



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 4 OF 2020

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 230, 20, 22(3),
41(A)(B), 27, 28, 29, 47(2), 50 AND CONTRAVENTION OF THE RIGHT TO REASONABLE
WORKING CONDITIONS, FAIR REMUNERATION, EQUALITY, FREEDOM FROM
DISCRIMINATION AND FAIR ADMINISTRATIVE ACTION, FREEDOM
FROM TORTURE, DEGRADING TREATMENT AND FAIR TRIAL**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 LAWS OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007 LAWS OF KENYA

SECTIONS 5, 26, 45, 47 AND OTHER ENABLING PROVISIONS

AND

IN THE MATTER OF SALARIES AND REMUNERATIONS ACT NO. 10 OF 2011, SECTIONS 11, 12 AND 13

AND

IN THE MATTER OF SALARIES AND REMUNERATION COMMISSION ACT

(REMUNERATION AND BENEFITS OF STATE AND PUBLIC OFFICERS)

REGULATIONS, 2013

BETWEEN

CLIFORD OTIENO OBIERO

PETITIONER

v

LAKE BASIN DEVELOPMENT AUTHORITY

RESPONDENT

RULING NO. 3

1. Before the Court is a Motion dated 30 March 2021 and filed in Court on 8 April 2021 by the Lake Basin Development Authority (the Respondent) seeking orders:

(1) ...

(2) ...

(3) THAT this Honourable Court herein be pleased to order a stay of execution pending the intended appeal to the Court of Appeal.

(4) THAT the costs of this application be provided for.

2. Clifford Otieno Obiero (the Petitioner) filed a replying affidavit in opposition to the Motion on 24 May 2021.

3. The Respondent filed its submissions on 21 May 2021, whilst the Petitioner filed his submissions on 15 June 2021.

4. In support of the Motion, the Respondent contended that its intended appeal raised triable issues of law and fact; the Petitioner would not be able to repay the decretal sum if execution proceeded and that the interests of justice demanded that a stay of execution pending appeal be granted.

5. The Respondent cited the decisions in *Multi-Media University & Ar v Prof Gitile Naituli* (2014) eKLR, *Butt v Rent Restriction Tribunal* (1979) eKLR and *Kenya Shell Ltd v Benjamin Kibiru & Ar* (1986) eKLR.

6. On the part of the Petitioner, it was asserted that there were no triable issues demonstrated because the advanced grounds of appeal did not emanate or reflect the findings by the Court, an appeal had not been lodged within 60-days despite certified copies of proceedings having been ready by 5 February 2021, and that the Respondent only moved the Court after the execution had commenced and its properties proclaimed.

7. The principles upon which an order of stay of execution are granted are derivatives of Order 42 Rule 6 of the Civil Procedure Rules. These are the demonstration of substantial loss which would be occasioned if a stay is not granted, moving the Court without unreasonable delay and provision of security.

8. These legal principles have been discussed and distilled in cases such *Mukuma v Abuoga* (1988) KLR 645, *Jotham Simiyu Wasike & another v Jackson Ongeru & 4 others* (2013) eKLR, *Tabro Transporters Ltd v Absalom Dova Lumba* (2012), eKLR and *Anthony Kiberenge Kamau v Kibuchi Wamunyi & 3 others* (2010) eKLR and *Antoine Ndiaye v African Virtual University* (2015) eKLR.

9. Whether a party has an arguable appeal is not one of the factors or principles for consideration in an application for stay of execution pending appeal in the High Court or this Court for that matter.

10. The motion was brought to Court about three months after the delivery of the judgment and only after the Petitioner had moved to execute.

11. The Respondent did not offer any explanation why it had to wait for execution to commence before moving the Court and the Court finds there was an inordinate delay.

12. On the element of substantial loss, the Respondent made a general assertion that the Petitioner would not be able to repay the decretal sum.

13. What constitutes substantial loss has been explained in several decisions by the High Court.

14. This Court endorses what was said by the High Court in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, that:

the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit...it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

15. The Court has keenly perused the Respondent's supporting affidavit, and nowhere therein has the deponent attempted to demonstrate the substantial loss it would be occasioned were the application for stay of execution pending appeal be denied.

16. The Court also notes that the Petitioner is a lawyer, and it is not probable that he is a man of straw.

17. In light of the foregoing, the Court finds no merit in the Motion dated 30 March 2021 and filed in Court on 8 April 2021.

18. It is dismissed with costs to the Petitioner.

19. If the Respondent does not secure any further stay orders from the Court of Appeal within the next 15 days, the monies deposited into Court should be released to the Petitioner without further reference to this Court.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

Petitioner in person

For Respondent Mr. Yogo instructed by Otieno, Yogo, Ojuro & Co. Advocates

Court Assistant Chrispo Aura