



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION COURT**

**AT NAIROBI**

**PETITION 61 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 22<sup>nd</sup> October, 2020)**

**CORPORAL THOMAS OTHOO.....PETITIONER**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATION.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant, Corporal Thomas Othoo filed a Notice of Motion application dated 6<sup>th</sup> December 2019 seeking to be heard for Orders:-

**1. Spent.**

**2. Spent.**

**3. THAT there be a stay of execution of the Judgment and/decree dated 28<sup>th</sup> September, 2018 pending the hearing and determination of the intended appeal to the Court of appeal.**

**4. THAT pending the hearing and determination of this application the Honourable Court be pleased to issue a Temporary Injunction to restrain the Respondents and or their agents and or their servants and or representative or any other officer acting on their command from charging and or commencing and or proceeding with illegal orderly room proceedings and or inquiry on 9<sup>th</sup> December 2019 or any other date thereafter and or victimising and or coercing and or intimidating and or terminating and or dismissing Petitioner from employment on account of offences allegedly committed on 4<sup>th</sup> April 2009.**

**5. THAT pending the hearing and determination of this the Petitioners appeal the Honourable Court be pleased to Issue temporary injunction to restrain the Respondents and or their agents and or their servants and or representative or any other officer acting on their command from charging and or commencing and or proceeding with illegal orderly room proceedings and or inquiry on 9<sup>th</sup> December 2019 or any other date thereafter and or victimizing and or coercing and or intimidating and or terminating and or dismissing Petitioner from employment on account of offences allegedly committed on 4<sup>th</sup> April 2009.**

**6. THAT the costs of this application be provided for.**

**7. Any other orders that meets the ends of justice**

2. The Application is premised on the grounds that the Honorable Court in the Judgement delivered on 28/09/2018, overturned the Orderly room proceedings leading to the Petitioner's dismissal for being flawed and the Court Ordered for fresh hearing in accordance with the Force Standing Orders. That the Petitioner/Applicant was dissatisfied with the said decision for the reason that he was going to be subjected to

fresh disciplinary process based on the same grounds that were overturned and would therefore be subjected to Double jeopardy. That the Petitioner thus lodged a Notice of Appeal to the Court of Appeal on 02/10/2018 and later requested for certified copies of Judgment and proceedings from the Registrar, ELRC.

3. That the Respondents summoned the Petitioner to resume work in Eldoret so as to be served with fresh Disciplinary Notice as ordered by this Court but have not formally written to the Petitioner on his current deployment in compliance with the Judgment of the Court. That on 27/11/2019 the Petitioner received two documents, one dated 13th November 2019 titled Implementation of National Police Service and the other dated 27<sup>th</sup> November 2019. That the Respondents intended fresh disciplinary action is unconstitutional as it violates the Petitioner's right to a fair hearing and that unless a stay of execution is granted, the Petitioner is likely to suffer substantial loss which may result to him losing his job and livelihood. That there has been no delay in bringing the application herein and that the intended appeal has a reasonable chance of success and further, that if execution is carried out it will render the intended appeal nugatory. The Petitioner is willing to abide by any conditions as the court deems fit.

4. In his Supporting Affidavit, the Petitioner/Applicant avers that he was supplied with several documents in reference to a charge of "causing disturbance in the police premises" which offence he purportedly committed on 04/04/2009. That the same was never a subject matter of this Petition for the Respondents to purport to be implementing this Court's judgment and initiating Orderly Room Proceedings set for hearing on 9<sup>th</sup> December 2019. That the 2009 proceedings were concluded and no action was taken against him as he continued working without any interruption and he is apprehensive that the Respondents carrying out fresh proceedings on offences allegedly committed 10 years back will be a witch hunt. That the fresh proceedings also infringe on his constitutional rights under **Articles 41, 47, 50, 236** and are a clear abuse of court process and that they ought to be stopped by an injunction. That it is in the interest of justice and fair play that a stay of the Intended Fresh Orderly Room Proceedings be granted.

