



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 15 OF 2017

(Before Hon. Justice Mathews N. Nduma)

GODFREY K. LUKORITO.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The application dated 1st October 2019 seeks stay of execution of a Judgment of Hon. Lady Justice Maureen Onyango dated 11/6/2019 and delivered on 16/7/2019 by Nderi Nduma J. Pending the hearing and determination of intended appeal to the Court of Appeal.
2. The Application is premised on grounds set out on the face of the application and in the supporting affidavit of Dr. Nancy Njeri Macharia, the Secretary and Chief Executive Officer of TSC.
3. In the main, the applicant states that the intended appeal raises weighty issues of law and will be rendered nugatory if a stay of execution of the Judgment and decree is not granted. That the applicant is likely to suffer irreparable loss and damage which may not be recovered should the intended appeal be successful.
4. That the petitioner will not suffer any prejudice should the order for stay be issued and the appeal is not successful because he will simply proceed to execute the Judgment and decree thereof.
5. That the application be granted as prayed in the interest of justice.
6. The application is opposed by a replying affidavit sworn to on 7th November 2019 by the claimant/respondent.
7. The respondent deposes that the application is misconceived and an abuse of court process. That the same has been filed 76 days from the date of the Judgment which was delivered on 16/7/2019.
8. That the applicant lacks clean hands because it has not complied with the judgment of the Court by paying withheld salary and allowances from the date of interdiction on 7/11/2016.
9. That the court directed the respondent to reinstate the claimant/Respondent and it is not legally possible to stay an order for reinstatement.
10. That the application is an afterthought upon service on the applicant with the decree on 16/9/2019.
11. That the applicant has not demonstrated the substantial loss to be suffered if the order for stay is not granted.
12. That the respondent has not received salary for over 36 months and will suffer great prejudice if the payment is further delayed by an order for stay of execution.
13. That the respondent is entitled to enjoy the fruits of his Judgment.
14. That no security has been offered by the applicant for due performance of the decree. That the application be dismissed with costs.

Determination

15. In **Butt –VS- Rent Restriction Tribunal, C. A. Civil Application on No. NA16 of 1979 (1979) eKLR** , Madan, Miller and Poter JJA stated

16. “ It is in the discretion of the court to grant or refuse a stay. In every case is whether there are or not particular circumstance in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory per Brett J. in **Wilson –VS- Church (No.2) 12 Chris 1879 454 at P. 459.**”

17. In the present case the Court reinstated the respondent to the position of a teacher on the basis that he was not accorded due process in interdicting him from service upon raising a complaint against his supervisor whilst invigilating a national examination a task done by a teacher outside their normal teaching duties and usually during teaching vacation.

18. The applicant did not comply with the order of the court for many months and did not bother to obtain stay of the Judgment of the court until contempt proceedings against officials of the applicant were commenced by the successful respondent.

19. Considering the nature of complaint raised against the respondent, it does not occur to this court that any irreparable damage or loss would be occasioned the applicant if the order for stay is not granted and the applicant is eventually successful in the appeal.

20. To the contrary the respondent has to date suffered serious prejudice emanating from unlawful noncompliance by the applicant with the orders of the court.

21. The claimant is lawfully entitled to enjoy the fruits of his Judgment and to a decent livelihood from the sweat of his brow.

22. This court finds no merit in denying the respondent opportunity to work and keeping him without pay and means of livelihood despite the orders of the court for payment of his salary and allowances from the date of the impugned interdiction.

23. The applicant did not demonstrate good faith in this matter and has not offered any security for the performance of the Judgment. The applicant has also failed to demonstrate how the appeal would be rendered nugatory if an order for stay is not granted.

24. The respondent will simply continue to offer teaching service and would be paid salary in turn until the court of appeal determines if he ought to continue teaching or that he be discontinued from service given that the complaints did not directly relate to his daily teaching chores, and especially when he was firstly the complainant turned villain by his employer.

25. Accordingly, the application lacks merit and is dismissed with costs in the appeal.

Ruling Dated, Signed and Delivered at Nairobi this 16th day of July 2020.

Mathew N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 has 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 18 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.

Mathews N. Nduma

Judge

Appearances:

Mr. Anyuor for Respondent/Applicant

Mr. Ndarwa for Claimant/Respondent

Chrispo: Court Clerk.