



**REPUBLIC OF KENYA**

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

**CAUSE NO.53 of 2018**

**PAUL KIPKEMOI KIPTOO.....CLAIMANT**

**VERSUS**

**BOARD OF TRUSTEES**

**NATIONAL SOCIAL SECURITY FUND (NSSF) .....RESPONDENT**

**RULING**

The respondent, Board of Trustees National Social Security Fund (NSSF) by application and Notice of Motion dated 7<sup>th</sup> October, 2019 and seeking for orders that there be temporary stay of execution of the judgement herein on 26<sup>th</sup> September, 2019 pending the hearing and determination of the intended appeal.

The application is supported by the affidavit of Austin Ouko the Company Secretary and on the grounds that the court reinstated the claimant back to employment with the respondent effective 1<sup>st</sup> October, 2019 and the respondent is not in a position to reinstate/redeploy and or re-engage the claimant back to his employment because there is no vacancy for a driver in any of its branches as at the date of reinstatement. The respondent intends to appeal against the judgement of the court and in order not to be held in contempt of the court seek a stay of the judgement pending the hearing and determination of the appeal.

Mr Ouko also avers that the respondent has a good appeal with high chances of success, the respondent shall suffer irreparable loss and damage if there is no stay of execution as they are now forced to reinstate the claimant back to the payroll among other expenditures. The respondent has filed a Notice of Appeal and intends to move to the Court of Appeal and if there is no stay of execution the intended appeal shall be rendered nugatory.

The claimant filed his Replying Affidavit and oppose the application of the respondent on the grounds that reinstatement has already taken effect vide letter dated 2<sup>nd</sup> October, 2019 to the position of Driver Grade 8 and then directed to take annual leave. The respondent has complied with the judgement of the court.

The claimant also avers that the respondent has not demonstrated that upon termination of employment no vacancy was declared and there is no replacement since. On the court judgement there is nothing due for stay and the court is now factus officio and any matter of appeal is not for this court to determine. The merits of the case cannot be argued before this court.

Both parties made oral submissions.

The respondent as the applicant submitted that there is notice of appeal filed, stay of execution should be allowed as the intended appeal shall be rendered nugatory as held in the case of **Kenya Airways Limited versus Alex Wainaina [2018] eKLR**. Where the appeal raise an arguable point of law stay of execution is justified. The respondent shall address the provisions of section 43(2) of the Employment Act on the grounds that what existed at the time employment terminated was a justifiable ground as held in **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2016] eKLR**.

The claimant shall not be able to reimburse the respondent the salaries paid to him if there is no stay of the judgement. The court has the power to issue the orders of stay as the subject judgement is now challenged at the Court of Appeal as held in **Co-operative Bank Limited versus BIFU [2016] eKLR**.

The claimant submitted that under Order 42 Rule 6 an applicant has to satisfy given conditions to warrant the grant of orders of stay of execution which the respondent has failed to address. There is no demonstration of what substantial loss which shall result if the orders sought are not issued. No security of the due performance of the judgement is offered and there is nothing to show there is an arguable appeal. The claimant was reinstated back to his position and there is nothing to be stayed. An order of reinstatement is self-executing.

To entitle an applicant to the order of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules requires the applicant to satisfy that;

1. *Substantial loss may result to the applicant unless the order was made;*
2. *The application was made without unreasonable delay; and*
3. *Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

The respondent asserts that the order of reinstatement granted by the court herein is prejudicial and there is compliance to avoid being in contempt of court and which shall be challenged at the Court of Appeal. Even where there is an arguable appeal as held **Jaribu Holdings Ltd versus Kenya Commercial Bank Ltd. CA No. 314 of 2007** an applicable seeking stay of execution must address the foundational condition for such an order that is what loss shall be suffered if stay of execution of the court order/decreed is not allowed. See **G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home versus Miriam Maalim Bishar & another [2018] eKLR**

The respondent's case is that there is a notice of appeal to challenge the judgement with regard to the application of section 43(2) of the Employment Act, 2007. However such matter ought to be addressed on the merits before the appellate court and not with this court which has already rendered itself and ordered for reinstatement of the claimant and fro deployment as appropriate. To address the application of section 43(2) of the Employment Act, 2007 at this instance will not meet the ends of justice. Well aware of findings in **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2016] eKLR**, with respect, the remedy of reinstatement is primary and lawful where there is good basis upon assessment of each case on the merits.

The respondent's case is also that there shall be irreparable loss and damage as the claimant shall be unable to reimburse the paid salaries of ksh.150,000 where the appeal is allowed.

There is only a notice of appeal filed. Such intention to appeal is not actualised. It remains an intention.

Upon reinstatement, the claimant's labour is available to the respondent and the salary and benefits paid shall be in return for his labours and thus even where the intended appeal is actualised and filed, heard and determined whichever way, there is no loss or irreparable loss shall be suffered by either party as whatever salary is paid is accounted for the labour offered.

**Accordingly, the court finds the application dated 7<sup>th</sup> October, 2019 without merit and is hereby dismissed. Costs in the cause.**

Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.

**M. MBARU?**

**JUDGE**

In the presence of: .....