



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 35 OF 2018

STEPHEN KIBET NGENO.....CLAIMANT

- VERSUS -

THE INDEPENDENT AND ELECTOROL AND BOUNDARIES

COMMISSION.....RESPONDENT

RULING

1. There are two Applications before the Court. The first is by the Claimant/Applicant dated 14.06.2021 brought under Section 5(1) of the Judicature Act, section 3A of the Civil Procedure Act and Order 50 Rule 1 & 3 of the Civil Procedure Rules 2010, seeking for orders:

- 1) That this Honourable Court be pleased to issue warrants of Arrest against the Respondent's Commission secretary/ the accounting officer and the Human resource manager for the disobedience of the court orders issued on the 13th April, 2021 in the Employment and Labour Relations cause number 35 of 2018.**
- 2) That this Honourable Court be pleased to commit the Respondent's Commission secretary/ the accounting officer and the Human resource manager to civil jail for disobedience of the Court Order issued on 13th April, 2021 in the Employment and Labour Relations cause number 35 of 2018.**
- 3) That the Respondent commission secretary/ the Accounting officer and the Human Resource manager to personally pay the costs of this Application.**

2. The Application is premised on the grounds that:

- a) This Court on 13th April, 2021, ordered the Respondent to immediately and unconditionally comply with this Court judgment delivered on the 1st February, 2019 and pay the entire decretal sum.
- b) That the Respondent was served with this Court's Orders, and therefore they have been aware of the same but has refused to comply with the said Judgment for the last 2 years.
- c) That the Respondents officers are now in contempt of Court Orders and the said Decretal sum continues to attract interest in the expense of the tax payers.
- d) That the Applicant continues to stay out of employment despite this Court express orders of reinstatement.

3. The Application is supported by the Claimant/Applicant's affidavit wherein he reiterates the grounds on the face of the application and adds that, justice will only be served if the officers mentioned above are held in contempt of this Court's Orders.

4. The Respondent replied to the application by filing a Replying Affidavit by one **Michael Goa**, the director legal affairs with the Respondent. He stated that, they were served with the Judicial Review Application dated 15th November, 2020, seeking Orders of Mandamus to compel the Respondent to comply with the Court Judgment of 1st February, 2019. Subsequently, a Mention Notice was served upon them with the mention scheduled for 10th March, 2021 for direction on the Judicial Review Application. However, on the said date the Advocate for the Respondent had difficulties logging in to the Court virtual session and even wrote an email to the Court Registry informing it of the difficulties he had assessing the Court Virtual session. The matter then proceeded ex parte and the Court issued ex parte Orders in absence of the Respondent when the matter had been scheduled for a mention not a hearing.

5. The Respondent contends that they were never accorded a chance to be heard contrary to the provisions of Articles 47 and 50 of the

Constitution.

6. It was stated further that the Respondent is a body corporate established under Article 88 of the Constitution excising both constitutional and statutory function whose financial obligations are governed by statutory process which must be complied with before monies are paid out.

7. It is on that note that the Applicant stated that their financial year had been closed by the time the decree was served upon them therefore the decree can only be considered in the next financial year.

8. It was also stated that the Judgment of 1st February, 2019 is subject of Appeal which has been filed in the Court of Appeal pending hearing and determination.

9. He therefore contends that to allow this Application would defeat the Appeal and the stay orders sought in this Court.

10. The Respondent then filed an Application dated 15th July, 2021 brought under sections 1A, 1B, and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 1 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, seeking for Orders:

a) That this application be certified as urgent and heard exparte in the first instance.

b) Pending hearing and determinations of the Application, the Honourable Court be pleased to grant stay of execution of the judgment and Decree of the Hon. D.K Njagi Marete delivered on the 1st February, 2021.

c) Pending hearing and determination of this Application, this Honourable Court be pleased to grant stay of execution of the Ruling and Orders of Lady Justice Hellen Wasilwa issued on the 10th March, 2021.

d) Costs of this Application be provided for.

