



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. E006 OF 2020

**IN THE MATTER OF ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS AND CONSTITUTIONAL
VALUES AND PRINCIPLES**

AND

**IN THE MATTER OF ARTICLES 1, 2, 10, 21, 22, 27, 28, 41, 47, 50(1), 54, 232 AND 259 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF SECTIONS 11, 12(2) AND 15 OF THE PERSONS WITH DISABILITIES ACT, 2003, SECTION 5 OF THE
EMPLOYMENT ACT, SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT AND OTHER ENABLING PROVISIONS
OF THE LAW**

BETWEEN

GODFREY ODEVERO NAKHAYO.....PETITIONER

VERSUS

COUNCIL, UNIVERSITY OF KABIANGA.....1st RESPONDENT

VICE-CHANCELLOR, UNIVERSITY OF KABIANGA.....2nd RESPONDENT

RULING

1. In a judgment delivered on 17 February 2021, the Court granted the following orders:

(i) A declaration be and is hereby issued that the Petitioner is an eligible public officer for the payment of a personal guide allowance in terms of the Circular dated 26 August 2019 from the Salaries and Remuneration Commission referenced Remuneration for a Personal Guide for Public Officers living with a Disability.

(ii) An order of mandamus be and is hereby issued compelling the Respondents to pay the Petitioner a personal guide allowance from the month of September 2020 and further periodically on a monthly basis until the Petitioner's retirement or termination of the Petitioner's employment with the Respondents, whichever is earlier.

2. The Respondents were dissatisfied, and on 26 April 2021, they filed a Motion seeking orders:

(i) ...

(ii) ...

(iii) THAT pending the lodging, hearing and determination of the applicants' intended appeal, the execution of the decision of this Honourable Court Employment and Labour Relations Court (Justice Radido Stephen) on 17 February 2021 in the ELRC Petition No. E006 of 2020 be stayed.

(iv) THAT costs and incidental (sic) to this application be provided for.

3. The Petitioner filed a replying affidavit in opposition to the Motion on 18 May 2021, and pursuant to directions issued by the Court on the same day, the Respondents filed their submissions on 15 June 2021, while the Petitioner filed his submissions on 3 August 2021.
4. In order to succeed in the Motion, the Respondents were expected to demonstrate that they would be occasioned substantial loss if a stay order was not granted, and that they moved the Court without unreasonable delay and that they were ready to furnish security for the due performance of the decree.
5. The grant of a stay is also a discretionary power.
6. The test is a derivative from Order 42 Rule 6 of the Civil Procedure Rules.
7. Whether an appeal is arguable is not one of the primary considerations in the grant of an order of stay in this type of application, and therefore the reference to the authority of *Transouth Conveyors Ltd v Kenya Revenue Authority & Ar* (2007) eKLR, which turned on the interpretation of rule 5(2)(b) of the Court of Appeal Rules does not assist the Respondents' case.
8. The Respondents moved the Court within 2- months of the judgment, and they deposed that they were ready to comply with any conditions imposed by the Court.
9. In the circumstances, the call of the Court is to determine whether the Respondents have satisfied the ingredient of showing substantial loss would be suffered if a stay order is not granted.
10. To demonstrate that they would be occasioned substantial loss, the Respondents asserted that the chances of recovering any payments of disability allowance made to the Petitioner were uncertain and almost nil were the intended appeal to succeed.
11. While resisting the Motion, the Petitioner deposed that he was in gainful employment with the Respondents and therefore were the appeal to succeed, any payments of the disability allowance could be recovered from his salary and benefits.
12. The Petitioner also contended that the Respondents had failed to establish that he was a man of straw with no means.
13. The Petitioner is in the employ of the Respondents and has been in the position of Assistant Accountant since 2009 (over 12 years).
14. He is, therefore, not a person of straw.
15. The Respondents, despite asserting that they stand to suffer a substantial loss, have not given any particulars of such a loss.
16. The 1st Respondent is the Council of the University of Kabianga, an institution that is still operating and will hopefully continue to operate by imparting education in the foreseeable future.
17. In the view of the Court, the Respondents have not satisfied the threshold of proving the ingredient of substantial loss.
18. The Motion filed in Court on 26 April 2021 is dismissed with costs to the Petitioner.
19. The Court regrets it could not deliver the Ruling on 10 November 2021 due to other official engagements.

Delivered through Microsoft teams, dated and signed in Kisumu on this 2nd day of December 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Omondi, Abande & Co. Advocates

For Respondents Robai Ayuma Wakoli, Advocate/Legal Officer

Court Assistant Chrispo Aura