



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 143 OF 2018**

**SAMSON OLE KISIRKOL.....CLAIMANT/RESPONDENT**

**VERSUS**

**MAASAI MARA UNIVERSITY.....RESPONDENT/APPLICANT**

**RULING**

1. This ruling is in respect of the Respondent/applicant's application dated 8<sup>th</sup> October, 2020 filed under certificate of urgency on 9<sup>th</sup> October, 2020 via the firm of Lubullelah and associates advocates pursuant to rule 17 to the Employment and Labour Relations Court (procedure) rules, sections 1A, 1B, 3A, 6 and 63(e) of the Civil Procedure Act, Order 22 Rule 22, Order 38 Rule 2, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions, seeking the following orders;

- 1) **That this application be certified as urgent and prayer 2 hereof be granted ex-parte in the first instance, pending the hearing and determination of the application.**
- 2) **That there be stay of proceedings herein pending the hearing and determination of Civil Appeal No. 255 of 2018- Maasai Mara University –v- Samson Ole Kisirkoi, being an Appeal against the decree and judgment delivered by Hon. Justice D.K Marete by which the claimant was reinstated into employment with the Respondent/ Applicant.**
- 3) **That the Costs of this Application be in cause.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 8<sup>th</sup> October, 2020 by the, **Eugine Lubale Lubullelah**, the advocate ceased of this matter and based on the following grounds: -

- (a) That the cause of action herein being, the legality of the Notice of retirement dated 22<sup>nd</sup> May, 2017, is grounded upon the employment of claimant by the Applicant.
- (b) That, prior to the cause of action herein the claimant had been dismissed by the applicant for gross misconduct but he was reinstated to employment on 31<sup>st</sup> January, 2018 by Justice D.K N. Marete vide Kericho Petition Number 8 of 2018.
- (c) That the Applicant appealed against the decision in Kericho Petition number 8 of 2018 in Nairobi Appeal No. 255 of 2018 and sought for stay via Civil Appeal Application Number 23 of 2018 which was granted on 31<sup>st</sup> May, 2018.
- (d) That the proceedings herein offend the provisions of section 6 of the Civil Procedure Act and therefore ought to be stayed.
- (e) That the applicant has an arguable appeal with overwhelming chances of success and that unless these proceedings are stayed its appeal will be rendered nugatory when they have stay orders issued by the Court of Appeal.
- (f) It prayed for the application to be allowed as prayed.

3. In opposing the application, the claimant, **Samson Ole Kisirkoi**, swore a replying affidavit on the 21<sup>st</sup> October, 2020 and filed in this Court on 13<sup>th</sup> November, 2020 on the following grounds;

- a) That the issues for determination in Kericho ELRC Petition 8 of 2018 related to unfair termination which was decided by the learned Justice Marete in his favour and he was reinstated to employment however the issue in this cause is with regard to retirement Notice which issues are different and thus does not offend section 6 of the Civil Procedure Act.

b) That the stay Orders issued by the Court of Appeal was with regard to implementation of the decree issued by Justice Marete on reinstatement and payment of damages for unfair termination which got nothing to do with retirement issue the cause of action in this suit.

c) It is contended that the Court of Appeal did not find the reinstatement untenable as alleged. further that even if the Court of Appeal sets aside the decree by Justice Marete then the issue of retirement will not have been dealt with as such will still need to be considered by this Court.

d) It is stated that the contention whether the matter herein offends section 6 of the civil procedure Act was determined by the court by its ruling delivered on 7<sup>th</sup> February, 2019 in application dated 14<sup>th</sup> May, 2018 and the Application dated 12<sup>th</sup> June, 2018 to the effect that the issue raised in the two suit were different.

e) He therefore opposed the application and stated that there is no prejudice that will be occasioned on the applicant if the application is not allowed, also that the application is a delay tactic and prayed that the same be dismissed.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 19<sup>th</sup> November, 2020 and the Respondent filed on 16<sup>th</sup> November, 2020.

