



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 188 OF 2017

JUSTINE NGUMA KITONYO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. On 27th July 2020, I delivered judgment in favour of the Claimant, made up of twelve months' salary in compensation and one month's salary in lieu of notice.
2. The Respondent was dissatisfied with my decision and sought to proceed on appeal to the Court of Appeal.
3. The Respondent therefore filed a Notice of Motion dated 11th August 2020, seeking stay of execution pending appeal.
4. The Motion is supported by an affidavit sworn on 12th August 2020, and a further affidavit sworn on 24th November 2020, by the Respondent's Deputy Director of Discipline, Catherine Kertich, and is based on the following grounds:
 - a) That on 27th July 2020, this Court delivered judgment in the matter, declaring the Respondent's decision to dismiss the Claimant irregular and awarding the Claimant 12 months' salary in compensation and 1 month's salary in lieu of notice;
 - b) That the Respondent is dissatisfied with the judgment of the Court and intends to appeal against the whole of the judgment and subsequent orders thereof;
 - c) That the cumulative sum awarded to the Claimant is fairly substantial and should the Claimant proceed to enforce the judgment in its present form, the Respondent stands to suffer irreparable loss as the Claimant may not be able to refund the decretal sum, in the event the intended appeal succeeds;
 - d) That the Respondent is apprehensive that the Claimant will move to execute the judgment;
 - e) That it is therefore in the interest of justice that the subject matter of the intended appeal be preserved;
 - f) That in the circumstances, it is in the interest of justice that a stay of execution be granted to enable the Respondent ventilate the intended appeal;
 - g) That the Claimant will not suffer any prejudice, in the event that the orders sought herein are granted.
5. The Claimant responded to the Respondent's application by his replying affidavit sworn on 8th December 2020.
6. The Claimant states that the grounds raised in the Respondent's Memorandum of Appeal, annexed to the application are not arguable and do not show any possibility of success.
7. The Claimant points out that he filed his claim on 7th March 2017 and that judgment was delivered on 27th July 2020; he maintains that it would be unfair to deny him the fruits of the judgment any further.
8. The Claimant states that he would be deeply prejudiced by any further delay as he has patiently waited for the judgment to enable him fend for himself and his family, as he is the sole bread winner.

9. The Claimant goes further to state that the fact that the process of execution has been put in motion, or is likely to be put in motion does not by itself, amount to substantial loss, because execution is a lawful process.

10. The Claimant adds that that he is able to refund the decretal sum in the event the Respondent's appeal succeeds.

11. The conditions under which an order of stay of execution pending appeal may be granted are set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules as follows:

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 performance of such decree or order as may ultimately be binding on him has been given by the applicant.

12. The Respondent posits that it has an arguable appeal which will be rendered nugatory unless an order of stay of execution is granted. The Respondent casts doubt as to the Claimant's ability to refund the decretal sum, were the intended appeal to succeed. In this regard, the Respondent flagged the Claimant's failure to file an affidavit of means.

13. The Respondent relied on several decisions notably; ***Kenya Medical Lab Technicians & Technologists Boards v Prime Communications Limited [2014] eKLR*** where the Court of Appeal stated:

"In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the Court.....And besides, an appeal is considered arguable even if it raises a single bona fide (sic) only."

14. The foregoing holding was restated by the Court of Appeal in ***Nairobi Women's Hospital v Purity Kemunto [2018] eKLR*** in the following terms:

"To say that an appeal is arguable is another way of saying it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues."

15. As regards the question as to what constitutes an arguable appeal therefore, the obtaining position is that the Court is not required to go into an inquiry as to whether the appeal will succeed; all the Court is required to do is to confirm that there is actually an appeal that is not frivolous. Looking at the Memorandum of Appeal filed by the Respondent, it seems to me that issues requiring further juridical interrogation have been raised.

16. With respect to the question whether the Claimant would be in a position to refund the decretal sum, in the event the Respondent succeeds on appeal, the Claimant was equivocal.

17. First, the Claimant did not file an affidavit of means and second and more significantly, he did not disclose details of his monthly income as a teacher in a private school. Indeed, the Claimant depones that he is a sole bread winner and has been waiting for the decretal sum to fend for himself and his family. All this left the Court in doubt as to whether the Claimant could actually refund the decretal sum, if the Respondent's appeal finally succeeds.

18. Looking at the post judgment events initiated by the Respondent, the Court did not find any evidence of delay and I will therefore let the issue rest.

19. Regarding the condition on security I have this to say; the Respondent, being a government body, is insulated by Order 42 Rule 8 of the Civil Procedure Rules, from the requirement for provision of security.

20. In the end, the Respondent's Motion dated 11th August 2020 is allowed with costs being in the appeal.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft

Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Ms. Kitoo for the Claimant

Ms. Kaluai for the Respondent