11. The Application is based on the grounds that:

a) Judgment was delivered for the claimant as against the Respondent in this matter on the 1st February, 2019.

b) Subsequently, the Respondent was served with Judicial Review Application dated 15th November, 2020, seeking Orders of Mandamus to compel the Respondent to comply with the Court Judgment of 1st February, 2019. Subsequently, a Mention Notice was served upon them with the mention scheduled for 10th March, 2021 for direction on the Judicial Review Application.

c) However, on the said date the Advocate for the Respondent had difficulties logging in to the Court virtual session and even wrote an email to the Court Registry informing of the difficulties he had assessing the Court Virtual session. The matter then proceeded ex parte and the Court issued ex parte Orders in absence of the Respondent when the matter had been scheduled for a mention and not a hearing.

d) The Respondent contends that they were never accorded a chance to be heard contrary to the provisions of Article 47 and 50 of the Constitution.

e) It was stated further Claimant as filed contempt of Court proceedings on account of this Court Ex parte Orders of 10th March, 2021

f) It is contended that there are serious procedural errors on how the orders were obtained which needs to be corrected to serve justice to all litigants.

g) That they are apprehensive that the Respondents officer cited for contempt are likely to be deprived their liberty if this Application is not allowed.

h) That the Claimant will not be prejudiced if the Application is granted since he can be compensated by an order of costs.

12. The Application is also supported by the affidavit of Michael Goa, the Director Legal Affairs with the Respondent, wherein he reiterates the grounds on the face of the Application.

13. The Claimant has filed a Replying Affidavit to oppose the Respondent's Application wherein he states that the when judgment was entered in his favour, the Respondent was informed of the same who was to reinstate him among other orders however the Respondent refused to obey the court orders prompting him to institute Judicial Review Proceedings against it.

14. He stated that the Judicial Review Application came up for direction on the 10th March, 2021 and since the Respondent was absence, though served, the court granted the Order in the Judicial Review Application.

15. It is stated that the only reason given for not attending Court was on alleged inability to assess the Court link which affidavit was sworn by the Respondent director of legal service and not the Advocate in conduct of the matter therefore the information is hearsay and

inadmissible.

16. That the Reason advanced by the Respondent is not sufficient to warrant the issuance of the Orders sought herein. That when this Court allowed the judicial review Application, the Orders of this Court was served upon the Respondent and the claimant's advocate sought a proposal from the Respondent on how the decretal sum was to be paid via the letter of 20th April, 2021 which letter was ignored by the Respondent.

17. The Claimant states that the only reason given for seeking stay is based on the leave that was granted by Court of Appeal to file Appeal out of time, which he contends does not operate as a stay.

18. It was stated that the Respondent had been indolent for 2 years and that the claimant is the one suffering since he is out of work without any source of income when this Court had ordered the Respondent to reinstate him and pay him back wages.

19. The Claimant prayed therefore that the Application be dismissed and the Respondent be compelled to act on the orders of this Court.

Submissions

20. The Claimant submitted that he has taken all the reasonable steps to have the Respondent comply with this Courts Orders to no avail. He argued that the only option left that will compel the Respondent to pay up the decretal sum is for its officers to be held in contempt and be punished thereof. The claimant then cited the case of **Teachers service commission V Kenya National Union of Teachers & 2 others [2013] eKLR** which court stated that;

‘...The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.39. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.’

21. It was submitted that the excuse given for not paying the decretal sum and acting on the Order was on purported budgeting in the financial year, when judgment was delivered more than 2 years ago, therefore the budgeting issue cannot be used as an excuse in this case. In this he cited the case of **Republic v Principal Secretary Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**. Where the Court held that; -

“...Non-allocation of funds by Parliament is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation. In the present case, this is particularly relevant given that the present contempt of Court proceedings commenced in April 2017, and the Respondent did not indicate what steps if any, have been taken since then to effect payment of the monies due to the Applicant.”

22. It was also submitted that the filing of an Appeal by the Respondent does not operate as a stay of this cause therefore contempt application can still be allowed and execution proceed thereof. In this they cited the case of **Republic v University of Nairobi & Another ex parte Nabiswa Wakenya Moses [2017] eKLR**.