5. The 1<sup>st</sup> Respondent filed a Replying Affidavit dated 19<sup>th</sup> February 2020 sworn by its CEO, Joseph Vincent Onyango who avers that contrary to the rules, the Petitioner/Applicant is yet to file a Memorandum and a Record of Appeal almost one and a half years later. That the filed Notice of Appeal is thus deemed withdrawn in accordance with the Court of Appeal Rules and that the Petitioner/Applicant has also not sought for extension of time from the Court of Appeal. That it is illogical for the Applicant to state that his appeal has a likelihood of success yet he has failed to adhere to the set out timelines. Further, that the Petitioner/Applicant is evidently using the appeal process to delay the conduct of fresh orderly room proceedings as directed by the Court and that the said delay is inordinate and without justification. That the stay orders granted to the Petitioner/Applicant ought to therefore be vacated given that he failed to move the Court of Appeal procedurally for extension of time and that the Application herein should be dismissed with costs to the Respondents.

6. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents on the other hand filed Grounds of Opposition dated 2<sup>nd</sup> March 2020 opposing the Application herein on grounds that the intended orderly room proceedings is done in compliance with the Court's Judgment delivered on 28/09/2018 and there is no likelihood of the Petitioner suffering double jeopardy. That **Rule 82 (1) of the Court of Appeal Rules 2010** provides that an appeal shall be instituted by lodging in the appropriate registry a memorandum of appeal and a record of appeal within sixty days of the date when the notice of appeal was lodged. That **Rule 83** further provides that if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time then he shall be deemed to have withdrawn his notice of appeal. That under **Rule 4 of the Court of Appeal Rules**, only the Court of Appeal may extend the time limited by the Court of Appeal rules.

7. The Petitioner/Applicant then filed a Supplementary Affidavit dated 10<sup>th</sup> April 2020 averring that Rules 4, 82 and 83 of the Court of Appeal Rules 2010 are not applicable to this Honourable Court whose procedure is regulated by ELRC Rules and Civil Procedure Rules. That the issues which have been raised through the said court of appeal rules can only be determined by the Court of Appeal and that contrary to **Article 159 of the Constitution**, the Respondents have raised only technical grounds in their response to the Application.

8. The Application was disposed of by way of written submissions.

#### **Petitioner/Applicant's Submissions**

9. The Petitioner/Applicant submits that the Court is enjoined to consider factors beyond those provided for under **Order 42 Rule 6 of the Civil Procedure Rules** including the overriding objective under **Sections 1A and 2B of the Civil Procedure Act**. That the status quo presently is to the effect that the Petitioner is back at his workplace deployed and performing his duties and responsibilities as per his terms of service and which status quo ought to be maintained until the Petitioner's intended Appeal is heard and determined. That the Application herein was filed only 8 days after the commencement of execution of the decree on 28.11.2019 thus meeting one of the conditions set under Order 42 rule 6 and that he had not foreseen the said mode of execution as he had been reinstated.

10. He submits that the Orders for Stay of Execution or proceedings or injunction are designed to preserve the subject matter of the Appeal in order to ensure just and effective determination of Appeal as was held by the Court of Appeal in **Nairobi Civil Application No. 322 of 2018; Oliver Collins Wanyama vs. Engineers Board of Kenya** which made reference to the case of **Equity Bank Limited V. West Link Mbo Limited**.

11. He further submits that he risks being dismissed from employment if the orderly room proceedings already commenced against him are left to proceed and that he will not be able to fend for himself and his family. He cites the case of **Machakos Civil Appeal No. 19 Of 2019 Victory Construction vs. BM (A minor suing through next friend one PMM)** which cited case law on what substantial loss means and granted the orders of stay of execution.

12. It is the Petitioner's submission that this Court has jurisdiction to grant orders of injunction pending the hearing and determination of the intended Appeal under **Order 41 (6) (2) and (6) of the Civil procedure Rules**. That the notice of appeal lodged in this Court and the Court of Appeal is an Appeal for the purposes of **Rule 75 of the Court of Appeal Rules** and that therefore the issue of filing of an appeal out of time as argued by the Respondents is misplaced and irrelevant to the proceedings herein. That the Court should also take judicial notice that the filing of the Memorandum and Record of Appeal requires certain mandatory documents including certified copies of the judgement and decree, all of which have not been supplied to the Petitioner. He further submits that on whether the High Court has jurisdiction to determine

the validity of a Notice of Appeal, he relies on the case of **Kisii Civil Case No. 229 of 2010; Samwel Kimutai Korir (Suing as personal and Legal Representative of Estate) of Chelangat Silevia vs Nyanchwa Adventist Secondary School) Nyanchwa Adventist College**. He urges the Court to grant him the orders sought with costs.

