



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 313 OF 2015

THE AGRICULTURE, FISHERIES & FOOD AUTHORITY

(PYRETHRUM & OTHER INDUSTRIAL CROPS DIRECTORATE)...APPELLANT/ APPLICANT

VERSUS

LEONARD MATU WANJAU.....RESPONDENT

RULING

1. This ruling is in respect of the Appellant/applicant application dated 7th December, 2020 filed under certificate of urgency on 9th December, 2020 via the firm of Murimi, Ndumia, Mbago & Muchela advocates seeking the following orders;

- 1) **THAT the Honourable Court be pleased to certify the matter as urgent and service thereof be dispensed with in the first instance.**
- 2) **THAT stay of execution of the Judgment/Decree herein be granted ex-parte in the first instance pending inter-parties hearing and determination of the instant application.**
- 3) **THAT stay of execution of the Judgment/Decree herein be granted pending hearing and determination of the intended appeal to the Court of Appeal.**
- 4) **THAT the Honourable Court be pleased to halt the sale of the Appellant/Applicant's motor vehicles by the Respondent through Auction.**
- 5) **THAT the Honourable Court be pleased to grant leave to the Appellant/Applicant to file a notice of appeal in the Court of Appeal against the whole Judgment/Decree herein delivered on 18th July 2019.**
- 6) **THAT the notice of appeal annexed herein be deemed as duly filed upon payment of the requisite court fees.**
- 7) **THAT the costs of this application be provide for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by **Mr. James Kimuttai** on 7th December, 2020 on the following grounds: -

- (a) **THAT Judgment in this suit was delivered on 18th July, 2019 in favour of the Respondent against the Appellant/Applicant and a decree drawn with the Decretal amount being Kshs. 2,301,384.80/- plus costs and interest.**
- (b) **THAT the Appellant/Applicant's advocates on record duly advised the Appellant's Head of Legal Affairs of the terms of Judgment/Decree herein.**
- (c) **THAT soon after the terms were relayed to the Appellant's Head of Legal affairs, the said head of legal affairs underwent a transfer removing from his job placement within the Appellant's management structure, as is normal for Civil Servants employed by the Government.**
- (d) **THAT unfortunately, he did not inform his successor of the suit herein nor the Judgment /Decree or the terms thereof. therefore,**

the Appellant's Office file in relation to this suit herein remained unattended until the Appellant's Interim Head of Legal Affairs was served with a Proclamation Notice and with Warrants of Attachment.

(e) THAT due to the nature of transfers/internal movement/shifting of government employees the officer in charge was transferred and unable to revert with instructions authorizing the filing of the appeal within the requisite period.

(f) THAT the delay in lodging the appeal was an inadvertence on the part of the Appellant's officer and a result of human error which mistake was honest and unintended. Further that, the Appellant moved with speed to instruct its advocates on record to file the application herein and to lodge an appeal against the Judgment/Decree, herein delivered on 18th July, 2019.

(g) THAT further, the prevailing conditions of the prevalence of the Covid 19 pandemic have further aggravated the delay in filing the application herein as well as the intended appeal to the Court of Appeal as there has been downscaling of government operations within government offices such as the applicant's office herein.

(h) THAT as such the delay in filing the intended appeal is not inordinate and is excusable in the circumstances, the same having been borne of the inadvertent mistake occasioned by the transitional challenge of an officer in the Appellant's legal department as well as the prevailing global pandemic.

(i) THAT the Appellant herein is desirous of prosecuting an appeal against the whole of the Judgment/Decree herein delivered on 18th July 2019 which intended appeal is arguable in that the Appellant/Applicant disputes the principles relied on by the Trial Court in awarding Kshs. 2,301,384.80 to the Respondent as unpaid salary for the period he was in suspension.

(j) THAT the issues intended to be raised on appeal ought to be determined at the Appellate level and on merit and that as it stands execution of the Judgment/Decree herein is proceeding, there being no stay of execution in place, much to the detriment of the Appellant which will occasion substantial loss and the intended Appeal rendered nugatory.

