



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**E059 OF 2020**

**TEACHERS SERVICE COMMISSION.....CLAIMANT**

**VERSUS**

**ALI ABDULLAHI ALI.....RESPONDENT**

**RULING**

1. The Application dated 16th October, 2020 seeks an Order in the following terms:

***(a) The Honourable Court be pleased to order a Stay of Execution of the Judgment and all consequent Orders issue by Hon. G. Mmasi in Nairobi CMEL No. 490 of 2018 on 18th September, 2020 pending the hearing and determination of the appeal lodged by the Applicant on 7th October, 2020.***

2. The application is anchored on grounds set out on the face of the application number 1 to 9, in which complaints against the Judgment of the trial magistrate delivered on 18/9/2020 are proffered.

3. The applicant submits that the applicant has an arguable appeal with high chances of success; that the intended appeal will be rendered nugatory if a stay of Execution of the Judgment is not granted; that the applicant is likely to suffer irreparable loss and damages as it is not likely to recover the large sum of money awarded to the claimant/respondent in addition to an Order of reinstatement to the former teaching position held by the Claimant; and that the application has been brought expeditiously and in good faith in exercise of its right of Appeal.

4. In addition and in the submissions by Counsel for the applicant Mr. Sitima, applicant states that the applicant is a government institution that may not go broke, and it is not prudent to request the applicant to place security for judgment sum and costs pending hearing and determination of Appeal. In this respect Section 21 of the Teachers Service Commission Act, deems proceedings against Teachers Service Commission to be proceedings under Government Proceedings Act, in respect of which placement of security is not necessary since it is not conceivable that the government would be unable to pay the decretal sum in the event the Appeal is not successful. The applicant prays the application be granted.

Response

5. The respondent filed a replying affidavit in response to the application. The respondent submitted that, this being an Application under Order 42 rule 6 of the Civil Procedure Rules, the mandatory preliquisites for grant of an Order for stay pending Appeal are that:-

***(i) The application must be filed without undue delay.***

***(ii) That the applicant must demonstrate that he/she would suffer irreparable loss if stay was not granted and the appeal was eventually successful and***

***(iii) That the applicant is willing to offer security for judgment pending hearing and determination of the Appeal.***

6. Counsel for the claimant/respondent Mr. Ayieko submitted that the application was filed after expiry of 30 days stay granted upon delivery of judgment and so same was visited with delay. That the applicant has not demonstrated by evidence that it is likely to suffer irreparable loss if stay is not granted and that the applicant has not shown any willingness to offer security for the decretal sum pending hearing and determination of the Appeal.

7. Counsel for the Respondent submitted that the substantive Order in the Judgment of the trial Court is one for reinstatement to the job previously held by the Claimant and that as a general rule an Order for reinstatement ought not to be stayed pending hearing and

determination of Appeal because in the event the Appeal is not successful, the Claimant will have suffered substantial loss not remediable later.

8. The Applicant countered this particular argument by submitting that only Orders that are negative in nature may not be injuncted and that there was nothing stopping Court from injuncting an order for reinstatement especially when the same is manifestly unjust.

9. The Respondent prays the application be dismissed and if it be granted, the Court makes appropriate conditions for payment or part payment of the decretal sum in the interim.

### **Determination**

The Court was referred by the parties to various authorities including:-

(i) **Wasike –vs- KPLC - EKLR, 2016**, per Ougo J. regarding issuance of

stay orders with regard to orders for reinstatement.

(ii) Co-operative Bank of Kenya –vs- Banking Insurance.

10. The Court is satisfied that the Judgment of the Court in addition to an Order for reinstatement awarded substantial sums of money to the Claimant/respondent by way of compensation and General damages. The Court is satisfied that the applicant is likely to suffer substantial loss in the event the appeal is successful and the claimant is unable to refund the decretal sum.

11. The Court is also satisfied that reinstating the Claimant to his position before the issues raised in the appeal are heard and determined by the appellate Court is prejudicial to the interests of the applicant in a manner that may not be remedied if the appeal is successful in the long run.

On the contrary, if the appeal is not successful, the applicant shall make good the payment of the decretal sum and with interest and also shall be in a position to reinstate the Claimant/respondent with back pay in terms of the judgment by the trial magistrate.

12. It is not necessary for Teachers Service Commission to place security for judgment in terms of Section 21 of the Teachers Service Commission Act which deems proceedings against Teachers Service Commission to be proceedings under the Government proceedings Act.

13. Accordingly, the application which in our view was brought without inordinate delay has merit and is granted and the Court makes the following orders:-

(a) The Judgment and all consequent Orders issued by Hon. G. Mmasi in Nairobi CMEL No. 490 of 2018 on 18th September, 2020 is stayed pending the hearing and determination of the Appeal lodged by the Applicant on 7th October, 2020.

(b) Costs be in the Cause.

**Dated and Delivered at Nairobi this 7<sup>th</sup> day December, 2020**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> 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. Sitima for respondent/applicant

Mr. Ayieko for Claimant/respondent

Chrispo- Court clerk