### **Respondents Submissions**

13. The 1<sup>st</sup> Respondent submits that the National Police Service Commission is mandated under **Article 246(3) (a) of the Constitution** to inter alia recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service. That the Commission is further mandated under **Article 246(3) (b)** to inter alia observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service. That the Commission's mandate is also replicated and exemplified in the National Police Service Act as clearly stipulated under **Section 10 of the Act** and that the Commission has always discharged its mandate and related functions with utmost fidelity to the Constitution and statutory regulations in Kenya.

14. The 1<sup>st</sup> Respondent submits that **Order 42 Rule 6(4) of the Civil Procedure Rules 2010** states that an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. It also quotes **Rule 75(2) of the Court of Appeal Rules** which states that every such notice shall be lodged within fourteen days of the date of the decision against which it is desired to appeal, subject to Rules 84 and 97. It further submits that the Petitioner ought to have filed his memorandum and record of appeal to the Court of Appeal seeking the grant of the above orders, which only the Court of Appeal can grant after he filed his notice of appeal. That the Petitioner's reason of having not received confirmation from the court on whether certified proceedings and judgment are ready for collection and that being the reason he has not filed his memorandum and record of appeal is not substantial.

15. That the Petitioner/Applicant has demonstrated he has no intention of instituting his appeal and this Court can only grant a stay pending appeal where there is sufficient cause, satisfaction of a substantial loss, furnishing of security and the application must also be made without unreasonable delay.

16. The 1<sup>st</sup> Respondent cites the case of **Machakos Civil Appeal No. 78 of 2017; New Wide Garments EPZ (K) Ltd -vs- Ruth Kanini Kioko** where the Court quoted the Court of Appeal case of **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365** to support this position. That the Petitioner is thus not entitled to be granted a stay pending his delayed appeal as he has not met the requirements for the same.

17. The 1<sup>st</sup> Respondent submits that this Court is *functus officio* and relies on the case of **Nairobi Civil Appeal No. 208 of 2015 Peterson Ndungu & others V KPLC Ltd** and states that under this doctrine, once a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive; such a decision cannot be revoked or varied by the decision-maker. That the interim stay orders granted to the Petitioner ought to be vacated given that he failed to move the Court of Appeal procedurally for extension of time.

18. It further submits that the application is an abuse of the court process as it is misconceived, frivolous, lacks merit and brought in bad faith as was illustrated by the Court in the case of **Fremar Construction Co. Ltd -vs- Minakshmavin Shah**.

19. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents submit that this Court agreed with the Respondents that the Petition before the Court was premature and ought to await the outcome of the Petitioner's appeal to the Chairman of the Commission. They cite the case of **Ndegwa Kamau T/A Sideview Garage vs. Fredrick Isika Kaiumbo in Civil Appeal No.51 of 2013** where the Court observed that the failure by the appellant to record of appeal is fatal to the appeal and struck out the appeal with costs for procedural incompetence.

20. They further submit that the Application should be dismissed as it has already been litigated and determined by a competent court of law as was affirmed by the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR**. It is their submission that this Court should find that the Petitioner has contravened the mandatory provisions of Rule 82(1) of the Court of Appeal Rules 2010 and that due procedural law was not adhered to in the filing of this Application.

21. I have examined the averments of the Parties herein. The application is premised on the fact that the Petitioner/Applicant was dissatisfied with his Court's judgement delivered on 28/9/2018 and lodged an Appeal on 2/10/2018.

22. The Respondents contend that the Applicant is not desirous of pursuing the Appeal. They want interim stay orders vacated.

23. I have considered the aspect that the Applicant has already preferred an Appeal and is currently enjoying stay orders. I see no prejudice that the Respondents will suffer if the stay is confirmed pending the determination of the Appeal. I will therefore confirm stay orders pending the hearing and determination of the Appeal.

24. Costs to abide the outcome of the Appeal.

**Dated and delivered in Chambers via zoom this 22<sup>nd</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Opiyo holding brief Muthiga for 1<sup>st</sup> Respondent – Present

Kioko for 2<sup>nd</sup> to 4<sup>th</sup> Respondents – Present

Mageto for Petitioner – Present