



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**PETITION NO.135 OF 2016**

**OBUYA BAGAKA.....PETITIONER**

**VERSUS**

**KENYA SCHOOL OF GOVERNMENT.....RESPONDENT**

**RULING**

The petitioner filed application dated 22<sup>nd</sup> February, 2021 under the provisions of section 12(3) of the Employment and Labour Relations Court Act and Rule 28(1) of the Employment and Labour Relations Court (Procedure) Rules and seeking for orders that;

- a) Pending the hearing and determination of this application, an order of stay be issued staying the execution of the judgement of the court delivered on 26<sup>th</sup> January 2020 [2021] and any decree arising therefrom directing the applicant/petitioner to pay the respondent Ksh.556,069 s well as vacate the respondent's house within one month from the date of this judgement. For the avoidance of doubt that the status quo before the judgement was delivered on 26<sup>th</sup> January, 2021 be maintained.*
- b) The respondent acting directly or indirectly be barred/prohibited from repossessing/evicting the applicant/petitioner from the house that he currently occupies until the respondent has fully settled the amounts awarded to the applicant/petitioner by the court or otherwise as the Court of Appeal will determine.*
- c) The applicant/petitioner be at liberty to apply for further Orders and/or Directions as the court may deem fit and just to grant.*
- d) Costs of this application be provided for.*

The application is supported by the petitioner's Affidavit and on the grounds that judgement herein was delivered on 26<sup>th</sup> January, 2021 where the court held that he was entitled to payment of 10 months' salary in compensation for unfair termination of employment and damages for breach of constitutional rights at ksh.3 million. The court allowed the respondent's cross-petition holding that the respondent is entitled to payment of rent of Ksh.556,069 as well as vacant possession of their house occupied by the petitioner within one month from the date of judgement.

Other grounds in support of the application are that upon the judgement of the court the respondent filed Notice of Appeal on 1<sup>st</sup> February, 2021 and which appeal has not been filed.

The petitioner was directed to vacate and hand over the house allocated by the respondent within 30 days from the date of judgement failure to which the respondent was at liberty to execute the decree. The petitioner is therefore faced with threat of eviction whereas he has not been paid his dues so as to look for alternative housing and hence seek stay of execution of the order requiring him to pay the respondent Ksh.556,069 and to vacate the respondent's house which he currently occupies.

The petitioner stands to suffer irreparable loss and injury if the orders sought are not issue as he will be deprived shelter yet the respondent has not paid him compensation and damages that he requires to pay rent and seek alternative accommodation. The petitioner is unemployed and has a family that requires a home.

The petitioner intends to file a cross-appeal to the Court of Appeal against the orders requiring him to pay rent and vacate the house so it would be best to preserve the status quo so as not to render the intended appeal nugatory. Unless stay is granted the judgement of the court will be rendered nugatory and the petitioner rendered homeless and occasioned grave loss and damage. The petitioner is willing to abide any condition issued by the court upon the grant of stay.

In his Supporting Affidavit the petitioner following judgement herein on 26<sup>th</sup> January, 2021 he intends to file appeal and seek stay of execution of the judgement. The application has been filed without delay and in the interests of justice, stay of the judgement be issued and he be allowed to continue occupation of the respondent's house as he has not been paid his dues to afford new hosing or pay the ordered rent.

In reply, the respondent filed the **Replying Affidavit of Dr. Nura Mohamed** the director of finance and administration and avers that on the orders sought by the petitioner and seeking stay of execution and that the respondent be barred from repossessing/evicting him from the house he is currently occupying until the respondent has fully settled the amounts awarded to the petitioner, on 8<sup>th</sup> November, 2016 the petitioner filed a similar application and there is a ruling delivered on 21<sup>st</sup> April, 2017 and dismissed it on the finding that employment had terminated and the matter to proceed to full hearing. The petitioner filed appeal to the Court of Appeal and judgement therefrom was delivered on 5<sup>th</sup> April, 2019 dismissing it.

Despite not having an order of stay, the petitioner has continued to occupy the respondent's house after his dismissal from employment in October, 2016 and has since adamantly refused to vacate and at the hearing the respondent asked for an order of eviction and for payment of rent and *mesne profits*. The court in judgement directed the petitioner to pay the respondent Ksh.556,069 and to vacate the house within one month.

The order for vacant possession was not conditional. The petitioner should not be allowed to change the judgement terms.

