



**REPUBLIC OF KENYA**

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

**CAUSE NO. 802 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> January, 2019)

**MUKOYA QASSIM KUPUONI.....CLAIMANT/RESPONDENT**

**-VERSUS-**

**TEACHERS SERVICE COMMISSION....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant filed the Notice of Motion on 28<sup>th</sup> September 2018 seeking the following orders:-

- 1. THAT the Application herein be certified as urgent and heard ex-parte in the first instance.***
- 2. THAT this Honourable Court be pleased to order Stay of Execution of the Judgment and all consequential orders of this Honourable Court delivered on 11<sup>th</sup> July 2018 pending the hearing and determination of this Application.***
- 3. THAT this Honourable Court be pleased to order stay of execution of the Judgment and all consequential orders of this Honourable Court delivered on 11<sup>th</sup> July 2018 pending the lodgement, hearing and determination of the appeal.***
- 4. THAT the costs of this application be provided for.***

2. The application is supported by the affidavit of Evalene Mitei and is premised on the following grounds:-

- 1. The Applicant is desirous to exercise its right of appeal provided under Section 17 of the Employment and Labour Relations Court Act and Article 163 (4) of the Constitution.***
- 2. Being dissatisfied with the Judgment of this Court, the Applicant has lodged a Notice of Appeal at the Court of Appeal within the Statutory Period and made a formal request for typed proceedings.***
- 3. The intended appeal raises weighty issues of law and will be rendered nugatory if a stay of execution of the aforesaid Judgment is not granted.***
- 4. In the event the said Judgment is enforced in its present form, the applicant is likely to suffer irreparable loss and damage which it may not recover should the intended appeal be successful.***
- 5. The Applicant has an arguable appeal with high chances of success necessitating the preservation of the substratum of the instant matter.***
- 6. The Applicant being a government institution will be able to satisfy the Courts decree in the event its appeal is unsuccessful.***

3. The Respondent filed a Replying Affidavit sworn by Mukoya Qassim Kupuoni opposing the application on the following grounds:-

- 1. That he was terminated more than 15 years ago and has always been ready to proceed with the case despite the numerous adjournment caused by the Applicant.***
- 2. That the Applicant has not demonstrated that the appeal herein has any chances of success.***

3. *That the sums awarded herein are not substantial as the Respondent runs a private business since his forceful dismissal by the Applicant.*
4. *That the Applicant apart from stating that it is a government body with perpetual succession has not offered any security for the due performance of the award given by this Court.*
5. *That taking into account the length of time it has taken, it is only just that a substantial portion of the awarded sum be released to the Respondent as a condition of suspending appeal.*
6. *That the rest of the sum should be deposited in an interest earning account to be held jointly between the parties' advocates.*

#### **Applicant's Submissions**

4. The Applicant submitted that Article 164 (3) of the Constitution read together with Section 17 of the Employment and Labour Relations Court grants the Applicant the inalienable right of appeal. The Applicant submitted that its intended appeal raises substantial and/or weighty issue of law and therefore seeks the Court's discretion for stay of execution to enable it ventilate its appeal before the Court of Appeal. The Applicant relied on the Court of Appeal decision in **African Safari Club Limited v Safe Rentals Limited [2010] eKLR** cited by Justice Nderi Nduma in **Mutuma Mugambi v Kenya Methodist University [2016] eKLR**.

5. The Applicant submitted that it has an arguable appeal with likelihood of success, which shall be rendered nugatory if the stay of execution is denied and that the Application raises grounds to justify the stay orders. The Applicant relied on the case of **Kenya Medical Lab Technicians & Technologists Boards v Prime Communications Limited [2014] eKLR** where the Court held:-

*“In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the Court (see Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd and Others Civil Application No.124 of 2008). And besides, an appeal is considered arguable even if it raises a single bona fide only.”*

6. The Applicant further submitted that it is likely to suffer irreparable loss which it may not recover should the intended appeal be successful as the Respondent may not be able to refund the decretal sum and costs of the suit. The Applicant further submitted that the government entity holding public funds, the Applicant will suffer irreparable loss including audit queries if the stay orders are not granted. The Applicant relied on the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR** where the Court of Appeal held:-

*“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”*

7. The Applicant submitted that pursuant to Section 21 of the Teachers Service Commission Act and Article 260 of the Constitution, the Applicant is a government organ and is therefore exempt from depositing security for costs under Order 42 Rule 8 of the Civil Procedure Rules, 2010. The Applicant submitted that it is a government institution with perpetual succession and will be able to satisfy the Court's decree in the event the appeal is unsuccessful.

8. The Applicant finally submitted that it had met the requirements under Order 42 Rule 6 of the Civil Procedure Rules.

#### **Respondent's Submissions**

9. The Respondent submitted that the intended appeal will not be rendered a nugatory if stay is not granted as the Applicant has not demonstrated that the Respondent is incapable of paying back the sums due in the unlikely event the Applicant succeeds on the intended appeal. The Respondent relied on the cases of **Butt v rent Restriction tribunal (1979) eKLR** and **Tropical Commodity Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331**.

10. The Respondent submitted that the appeal has no likelihood of success as the Applicant has not indicated any single issue it intends the Appellant Court to pronounce itself on. The Respondent relied on the case of **Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union** where the Court held:-

*“He need not show that such an appeal is likely to succeed. It is enough for him to show there is at least one issue upon which the court should pronounce its decision.”*

11. The Respondent submitted that by granting stay orders he will be greatly prejudiced having waited for the determination of the suit. Moreover, the Applicant will suffer no loss, as the Respondent is capable of satisfying the terms of the judgment. The Respondent relied on the case of **Jason Ngumba Kagu & Others v Intra Africa Assurance Co. Ltd [2014] eKLR** and **Absalom Dora v Tarbo Transporters [2013] eKLR**.

12. The Respondent submitted that the Applicant has delayed in filling this Application in good time and was only prompted to do so after

the prosecution of the bill of costs. The Respondent further submitted that the Applicant has not demonstrated any readiness to comply with any directions the Court may issue and therefore prayed that the application be dismissed with costs.

13. I have considered the averments of both parties. I note that Order 42 rule 6(2) is clear as to under what circumstances, a Court may grant stay orders. The order states as follows:-

**“(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.**

14. Indeed the Respondent filed this application for stay within the requisite period without delay. The Applicant has also submitted that they stand to suffer irreparable damage if the application is not granted.

15. They submitted that the Claimant/Respondent will not be able to pay them back the decretal sum if the appeal succeeds. The Respondent in answer indicated that he runs a privation business and is therefore capable of paying the decretal sum, which is not substantial.

16. I note that the judgment rendered by Court apart from the monetary pronouncements also encompasses payment of pension to the Claimant. Indeed this if reversed by the Court of appeal will be unrecoverable.

17. In the circumstances, I find the application for stay is merited and I will allow it pending hearing and determination of the appeal.

18. Costs to abide the outcome of the appeal.

**Dated and delivered in open Court this 17<sup>th</sup> day of January, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Njeru holding brief Enonda for Claimant – Present

Respondent – Absent