



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND ABOUR RELATIONS COURT OF KENYA AT NAKURU**

**PETITION NO.3 OF 2019**

**[Formerly Kericho Petition No.10 of 2016]**

**HOSEA SITIENEL.....PETITIONER**

**Consolidated with**

**PETITION NO. 4 OF 2019**

**[Formerly Kericho Petition No.11 of 2016]**

**PROFESSOR EZEKIEL K KIPROP.....PETITIONER**

**VERSUS**

**UNIVERSITY OF ELDORET.....1<sup>ST</sup> RESPONDENT**

**VICE CHANCELLOR,**

**UNIVERSITY OF ELDORET.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY FOR EDUCATION,**

**SCHIENCE AND TECHNOLOGY.....3<sup>RD</sup> RESPONDENT**

**And**

**PROF. TERESA A.O. AKENGA.....1<sup>ST</sup> RESPONDENT**

**DR. DAVID I OJAKAA.....2<sup>ND</sup> RESPONDENT**

**CLEMENT OBURE ODEKA.....3<sup>RD</sup> RESPONDENT**

**DUNCAN NDIRANGU.....4<sup>TH</sup> RESPONDENT**

**ZIPPORA KINAGA MOGAKA.....5<sup>TH</sup> RESPONDENT**

**TERESA CHEBET MAINA.....6<sup>TH</sup> RESPONDENT**

**MARTIN NTABATHIA.....7<sup>TH</sup> RESPONDENT**

**PAMELA KHAYASI MASINDE.....8<sup>TH</sup> RESPONDENT**

**GEOFFREY OUMA.....9<sup>TH</sup> RESPONDENT**

**UNIVERSITY OF ELDORET.....10<sup>TH</sup> RESPONDENT**

## RULING

The ruling herein relates to two (2) applications, one filed by the petitioners and dated 9<sup>th</sup> September, 2019 and the application filed by the respondents dated 7<sup>th</sup> October, 2019.

The application by the petitioners is premised on the provisions of Article 162(2) (1) of the Constitution, 2010 and section 5(1) of the Judicature Act, section 3, 4, 12 (3) (viii), 13, 29(1) of the Employment and Labour Relations Court Act, 2011 and Rule 28(1) (g) and 32(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

1. Spent.

2. The court be pleased to commit the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents to civil jail for six months for contempt of court decree given on 9<sup>th</sup> July, 2019.

3. Without prejudice to prayer No.2 above, this court be pleased to impose a fine

on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents of an amount that the court deems fit for contempt of this court's decree given on 9<sup>th</sup> July, 2019.

4. This court be pleased to allow the partial execution of its decree given on 9<sup>th</sup> July, 2019 against the 10<sup>th</sup> respondent in favour of the applicants for the sum of Ksh.38, 903,116.60 before taxation of the Party and Party Bill of costs.

5. The respondents be condemned to bear the costs of this application.

The application is supported by the annexed affidavit of Hosea Sitienei one of the petitioners in the consolidated petitions and on the grounds that on 9<sup>th</sup> July, 2019 the court delivered judgement for the petitioners with the reinstatement the 1<sup>st</sup> applicant to the position he held as the Finance Officer of the 10<sup>th</sup> respondent and ordered for the payment of his back salaries and to be paid within 30 days of the judgement and failure to pay there be payment of ksh.14,729,122.00 being the salary owing following unfair termination of employment which has since been addressed.

The court also directed that the 2<sup>nd</sup> applicant be paid ksh.24,174,994.660 following his unlawful termination of employment as the Deputy Vice Chancellor (Administration and Finance) of the 10<sup>th</sup> respondent and which sum included back salaries, notice pay, leave pay, gratuity and passage and baggage.

Upon the delivery of the judgement in the presence of both parties, on 11<sup>th</sup> July, 2019 the petitioners scanned a copy of the judgement and sent it by email to the 10<sup>th</sup> respondent through their advocates and who acknowledged receipt of the same.

A decree has been extracted and issue don 17<sup>th</sup> July, 2019 and vide letters dated 9<sup>th</sup> July, 2019 and 12<sup>th</sup> July, 2019 sent to the 10<sup>th</sup> respondent through the office of the 1<sup>st</sup> respondent for the reinstatement and payment of the petitioners respectively. On 16<sup>th</sup> July, 2016 demand letters were sent to the office of the 1<sup>st</sup> respondent, on 18<sup>th</sup> July, 2019 the respondents were served with the court decree and which have all been received and acknowledged.