3. In opposing the application, the claimant/ Respondent, **Leonard Matu Wanjau**, swore a replying affidavit dated 11th January, 2021 and filed in this Court on 13th January, 2021 on the following grounds;

a) That the current application is untenable, misconceived and an abuse of the court process, having not met the well settled principles of invoking the discretion of the court to grant the orders sought.

b) THAT the suit herein was instituted on 21st October 2015, heard in early 2019 and judgement delivered on 18th July, 2019.

c) THAT he was employed by the Applicant as a field officer by a letter of 8th December, 1992. However, he was suspended with effect from 19th September, 2009, which suspension lasted up to 25th August, 2014 when his employment was terminated giving rise to this cause which was decided in his favour as against the applicant/ appellant.

d) THAT this Honourable Court made a sound decision in that, it solidly based its finding on the existing statutes, and as such the intended appeal does not have any chances of success.

e) THAT the Applicant was very much aware of the fact that the judgement of this Honourable Court was well reasoned and incapable of displacement and that explains the reason why the Applicant did not immediately institute any appeal proceedings against it as it was contended with it.

f) THAT the aforesaid judgement was delivered in the presence of the Applicant's Advocate who did not seek for stay of execution or indicate any intentions of seeking for instructions to appeal against the said judgement.

g) THAT after the delivery of judgement, he instituted taxation proceedings and served the applicant's advocate for interpartes hearing on 20th November, 2019 as evidenced in the affidavit of service annexed herewith.

h) THAT there is inordinate delay in filing the current application and no plausible reasons have been advanced substantively to support the farfetched excuses alleged to have befallen the Applicant.

i) THAT the deponent in the application herein is incompetent as he purports to depose on matters that were not within his domain. Further that, the said deponent has been in the Applicant's legal department for a long time, and was involved and participated during the hearing of this suit by instructing the Applicant's witness to testify on its behalf.

j) THAT the Applicant has not attached an affidavit of the purported interim Head of Legal Affairs to shed light on when he assumed the office, the alleged transfer of his predecessor and how the current matter escaped his attention until when he was served with a proclamation notice. In any event, the proclamation notice was served upon the Applicant on 19th November, 2020, and there being no response from the Applicant, the auctioneers attached the Applicant's motor vehicles on 26th November, 2020 and advertised on 2nd December 2020 for sale on 9th December, 2020, which the Auctioneers realized a sum of Kshs. 1,540,000/.

k) THAT as a result of the aforesaid public auction, a sum of Kshs. 1,088,735/- was forwarded to his Advocates, therefore the prayer for stay of execution has partially been overtaken by events

l) THAT the Applicant has not demonstrated the irreparable loss that it is likely to suffer if execution proceedings continue, and taking into account the fact that his salary for the period between 19th September 2009 to 25th August 2014 had unlawfully been withheld by the Applicant, on the contrary, he is the one who has suffered loss and will continue to suffer loss if there is stay of execution.

m) THAT the Applicant should not sway this Court into granting stay of execution on the basis that its intended appeal will be rendered nugatory, as it has been held that execution of a money decree cannot render an appeal nugatory, as there is a remedy of refund, which he undertakes to comply with if ordered.

n) THAT in view of the foregoing, the current application is purely and afterthought, and has been brought in bad faith and lacks merits and as such prayed for it to be dismissed with costs.

4. The parties herein agreed to canvass this application by way of written submission with the applicant filing its on 2nd March, 2021 and the claimant/ Respondent filed on 9th March, 2021.

Applicant's submissions.

5. The Applicant submitted that, it is not disputing the facts of the case, rather it is disputing the award made by the trial court and the principles relied upon while making the said award. It therefore argued that it has an arguable Appeal. He argued that an arguable appeal has been described as an appeal that is not necessarily expected to succeed but one which there is at least one issue upon which the court should pronounce itself and cited the case of **Kenya Tea Growers Association –versus Kenya Planters & Agricultural Workers Union [2012]eklr.**

6. The applicant submitted that, the claimant was indeed suspended from its employ on 19th September, 2009 and later charged with criminal offense of stealing by Servant in **Nyahururu Criminal case number 935 of 2010** and found guilty. Further, that the disciplinary process against him found that the claimant was culpable and thus was dismissed. The respondent thus argues that since the claimant was found guilty in the criminal case and culpable in the internal disciplinary process, he ought not be paid any single cent during his suspension. It buttressed this line of thought by relying on the case of **Grace Gacheri Muriithi –versus- Kenya Literature Bureau [2012] eklr** where the court held that;

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.”

7. Accordingly, the applicant argues that it is disputing the outcome of the Trial Court since the trial court applied a wrong principle and arrived at a wrong finding.

8. On whether the appeal will be rendered nugatory, the applicant submits that, the claimant has so far received Kshs 1,540,000.00 in the partial execution of the decree and now intends to execute further to recover a further sum of Kshs. 1,784,690.00, which according to the applicant is a colossal sum that can be preserved pending the intended appeal. Further that the Claimant has not demonstrated that he is a man of means who is capable of refunding the said sum paid in the event the Appeal succeeds. In this it cited the case of **Kenya Orient insurance Co Ltd –versus- Paul Mathenge Gichuki & another [2014] eklr** where the court held that;

“The burden of proof that the respondent can refund the decretal sum if the appeal succeeds shifts to the respondent the moment the appellant states that it is unaware of the respondent's resources.”

9. The applicant also cited the case of **National Industrial Credit Bank Ltd –Versus Aquinas Francis Wasike & Another** where the court held that ;

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

10. Accordingly, the applicant submitted that it is apprehensive that the claimant may not be in a position to refund the decretal sum if further execution is not stopped by this Court.

11. On the issue of inordinate delay, the Applicant, submitted that the delay was occasioned by the transfer of its head of legal affairs, who inadvertently did not give direction on this file. Further that the Novel Covid- 19 exacerbated matters culminating to downscaling of operation at all government offices. It was therefore argued that the delay is not inordinate and the same ought to be excused by this Court

and relied on the case of **Philip chemwolo & another –versus- Augustine Kubede [1982-1988] civil appeal 103 of 1984 KLR 103.**

12. The applicant, in conclusion urged this Court to exercise its discretion and allow the application as prayed.

Claimant/ Respondent’s Submissions.

13. The claimant reiterated his replying affidavit and submitted that, the applicant has not given cogent reasons to warrant the issuance of the orders sought. further that the reason advance by the applicant blaming Covid -19 on the delay should be disregarded as the said pandemic was declared a pandemic in Kenya mid-March 2020. Further that, the judiciary functions and government function were scaled down not shut down as alleged.

14. He submitted that the applicant has failed to disclosed the name of the head of legal affairs who was transferred, neither has it attached a letter of transfer or an affidavit confirming the said allegations thus raising doubt as to the existence of the pleading facts.

15. The claimant took issue with the disposition of the respondent’s deponent, and submitted that the said deponent has failed to indicate when he assumed the said office therefore cannot authoritatively swear an affidavit on behalf of the respondent/ Applicant.

16. It was submitted that an employee under suspension is deemed to be an employee until he is dismissed. He placed his reliance on the case of **James Njuguna Muchiri –versus- Armed Forces canteen organization (AFCO) [2016] eklr** where the court held that;

“28. A significant ground of appeal is whether the trial court erred in not awarding the appellant accumulated salary arrears for the period December 2001 to June 2006. The appellant was suspended from duty on 3rd December 2001 and terminated from employment in June 2006. What was the status of the appellant during this period? Was he an employee of the respondent and if so, was he entitled to payment of his monthly salary? In other words, is an employee on suspension entitled to monthly salary?