23. It was therefore submitted that the respondent's Application dated 15th July, 2021 does not meet the threshold set out under Order 42 Rule 6 of the Civil Procedure Rules for granting stay of execution. For instance, that they have demonstrated what loss they will suffer if the application is decline in this they cited the case of **in re estate of Kithumbu Nyaga Elijah (Deceased) [2021] eKLR**.

24. It was also submitted that the application for stay has not be filed in a timeous manner since the judgment the Respondent seeks to stay is one delivered on 1st February. 2019, more than 2 years ago. He thus urged this Court to dismiss the Respondent application of 15th July, 2021 and allow its application of 14th June, 2021.

25. The Respondent on the other hand submitted that on three issues being; whether the Respondent was granted fair hearing, whether the applicant will suffer prejudice should there be stay of execution and who should bear the costs of this application.

26. On the first issue it was submitted that the Respondent had purposed to attend hearing when this matter came up for directions on the 10th March, 2021, however due to a technical hitch, the Respondent's Advocate could not log in to the virtual Court and the Application was allowed ex parte without their part being heard. It is argued that the Respondent had legitimate expectation that directions were to be taken on the said date and the matter slated for hearing on another date. They therefore argued that they were condemned unheard contrary to Article 47 and 50 of the Constitution and reinforced their argument by citing the case of **China Road & Bridge Corporation v Samuel Mwangi Nyamu [2021] eKLR** where the Court held that;-

“...In this case, the Appellant's case is that her appeal was dismissed on a date when the same was coming for directions without its replying affidavit which it had filed though not on the court filed being considered. That the matter was on that day coming up for directions and not hearing is admitted by the Respondent. It is also not disputed that the Respondent had

in fact filed a replying affidavit whose contents were never considered. The general position was restated in Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74 as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice..."

This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio."

27. On whether stay of execution should be granted, it was submitted that the judgment of this Court which was delivered on 1st February, 2019 is now subject of Court of Appeal, which record of Appeal has been filed awaiting hearing. He argued that if stay is not granted then the decision of his Court will be in conflict with the **Court of Appeal Civil Application No. 62 of 2017[UR 43/2017) County Government of Embu & Another and Eric Cheruiyot & 7 others V IEBC and 7 other (Petition No. 1 of 2017)** which is likely expose the Respondent to contempt proceedings at the Court of Appeal if they comply with this Court Orders now and to this Court contempt if they don't comply with this Court Orders therefore leaving the Respondent in a Limbo.

28. The Respondent then cited the case of **County Government of Embu & Another v Eric Cheruiyot & 15 others [2017] eklr** and urged this Court to allow the stay application.

29. It was then submitted that the Claimant will not suffer and prejudice if the stay of execution application is allowed in this they cited the case of **Shah v Mbogo [1974] E.A** as quoted in the case of **Sameer Africa Limited v Aggarwal & Sons Limited [2013] eklr**.

30. The Respondent then urged this Court to allow it's application for stay and disallow the contempt application by the claimant so as to enable the officer cited for contempt to lobby for the settlement of the decretal sum.

31. There are actually 2 applications before me. One being the application for contempt and the other being an application for stay of execution.

32. The respondents also contend that the Judgment of 1st February, 2019 is a subject of appeal before the COA and if their application is not allowed, they would suffer prejudice.

33. The claimants have not denied that there is an appeal pending before the COA. The claimants admit that they were served with a notice of appeal dated 26/10/2020 on 19/11/2020 as per this Notice of Address for service filed in court on 25/11/2020.

34. In view of the position that the respondents have filed an appeal pending before the COA, declining to grant a stay of execution before this court would be a denial of the respondent's right to an appeal process which may render the appeal nugatory.

35. I will therefore stay the execution process and in essence the entire process for contempt against the respondent to allow the appeal process take its course.

36. Costs to abide the appeal process.

RULING DELIVERED VIRTUALLY THIS 4TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Odhiambo holding brief for Respondent – present

No appearance for applicant

Court Assistant - Fred