Dr. Mohamed also avers that the petitioner has not filed a Notice of Appeal and this court stands *functus officio* upon its judgement. The petitioner cannot re-litigate a matter already addressed as this is *res judicata*.

In his evidence before court, the petitioner admitted to owing the respondent ksh.556,069 and that he was in occupation of its house since employment terminated. He has no right to stay of execution pending the hearing of an appeal. There is no appeal filed. The application should be dismissed with costs.

Both parties filed written submissions.

The petitioner submitted that his application is based on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and which requires that an order of stay shall only issue where an applicant has satisfied that there is likelihood of substantial loss where stay is not granted, the application is made without undue delay and the applicant is willing to give security for the due performance of the judgement as held in **Butt v Rent Restriction Tribunal [1982] KLR**. That a court should not refuse to grant stay if there are good grounds for granting it and merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

The petitioner also submitted that the special circumstances of his case is that he has been unemployed from the year 2016, Covid – 19 and struggling economy have made it difficult for him to secure new employment and has been staying in the respondent's premises since his unlawful dismissal in 2016. He stands to suffer substantial loss unless the order of stay is granted. The respondent has not paid him compensation and damages so as to be able to fund alternative accommodation. It is only fair for the respondent to pay damages simultaneously allowing the petitioner to look for alternative accommodation and by doing so the court will alleviate any undue hardship the petitioner would suffer if stay is declined.

The petitioner also submitted that he is entitled to accessible and adequate housing under Article 43 of the constitution as held in **Satrose Ayuma & 11 others v Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3**

**others.** any eviction from his current housing will be in violation of article 28 of the constitution and this application having been made without undue delay should be allowed. He is willing to deposit security for the due performance of the decree and the respondent shall not suffer any prejudice if the application is allowed.

The matter is not *res judicata* as alleged as under Order 42 Rule 6 the petitioner has the right to seek for stay of execution of the judgement herein delivered on 26<sup>th</sup> January, 2021. The previous ruling related to a ruling delivered on 21<sup>st</sup> April, 2017.

The respondent submitted that the petitioner's application is a *res judicata* and that the Court should not entertain it. The application seeking stay of execution is made on the grounds that the petitioner was directed by the court to pay rent of Kshs. 556,069 and that the respondent is entitled to vacant possession of their house occupied by the Petitioner within 1 month from the date of the judgment.

The Petitioner as an employee of the Respondent enjoyed the benefit of institutional housing governed by the Respondent's Terms and Conditions of Service which provide that if one is removed from employment the housing benefit must be surrendered. The Employment and Labour Relations Court had already decided the matter of stay in circumstances where the Petitioner's contract of service was terminated and his application to stay the termination had been denied. Hence the application dated 8th November 2016 and the Ruling on that application on 21st April 2017 where court dismissed application for stay of the termination.

The petitioner filed Civil Appeal No.128 of 2017 **Obuya Bagaka v Kenya School of Government[2019]eKLR** and similarly declined stay and upheld the finding of this court. The Supreme Court in **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR** considered and determined an issue whether a matter previously determined by a court of competent jurisdiction between the same parties was barred by the doctrine of *res judicata* to prevent a litigant from engaging in multiplicity of suits.

In this case, the court having determined the issue of stay of termination of employment and occupation of the housing allocated to the petitioner, such matter cannot be revisited.

The respondent also submitted that The Petitioner avers that he intends to cross-appeal according to the Court of Appeal Rules once the

Respondent has appealed. He intends to appeal against the orders to vacate the Respondent's institutional housing and to pay *mesne profits* for the period he has continued to stay in the house after his employment was terminated. The housing was a benefit running with the employment. Three different courts have recognised that fact and found that in the circumstances of the case the Petitioner is not entitled to the benefit. Section 17 of the Employment and Labour Relations Court Act provides that appeals from the court lie to the Court of Appeal on fact and law as of right in accordance with Article 164(3) of the Constitution of Kenya, 2010.

The orders sought are not deserved and the application should be dismissed with costs.

### **Determination**

The gist of the petitioner's application is that an order of stay be issued staying execution of the judgement herein directing him to pay the respondent Ksh.556,069 and to vacate the respondent's house within one month from the date of judgement.

The petitioner is also seeking that the respondent be barred/prohibited from repossessing/evicting him from the house that he currently occupies until the respondent has fully settled the amounts awarded to him by the court or as the Court of Appeal will determine.

