



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

JUDICIAL REVIEW NO. E004 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF TRADE UNIONS,

MINISTRY OF LABOUR AND SOCIAL PROTECTIONS.....RESPONDENT

AND

THE HON. ATTORNEY GENERALINTERESTED PARTY

KENYA UNION OF CLINICAL OFFICER – EX-PARTE APPLICANT

RULING

1. Before me, for determination is the Ex-parte Applicant’s Notice of Motion Application dated 23rd June, 2021. It seeks the following orders **THAT**:

- a) **THAT** this application be and is hereby certified as urgent and heard *ex parte* in the first instance.
- b) **THAT** this Court be and is hereby pleased to grant an interim **ex parte** order of stay of execution of the Respondent's circular Ref No. ML&SP/TU/Elections/2021 dated 25th September 2020 in so far as the circular relates to the Applicant pending the **inter partes** hearing and determination of this Application.
- c) **THAT** this Court be and is hereby pleased to grant an order of stay of execution of the Respondent's circular Ref No. ML&SP/TU/Elections/2021 dated 25th September 2020 in so far as the circular relates to the Applicant, pending the hearing and determination of the appeal herein.
- d) **THAT** this Court be and is hereby pleased to grant an interim **ex parte** order of stay of execution of the judgment and decree given on 17th June 2021 pending the **inter partes** hearing and determination of this Application.
- e) **THAT** this Court be and is hereby pleased to grant an order of stay of execution of the judgment and decree given on 17th June 2021 pending the hearing and determination of the already preferred appeal and/or further directions of this court.
- f) **THAT** the costs of this application be provided for

2. This Application is premised on the grounds **THAT**:

- (i) A judgment was delivered in this matter on the 17th June, 2021 by Hon. Lady Justice Maureen Onyango which directed the Applicant to hold elections by 30th August 2021 and the applicant being aggrieved by the said judgment has preferred an appeal.
- (ii) The Ex-parte Applicant states that the judgment was delivered a day before the date it was scheduled in the absence of all the parties as such there was no order for Stay of execution and are apprehensive of eminent execution proceedings on the orders given

by the court.

(iii) The Ex-parte Applicant states that it has an arguable appeal therefore seeks the orders prayed for be granted as failure of which the applicants constitution will be rendered void and will defeat the objective of the applicant to its members.

3. The Application is further supported by the Affidavit of **GEORGE MAROAH GIBORE**, the General Secretary of the Ex-parte Applicant sworn on 30th June, 2021 in which he reiterates the grounds as set out on the face of the notice of motion application.

4. The Application is filed under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010.

Respondent and Interested Party's Case

5. In response to the application, the Respondent and the Interested Party has filed joint Grounds of opposition dated 16th July, 2021 in which he contends that the Ex-parte Applicant has not met the threshold for the grant of the Orders sought in their application.

6. They contend that the applicant has not demonstrated the detriment/prejudice they are likely to suffer if the election of the Respondent is conducted as per the circular of REF NO ML&SP/TU/Elections/2021.

7. Further they state that the Ex-parte Applicant has an option for nullification of the election once they succeed in the appeal.

8. They states that certified copies of the proceedings have not been exhibited to demonstrate the genuineness of the grounds listed in the attached Notice of Appeal and Draft memorandum of appeal.

9. They contend that the application is brought in bad faith and is a delaying tactic. They seek that the same be dismissed.

Rejoinder

10. The Ex-parte Applicant filed a supplementary affidavit sworn

by George Maroah Gobore the General Secretary of the Applicant sworn on 21st July 2021 in response to the grounds of opposition filed by the Respondent and the Interested Party.

11. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Ex-parte Applicant

12. The Ex-parte Applicant submits that it has met the threshold for the grant of the Orders sought in its Application as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and is entitled to the orders as prayed.

13. It further submits that the draft memorandum of appeal raises cogent issues intended to be argued before the court of appeal. That the orders prayed for if not granted the appeal will be rendered nugatory.

14. The Ex-parte Applicant relies in the case of **George Otieno Gache & another v Judith Akinyi Bonyo & 5 others [2017] eKLR** the Court of Appeal while dealing with an application for stay and injunctions pending an appeal explained the term an appeal being nugatory to mean a situation where *"the applicants' appeal if successful will be no more than an academic exercise as the situation may be irreversible and an award of damages may not be adequate"*.

15. The Ex-parte Applicant submits that if the court does not grant stay of execution of the judgment pending the determination of the already preferred appeal the Respondents will proceed to execute the orders given which will defeat the essence of the applicant's constitution.

16. The Ex-parte Applicant submits that the main reason they are appealing on the judgment is the timeframe given to conduct the elections being less than 30 days and elections require funds which it does not have as the elections are meant to be conducted in July 2022.