29. Several facts on record lead us to conclude that between December 2001 and June 2006, the appellant was an employee of the respondent. First, he was suspended from duty and suspension is not termination of employment. Second, the Board of the respondent met and deliberated on the appellant’s conduct; the Board would not have met to discuss a person who was not an employee of the company. Third, the respondent by writing the letter of termination acknowledged the fact that they were terminating the appellant who was its employee; by this letter, the Board impliedly, if not expressly, was admitting that there was an employer-employee relationship between the parties. Based on these facts, we hereby find that during the period 3rd December 2001 and June 2006, the appellant was an employee of the respondent; we find and hold that he was an employee on suspension. We are of the considered view that the trial court erred in failing to consider and determine the status of the appellant and his entitlements for the period 3rd December 2001 and June 2006.”

17. He further cited the case of **Paul Billy Nyagilo –versus- East African Portland cement co ltd [2018] eklr** where the court held that;

“The Claimant stayed on suspension until 18th November 2010, when he was summarily dismissed. During this period, he was not paid any salary. The decision to withhold the Claimant’s salary during suspension was based on Clause 12.10, which provides that no salary is payable during suspension. The Claimant faults this policy on two scores:

a) First, that it is flies in the face of Section 18(4) of the Employment Act, 2007 which provides as follows:

(4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of dismissal.”

18. The claimant further submitted that, when the respondent placed the claimant on suspension for 59 months and 11 days, the disciplinary process was negated as was held in the case of **Edith Kathure Munyua –versus- Moi Teaching and Referral Hospital and 3 others[2019] eklr** where the court held that;

“On the other hand, it is well established that disciplinary process should be concluded within a reasonable time especially where an employee has been placed on suspension with or without pay. This principle is on the basis that an employee ought not to be subjected to unfair labour practice in violation of Article 41 of the constitution and that any administrative action taken against an employee should be expeditious, efficient, lawful, reasonable and procedurally fair in terms of Section 47(1) of the constitution as read with Section 4 of Fair Administrative Action Act, 2015.

17. The conduct by the respondent of placing the claimant on suspension without pay from 16th August 2012 to the date of termination on 20th July 2016 about four (4) years, is conduct that is not reasonable, expeditious, efficient, lawful and procedurally fair. This is the position regardless of the eventual outcome of the process.”

19. He also submitted that the fact that the claimant was found guilty of a criminal offense does not discharge an employer from paying the said employee his entitlement during the said suspension. This reasoning was upheld by the court in the case of **Paul Ngeno –versus- pyrethrum board of Kenya [2013] eklr** that court held that;

“As to whether the outcome in the criminal case was binding upon the respondent, the court holds that the acquittal in the criminal case was binding upon the respondent as the conclusive finding on the allegations leveled against the claimant... The court upholds its opinion that in employment disciplinary cases where the criminal element exists in the opinion of the

employer, the employer has an election to conduct the investigations using the internal administrative systems or to report to the relevant criminal justice agency and in which event the agency's findings would be binding upon the employer in that matter as was held to be the position in the case of Patrick Njuguna Kariuki –Versus- Del Monte (K) Limited, Cause No. 9523 of 2011.

Accordingly, to answer the first issue for determination, the court finds that the claimant is entitled to the withheld half pay during the interdiction and full pay during the suspension up to the date of the acquittal.”

20. The claimant therefore submitted that the application by the respondent/ Applicant lacks merit and urged this Court to dismiss the same and allow him proceed with execution to satisfy the decree of this Court issued on 18th July, 2019 .

21. I have examined the averments of the parties herein and submissions filed. The applicant seeks stay of execution over a Judgment delivered on 1st July, 2019 as they wish to pursue an appeal at the Court of Appeal.

22. No appeal has since been preferred and time for filing an Appeal has since lapsed. It is not clear upon what premise a stay order can be granted as there is no pending Appeal at the Court of Appeal.

23. The delay in filing an appeal is also not excusable 3 years down the line.

24. In my view the prayer for stay of execution is not merited and is therefore denied and dismissed.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF APRIL, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Munyiri for applicant – present

Nderitu for respondents – absent

Court Assistant – Fred