#### **Applicant submissions**

5. The applicant maintains that the issue in this case which is with regard to the legality of the Notice of retirement dated 22<sup>nd</sup> May, 2018 was pleaded together with other prayers which issues are grounded upon the employment of the respondent which is now subject of an Appeal and stay Orders issued to stay and execution thereof. Further that if the Appeal succeeds then the Retirement notice will have no effect.

6. It was submitted that, the Applicant has satisfied the conditions necessary for grant of stay Order envisioned under Order 42 Rule 6 of the Civil Procedure Rules and cited the case of **Global tours and Travels Limited –v- Nairobi H.C Winding up cause No. 43 of 2000**.

7. He argued that if the stay Orders are not granted then the Appeal will be rendered nugatory and cited the case of **Director General National Intelligence Service and another v- Vincent Konga Chelimo [2019] eKLR**. Further that it does not know the financial worth of the applicant, who if paid the decretal sum will not be in a position to refund if the appeal succeeds as his financial worth is not known.

8. He concluded by submitting that the respondent will be compensated by damages in the event the appeal does not succeed therefore will not suffer any prejudice if the stay is granted in the interim.

#### **Respondent's submissions**

9. The Respondent/Claimant submitted that the issues raised in Kericho Petition 8 of 2018 was on unfair termination of the respondent's employment while the current case seek the Courts determination with regard to legality of a retirement Notice issued by the Respondent Dated 22<sup>nd</sup> May, 2017 which changed the terms of engagement of employment of the respondent. Therefore, he argued that the issues are substantially different and are not in any way contravening section 6 of the Civil Procedure Act.

10. It was argued that the decision of Court of Appeal whether it goes against or for the appellant does not in any way affect the issue for determination in this case. Further that the stay granted to the appellant was with regards to execution of Orders in Petition 8 of 2018 and not in any way with regards to this suit.

11. It was submitted further that the issue whether the two matter are similar to occasioned the appeal to be nugatory was determined by this Court in the applications dated 14<sup>th</sup> May, 2018 and 12<sup>th</sup> June 2018 by the Respondent and the Applicants respectively that the issues are different.

12. On the issue of costs the respondent prayed that the application be dismissed and he be paid costs of this application.

13. I have examined the averments of the parties herein. The applicants herein seek stay of proceedings in this case pending the hearing and determination of C.A. No.255/2018.

14. C.A No.255/2018 emanates from the decision of Marete J in Kericho Petition No. 8/2018. In C.A 255/2015, the Court of Appeal granted stay orders.

15. The applicant avers that the 2 matters Petition 8/2018 and this cause 143/2018 are inter-related and therefore stay of proceedings should be allowed.

16. The respondents oppose this application and aver that the two matters are different as this cause relates to retirement whereas Petition 8/2018 related to reinstatement.

17. The respondent further argues that whether the matters are similar or not to render the appeal nugatory was determined by this court in Application dated 14<sup>th</sup> May, 2018 and 12<sup>th</sup> June, 2018 that the two matters are different.

18. I note that vide a ruling of J. Mbaru on 23/9/2020, this court declined to grant orders sought therein and decided that the matter proceeds for hearing for the determination of the issues raised.
19. The issues related to a retirement notice and not to issues raised in Petition/2018 which relate to the reinstatement of the claimant.
20. In my view, the two issues are materially different and the issues raised in the application of 13/9/2018 can only be determined by having this matter fully determined.
21. I do not see how hearing this cause will be prejudicial to the respondents nor make the pending appeal nugatory.
22. I find the application to stay proceedings herein not merited and I order this claim to proceed for determination on merit.
23. Costs in the cause.

Ruling delivered virtually this 15<sup>TH</sup> day of JULY, 2021.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Lubullelah for Respondent/applicant present

Claimants – absent

Court Assistant – Fred and Wanyoike