The application for Stay of execution is therefore based for the reason the petitioner should not be evicted from the house he currently occupies *until the respondent has fully settled the amounts awarded to him by the court or as the Court of Appeal will determine.*

Firstly, the court has since rendered itself vide judgement delivered on 26<sup>th</sup> January, 2021. The petitioner has not filed any appeal.

Secondly, there is no Notice of Appeal filed by the Petitioner with regard to any intention to proceed to the Court of Appeal. There is no determination of the Court of Appeal that is pending with regard to the subject matter.

And thirdly, stay of execution is well governed under Order 42 Rule 6(2) of the Civil Procedure Rules. The petitioner has well addressed the case of **Butt v Rent Restriction Tribunal [1979] eKLR** that the order of stay of execution is discretionary and should be issued to secure an appeal so that it cannot be rendered nugatory, consider the special circumstances of the case and where there is offer of security for the due performance of the judgement. The court held that;

- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.*

Has the petitioner satisfied these conditions?

The judgement of the court on 26<sup>th</sup> January, 2021 was that;

*155. Having determined that the dismissal of the Petitioner was unfair and unjustified it is my finding that the Petitioner is entitled to the following remedies:-*

- 1. 10 months' salary as compensation for the unfair dismissal.*
- 2. A declaration that the Respondent's action and conduct amounts to denial violation of the Petitioner's fundamental rights and freedom under Articles 41 and 47 of the Constitution of Kenya.*
- 3. A declaration that the actions and conducts of the Respondent are in breach of the Fair Administrative Action Act, its own Terms and Condition of Service Manual and Rules of natural justice.*
- 4. The Petitioner is entitled to damages equivalent to 3 million for breach of his constitutional rights.*
- 5. The Petitioner is also entitled to any back pay from time of interdiction to time of dismissal.*
- 6. The Respondent is entitled to payment of rent equivalent to Kshs 556069.*
- 7. The Respondent is also entitled to vacant possession of their house occupied by the Petitioner within 1 month from the*

*date of this judgment.*

**8. The Respondent will pay costs of this Petition plus interest at Court rates with effect from the date of this judgement.**

My reading of these orders is that each is distinct and independent. None is conditional and inter-related.

The respondent is directed to pay the claimant compensation and damages.

The claimant is also directed to pay the respondent rent and to vacate the house and property of the respondent within one month of the judgement.

The payment of rent is addressed by the court under paragraph 154 of the judgement and on the grounds that the petitioner admitted to owing this amount of Ksh.556,069.

The application for a check off of the rent due was not granted. This amount is due from the petitioner and payable to the respondent. vacant possession of the house occupied by the petitioner was to be within one month.

In employment and labour relations, the work benefits given by an employer cease with cessation of employment. this cannot be extended pending a determination by the Court of Appeal, which is not the case here, since the court has rendered itself in judgement and there is no appeal pending. Even where there was an appeal pending, stay of the instant judgement is governed by principles as set out above.

Without the claimant filing an appeal and dissatisfied with the judgement, there was the option to file for a review. On the positive orders, the petitioner has the right to execute.

Where the petitioner was to address the terms of the judgement and to address why he should not be evicted from the house he currently occupies until the respondent has fully settled the amounts awarded to him by the court or as the Court of Appeal will determine a review application and not an application for stay should have sufficed. With good legal representation, the court takes it the instant application for stay was on purpose save the orders sought and the grounds thereof do not satisfy the court to apply its discretion and allow.

On the judgement of the Court on 26<sup>th</sup> January, 2021 the petitioner was directed to allow vacant possession of the house he currently occupies within one month. Upon filing the instant application the court issued interim stay which has applied to date. Employment terminated in October, 2016 and the petitioner has remained in the respondent's housing since. Without going back on the merits of the judgement herein, there is determination of the rent due and surrender of the housing within a given time. to therefore go back on the matter would contrary to the principles of *res judicata* as the court has rendered itself.

**Accordingly, in the interests of justice application dated 22<sup>nd</sup> February, 2021 is found without merit save for the rule of law, the petitioner is given 30 days from the date hereof to render vacant possession of the respondents house he currently occupies. Costs awarded to the respondent.**

**Delivered in open court at Nairobi this 22<sup>nd</sup> day of April, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....