incase the Court is inclined to allow the stay and grant leave to appeal then the Applicant be ordered to deposit the entire decretal sum in an interest earning account in the joint names of the parties herein.

24. The Application was disposed of by way of written submissions with the Applicant filing its written submissions on 26th January, 2021 while the Respondent filed his Submissions on 29th January 2021.

Applicant's Submissions.

25. The Applicant's Counsel opened his submissions by submitting that this Court has Jurisdiction and power to grant stay of execution and based his reliance in Section 3A of the Appellate Jurisdiction Act and cited Halsbury Laws of England Vol. 37, 4th Edition at Paragraphs 437 which gives the objects of stay Orders.

26. Counsel reinforced its position by citing the case of **Olivia Da Ritta Siqueira E Facho an another Vesrus- Siquiera, Roddrigues and Ribiero[1933] 15 KLR 34** and submitted that this Court has overriding duty to promote justice and from this duty there arise a power to stay.

27. Counsel further submitted that the Applicant is entitled to an extension of time to lodge the Appeal and contents that the delay of filing the Appeal out of time was a result of the Claimant/Respondent Application of 6th July 2020 which Ruling was delivered on 12th October, 2020.

28. Counsel Submitted that the ruling in the Application dated 6th July, 2020 operated as a Courts clarification to its judgment of 24th January, 2019. Further that, it is as a result of the said Ruling and interpretation of the Courts judgment that the Applicant herein became aggrieved and filed a Notice of Appeal and this application.

29. Citing the Court of Appeal case of **Paul Musili Wambua -Versus- Attorney Genral & 2 others e KLR** Counsel submitted that this Court has unfettered discretion however the said discretion ought to be exercised with reason(s). Further that the Court has to look at the length of the delay, the reasons for the delay, and the chances of success if leave is granted and finally the prejudice that will be visited upon the Respondent if the stay Order is granted.

30. In urging this Court to allow this Application, Counsel submitted that mistakes of an advocates ought not to be visited upon the Applicant and placed his reliance on the case of **Peter Mwangi Kangi –versus- Damaris Wanjiku Gikunju and Anor [2019] eklr** and the case of **APA Insurance Limited- versus- Michael Kinyanjui Muturi [2016] eklr**

31. On whether the Applicant has met the conditions for Grant of stay of Execution pending hearing and determination of the Intended Appeal, Counsel submitted that **Order 42 Rule 6 (2)** of the Civil Procedure Rules 2010 outlines the guiding principles.

32. On the issue of Substantial Loss, it was submitted that, the decretal award is a monetary decree that if executed before the intended appeal is heard and determined; the Claimant/Respondent may not be in a position to refund as the Applicant herein does not know the Respondent financial status. Counsel relied on **Civil Application no. Nai 97 of 1986 Kenya Shell Limited –versus- Benjamin Karuga & another [1986]** which court put emphasis on substantial loss as that which Court has to prevent.

33. Counsel submitted further that, it is the duty of the Respondent to demonstrate that he is not a man of straws and that the Burden shifts to the Respondent. The Applicant contends that the Respondent has not demonstrated his financial Status. He cited the case of **Bonface Kariuki Wahome –versus- Peter Nziki Nyamai & amnother [2019] eklr** which Court held that evidential burden resides with the Respondent to prove that he is not a man of Straw as alleged.

34. On the issue of unreasonable Delay, Counsel maintains that the Applicant had complied with the judgment of Court and was only dissatisfied with the said judgment after the Ruling delivered on 12th October 2020 which directed it to pay the Claimant back Wages. Counsel submitted that the current case is unique and this Court ought to determine it as such. on this ground he relied on Court of Appeal case number **Civil Appeal No. 45 of 2015 M'ndaka Mbiuki –versus- James Mbaabu Mugwiria [2016] eklr** which Court held that there is no Exact measure as to what amount to unreasonable delay and that each case be determined on its merit.

35. On the issue of security, Counsel submitted that, this Court has unfettered discretion to issue orders to preserve the subject matter pending hearing of the Appeal and that it is amenable to depositing security in respect of the decretal award as directed by this Court.

Claimants/ Respondent's Submissions.

36. In a bid to demonstrate why the Application herein should be dismissed, counsel for the respondent submitted that the Applicant has not annexed a Decree and a draft Memorandum of Appeal as mandated by law. Further that, this Court has nothing to refer in determining whether the Appeal is arguable and whether it has any chances of success.

37. Counsel submitted that the Notice of appeal having been filed, the Stay of Execution application ought to have been filed in the Appellate Court that is ceased of the matter.

38. Counsel further submitted that the Applicants herein misapprehended the law by relying on Section 79 G of the Civil Procedure Act in filling this Application and that Section 79 G applies to appeal emanating from subordinate Courts.

39. Finally, He submitted that the reasons advances by the Applicant are not sufficient to warrant issuance of the Orders sought considering the delay is about 2 years and prayed that the Application be dismissed with costs to the Respondent.

40. I have examined the averments of the parties herein. I notice that the applicants have substantially complied with this court's Judgment by reinstating the claimant and paying him salary. If stay is ordered, the implication would be to order a refund of money, already dispensed and also stay reinstatement.

41. This court has made rulings before that a reinstatement is a self-executing order and is therefore incapable of being stayed. Other than that, Order 42 Rule 6(2) of the Civil Procedure Rules provides instances of when a stay may be granted. The provision is that the application should approach it without delay.

42. The applicants are choosing to approach court 2 years after the orders issued which is an unreasonable time of delay.

43. I find that this application has no merit. I therefore dismiss it accordingly with costs to the claimant.

Ruling delivered virtually this 4th day of March, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

CA: Fred/Wanyoike and No appearance for parties.