17. The Ex-parte Applicant submits that "Substantial loss" as a ground for Stay of Execution pending appeal was addressed by the court **In re Estate of M'Twarugoji M'Kirimunya (Deceased) [2021] eKLR** as follow: -

"The cornerstone consideration in any application for stay pending appeal must however remain the question as to whether the applicant will suffer substantial loss if stay of execution pending appeal is not granted. Substantial loss has been defined as a relative term and more often than not can only be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. In the contexts of this case, where there is no decretal sum to be paid or executed for, substantial loss must be a situation that would irreversible and that can only be avoided by the grant of stay of a threatened act. I have asked myself what it is that must be forestalled and which if not forestalled will put the applicant in such a prejudicial or disadvantaged position that would be irreversible after the appeal is heard and determined in his favour."

18. The Ex-parte Applicant submits that this is a non-monetary decree and the condition of security for due performance of the orders does not arise replying on the decision in **Praxades Okutoyi v Medical Practitioners and Dentists Board (2008) eKLR** where Visram, J. (as he then was) stated that:

“As this is not a money decree, no financial obligations are involved on either side, the issue of security does not arise...”

19. The Ex-parte Applicant prays that the application be allowed as the same was brought without unreasonable delay.

Respondent and the Interested Party’s Submissions

20. The Respondent and the Interested Party submit that an Applicant for stay of execution or an order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules and relies in the celebrated case of **Butt v Rent Restriction Tribunal (1979)** that set out the principles for granting of stay of execution.

21. They submit that the applicant has not met the pre-requisites of Order 42 Rule 6 as they have not demonstrated the substantial loss they would suffer if the orders are not granted. That it has also not demonstrated whether the application was brought without unreasonable delay nor provided any security for costs.

22. The Respondents and Interested Party submit that the Ex-parte Applicant’s right to determine its own administration and programs under the constitution is not absolute, and therefore can be limited in instances where the enjoyment of this right purports to infringe on the rights and freedoms of the members of the union under Section 34(2)(a) of the Labour Relations Act and Article 27 of the Constitution.

23. The Respondents submit that the Ex-Parte Applicant has not stated what loss if any it stands to suffer if the orders for stay are not granted.

24. The Respondent submits that the Ex-Parte Applicant should provide for security for costs and relies in the case of **Absalom Dova v Tarbo Transporters (2013) eKLR** stated;

“The discretionary relief of stay of execution pending appeal is designated on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation ...”

25. The Respondents submit that the Ex-parte Applicant has not offered to deposit security.

26. The Respondent submits that the instant application is an abuse of the court process as there is no prejudice that Applicant will suffer since there is no execution of judgment that would warrant any stay of execution.

Analysis and Determination

27. Upon considering the parties’ arguments and the evidence adduced, I find that the issue for determination is whether the Applicant meets the threshold for grant of the orders

sought.

28. **Order 42 Rule 6(2)** of the Civil Procedure Rules bars this Court from ordering stay of execution pending appeal unless –

- a) The Application is brought without inordinate delay.
- b) The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and
- c) The Applicant is willing to give security as the Court may deems fit to order.

33. Judgment in this suit was delivered on 17th June 2021. The Applicant filed notice of appeal on 18th June 2021. The current application seeking stay of execution pending appeal was filed on 1st July 2021. There is no doubt that the application was timeously filed.

34. The Ex-parte Applicant submits that it has an arguable appeal while the Respondent and the Interested Party submit that the application is an abuse of the court process and the holding of elections will not prevent the Ex-parte Applicant from appealing as he can always nullify the application if the appeal succeeds.

35. In the judgment herein, I held that Article XX of the Applicant’s constitution offends the provisions of Section 34(2) of the Labour Relations Act as it discriminates unfairly between incumbents and other candidates who may wish to vie for positions in the Union. I further held that the same Article XX of the Applicant’s constitution does not state the term of office of the interim officials, who by the suit herein and the instant application, seek to stay in office beyond the period set out in the circular from the Registrar of Trade Unions, the Interested Party herein, on the calendar of elections for trade unions.

36. As in national elections, the term of interim officials, or any officials who take office mid-term, must come to an end upon the calling of general elections, which is what the Interested Party did in the circular dated 25th September 2020 which the Applicant's wished to quash in the suit herein.

37. The orders sought by the Applicants would have the effect of keeping them in office illegally. As I stated in the judgment, the Applicants are interim union officials who have not been sanctioned by members through an election. They cannot use the Court to keep them in office illegally.

38. In **Butt v Rent Restriction Tribunal, (1992) KLR 417**, the Court made it clear that it is in the discretion of the Court to grant or refuse a stay. That what has to be judged in each case is whether or not there are particular circumstances in the case to make an order stay of execution. The Court will only grant or stay where special circumstances of the case so require.

39. In this case, the grant of stay orders sought by the Applicant's would participate as situation which the Court has already found to be in contravention of the law.

40. Again, as stated in the case of **Absalom Dova v Tarbo Transporter (2013) eKLR**, the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court. As such the order of stay should not introduce a disadvantage but administer the justice that the case deserves. This is in recognition that both parties have rights which the Court must balance.

41. In the instant case, the balance would be in favour of declining the orders which would have the effect of keeping the interim officials in office unlawfully in perpetuation of an illegality.

42. It is for these reasons, the application dated 23rd June 2021 is accordingly dismissed.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE