



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 184 OF 2019**

**(Before Hon. Justice Hellen S. Wasilwa 11<sup>th</sup> November, 2020)**

**TEACHERS SERVICE COMMISSION.....APPLICANT**

**VERSUS**

**HELLEN KHAMALI.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Pending before me for determination is the 1<sup>st</sup> Respondent's Notice of Motion Application dated 30<sup>th</sup> September, 2020. The same is brought under Certificate of Urgency under the Under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. Seeking Orders that:-

***1. The Application herewith be certified as urgent and heard ex-parte in the first instance (Spent).***

***2. This Honourable Court be pleased to Order Stay of Execution of the Judgment of Hon. Lady Justice Hellen Wasilwa made on 7<sup>th</sup> September, 2020 pending the lodgement, hearing and determination of the intended Appeal.***

***3. The costs of this Application be in the cause.***

2. The Application which is premised on the grounds that:-

***1. The Applicant is dissatisfied with the entire Judgment of Hon. Lady Justice Hellen Wasilwa delivered on 17<sup>th</sup> September, 2020 and intend to Appeal against the said orders. In this regard, a Notice of Appeal and a request for typed proceedings have been filed and served.***

***2. The Judgment directs the Applicant to reinstate the 1<sup>st</sup> Respondent to employment without loss of salary and other benefits from the time of dismissal and further awards her costs.***

***3. The Applicant being dissatisfied with the entire judgment and decree of the Court has chosen to Appeal to the Court of Appeal.***

***4. The Appeal raises arguable points of law and fact, and has high chances of success as shown by the attached draft Memorandum of Appeal.***

***5. In the event that the Judgment is enforced in its present form; the Applicant herein is likely to suffer irreparable loss and damage in that:-***

***1. Reinstatement of the 1<sup>st</sup> Respondent to serve will disrupt the internal processes of the Applicant as well as undermine the Constitutional and Statutory mandate of the Applicant.***

***2. The 1<sup>st</sup> Respondent may not be able to refund the money payable to her in salaries and allowances in case the Appeal is successful.***

***6. Unless the Application is heard and determined urgently, matter shall be rendered nugatory and otiose.***

**7. It is in the interest of justice that pending the lodgment, hearing and determination of the intended Appeal, the subject matter of the intended Appeal be preserved.**

**8. The Respondent will not suffer any prejudice in the event the Orders sought herein are granted.**

**9. This Honourable Court has jurisdiction to issue the Orders prayed for herein.**

3. The Application further supported by the Affidavit of **MARY ROTICH**, the Applicant's Director in charge of Field Services sworn on 30<sup>th</sup> September, 2020, in which she reiterates the averments made in the Notice of Motion Application.

#### **Claimant/Respondent's Case**

4. In response to the Application, the Claimant/Respondent filed a Replying Affidavit sworn on 26<sup>th</sup> October, 2020, in which she avers that the intended Appeal is an abuse to the Court process and that the Draft Memorandum of Appeal as attached is in-fact frivolous and fails to raise a prima facie cause of action.

5. The Affiant further maintains that her Petition as against the Respondent was meritorious and that the Judgment was entered in her favour as no evidence was availed to this Honourable Court to prove otherwise.

6. It is on this basis that the Respondent maintains that the instant Application is only meant to defeat the cause of justice and deny her the fruits of the Judgment entered in her favour.

7. She further avers that the Application as drafted is defective as there is no prayer seeking for stay of execution pending hearing and determination of the same.

8. The Respondent contends that the Application as filed does not in any way stay the execution of this Court's judgment and is therefore not prevented from enjoying the fruits of the Judgment entered in her favour.

9. She further contends that the Applicant being a public body is expected to act in a manner that is valid, fair and in a manner that upholds the Constitutional rights of the Public.

10. The Respondent maintains that the instant Application as filed is devoid of merit and urged this Honourable Court to dismiss the same in its entirety with costs to the Claimant/Respondent.

11. Parties agreed to dispose of the Application by way of written submissions.

#### **Submissions by the Parties**

12. The Applicant in its submissions maintains that it has met the threshold for the grant of the Orders sought in the instant Application as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010. To buttress this argument the Applicant cited and relied on the case of **Antoine Ndiaye Vs African Virtual University (2015) eKLR** where the Court maintained that for grant of stay orders it ought to be guided by the requirements as provided under Order 42 Rule 6 of the Civil Procedure Rules.

13. The Applicant further submitted that it has an arguable Appeal that raises arguable points of law for consideration by the Court of Appeal and therefore there is need to protect the substratum of the subject matter pending the hearing and determination of the intended Appeal. For emphasis the Applicant cited and relied on the cases of **Joseph Gitahi Gachau & Another Vs Pioneer Holdings (A) Limited & 2 Others (2009) eKLR** on the definition of an arguable Appeal.

14. The Applicant maintains that it is likely to suffer substantial loss if the Orders sought in the instant Application are not granted as the Respondent may not be able to refund the money payable in her salaries and allowances in the event the Appeal is successful. To fortify this argument the Applicant cited and relied on the decisions in the cases of **Antoine Ndiaye Vs African Virtual University (2015) eKLR** and **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR**.

15. The Applicant further maintains that its Appeal would be rendered nugatory in the event the Judgment is enforced in its present form and the intended Appeal succeeds. For emphasis the Applicant cited the case of **Focin Motorcycle Company Limited Vs Annn Wambui Wangui & Another (2018) eKLR**.

16. In conclusion the Applicant maintained that it has made out a case for the issuance of the Orders sought in the instant Application and therefore urged this Honourable Court to allow the same as prayed.

#### **Claimant/Respondent's Submissions**

17. The Claimant/Respondent on the other hand submitted that the Applicant has failed to demonstrate sufficient reasons for grant of stay Orders that it seeks as it has failed to demonstrate a sufficient cause for this Court to disturb its Judgment delivered on 17/9/2020.

18. The Respondent further maintains that the Stay Orders sought cannot be granted as they are for an indefinite period of time.

19. The Respondent further maintains that the Applicant has further failed to satisfy the requisite conditions for the grant of the stay orders it so wishes to be issued in its favour as provided under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

20. It is on this basis that the Claimant/Respondent argues that the instant Application lacks merit and urged this Court to dismiss the same with costs to the Claimant/Respondent. For emphasis the Claimant/Respondent cited and relied on the case of **Republic vs Retirement Benefits Appeals Tribunal Ex-parte Heritage A.I.I Insurance Company Limited Retirement Benefits Scheme (2017) eKLR** that quoted the Court of Appeal decision in the case of **Co-operative Bank of Kenya Limited Vs Banking Insurance & Finance Union (Kenya) (2015) eKLR** on the conditions to be met before granting Orders of Stay of Execution.

21. On the issue of whether the intended Appeal raises triable issues the Respondent maintained that the issues raised by the Applicant in the draft Memorandum of Appeal were completely addressed by this Honourable Court and that on the reliefs granted none were out of the ordinary mandate of this Honourable Court.

22. The Respondent argued that the Applicant does not have an arguable Appeal. To buttress this argument the Claimant/Respondent cited and relied on the judicial decisions in the cases of **Judicial Service Commission Vs Maxwell Miyawa & 7 Others (2018) eKLR** and **Republic vs Retirement Benefits Appeals Tribunal Ex-parte Heritage A.I.I Insurance Company Limited Retirement Benefits Scheme (2017) eKLR**.

23. In conclusion the Claimant/Respondent urged this Honourable Court to find the instant Application devoid of merit and to dismiss it in its entirety with costs to the Claimant/Respondent.

24. I have examined the averments of the Parties herein. This Court granted orders on 17/9/2020 ordering reinstatement of the Petitioner herein.

25. Order 42 rule 6 of the Civil Procedure Rule rules circumstances under which stay orders can be granted as follows:-

*1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside.*

*2) No order for stay of execution shall be made under subrule (1) unless:-*

*(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) 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".*

26. On issue of the Applicants approaching this Court without delay, they have done so having filed the application for stay within 2 weeks from the time the judgement was delivered.

27. The Respondents also aver that they stand to suffer harm if the stay orders are not granted. They contend that they have decided to file an appeal but have not even filed such an appeal as no Notice of Appeal has been annexed to this application. It is therefore clear that no appeal is yet to be filed.

28. On issue of security, there is no indication that the Applicants have offered any security as a condition for the stay. The main impediment to the issue of security is actually due to the nature of the orders being sought to be stayed. This Court has ruled severally that orders of reinstatement are self-executing and are therefore not capable of being stayed.

29. In **Aggrey Lukarito Wasike vs Kenya Power Lighting and Company (2016) eKLR** the issue of self-executing judgements and orders was discussed by this Court in **Matilda Tenge Mwachia vs Kenya Industrial Estates Limited and Another** this Court citing **Aggrey Lukarito (supra)** stated as follows:-

*"While taking the foregoing view, the Court has considered and been guided by the dissenting opinion in Cooperative Bank of Kenya Limited vs Banking Insurance and Finance Union (Kenya) (2015) eKLR where Mwilu JA stated:-*

*"20.....In considering whether to stay the order of reinstatement or not, I have also considered Article 23(1) of the Universal Declaration of Human Rights which provides for the right to work, to free choice of employment and to protection against none employment. Article 2(6) of the Constitution domesticates as part of our laws any treaties and conventions ratified by Kenya. The Constitution further protects the freedom of expression, against forced labour and the right to economic and social rights which can be construed to include the right to work.....Reinstatement is in any event a statutory remedy and I find it appropriate here".*

30. I rendered myself citing **Lukariro** as follows:-

*"32 I want to agree with the above proposition that indeed the orders the Applicants want this Court to stay are self-executing*

*orders and so cannot be stayed. Their nature is even demonstrated in the fact that no security can be given in place of the said orders”.*

31. Having considered as above, I am still of the view that this Court having rendered its judgement in this Petition reinstating the Petitioner to work, an order of stay is not available as the order is self, executing and incapable of being stayed. I therefore find the application without merit and I dismiss it accordingly.

32. Costs in the Petition.

**Dated and delivered in Chambers via zoom this 11<sup>th</sup> day of November, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Shadrack Waiboi for Omari for Petitioner – Present

Miss Musundi holding brief Sitima for Respondent – Present