Following the judgement of the court herein, on 22<sup>nd</sup> and 23<sup>rd</sup> July, 2019 the 1<sup>st</sup> applicant reported to his immediate supervisor, the Deputy Vice-Chancellor (Administration & Finance) and was denied access to his office. Upon the lapse of 30 days, the 1<sup>st</sup> to the 9<sup>th</sup> respondents continue to refuse and neglect to pay the applicant his dues in accordance with the court decree.

The actions of the respondents are unlawful and in utter disobedience of this court decree and judgement of 9<sup>th</sup> July, 2019. Such wilful disobedience and defiance affronts the authority of the court and the supremacy of the law.

Following the unlawful termination of employment, the 1<sup>st</sup> applicant have been unable to secure alternative source of income due to the age and thus unable to support self and family. The 2<sup>nd</sup> applicant had secured a loan mortgage and which is in arrears of Ksh.1, 092,708.00 with Kenya Commercial bank and vide letter dated 14<sup>th</sup> August, 2019 the bank has threatened to call up the entire debt of ksh.19, 842,507.00 if such arrears are not cleared by 30<sup>th</sup> August, 2019. If such loan arrears are not cleared there is chance of losing the offered security and shall be left destitute.

To ensure justice, the petitioners seek for the orders of committal of the respondents to civil jail and be fined with an amount the court shall find fit for contempt.

To ensure the ends of justice are achieved, the applicants also seek that they be allowed to partially execute against the 10<sup>th</sup> respondent to protect their dignity. They are faced with huge legal fees that they are required to meet but are unable since the money under the decree has not been paid by the 10<sup>th</sup> respondent. The applicants have suffered and shall continue to do so due to the acts of commissions and omissions of the 1<sup>st</sup> to the 9<sup>th</sup> respondents of reducing the court's decree to a mere paper. Such is an affront to the authority of the court and rule of law.

In reply the respondents filed Grounds of Opposition and on the reasons that there is no disobedience of the court judgement and orders

stemming from it as the decree issued was two-pronged to either reinstate or pay the applicants the decretal sum and either of the two options would be in compliance with the court judgement.

The application by the petitioners seeking to enforce the order or decree through contempt proceedings whereas under section 13 of the Employment and Labour Relations Court Act provides for the mode of execution shall be as in the Civil Procedure Act. There is no application to execute the decree in accordance with the Civil Procedure Act and the application made offends the principles set out in the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR** in that the application seeks to embarrass and/or defeat the substratum of the Notice of Motion dated 20<sup>th</sup> August, 2019 seeking stay of execution of the decree and the application before the Supreme Court.

#### 2<sup>nd</sup> application

The second application by the respondents is seeking for orders that;

*The court be pleased to order the stay of execution of the judgement and decree of this court and or further proceeding pending hearing and determination of the appeal currently pending in the Supreme Court Petition No.33 of 2019 University of Eldoret & another versus Hosea Sitienei & another.*

The application is supported by the affidavit of Stephen Anditi the senior legal officer for the 10<sup>th</sup> respondent, University of Eldoret and on the grounds that the respondents as decree-holders following the judgement and decree of the court running to Ksh.28 million cumulatively and which followed judgement by the Court of Appeal in Civil Appeal No.55 and 58 of 2017 – Hosea Sitienei, Ezekiel Kiprop versus University of Eldoret & 2 others.

Mr Anditi also avers that there is a challenge against the decision of the Court of Appeal before the Supreme Court in Petition No.33 of 2019 – University of Eldoret versus Hosea Sitienei & Another and which petition is pending determination. In view of the matters now before the Supreme Court, the object of the application by the petitioners herein and to preserve the integrity of the on-going appellate process before the court, the preservation of the judgement herein is imperative.

The Court of Appeal held that the Council of the 10<sup>th</sup> respondent was not lawfully constituted to conduct disciplinary proceedings against the petitioners and upon such findings the operations of the respondent university are in limbo with uncertainty over all its prior, current and future decisions in accordance with the mandate of the Council and which include respect and compliance with the court judgement and decree that is subject of the current application.

The constitution of the 10<sup>th</sup> respondent council was found by the Court of Appeal to be illegal, a matter now before the Supreme Court. A determination of such matter will have a bearing in these proceedings.

The parties made their oral submissions in court.

The parties filed list of cases and the petitioners filed written submissions.

The petitioners submitted that there is a deliberate and wilful defiance to comply with the court judgement and decree and the respondents should be cited for contempt and in the alternative be allowed to proceed with partial execution on costs. The judgement of the court required compliance within 30 days which has since lapsed and there is no reinstatement of the 1<sup>st</sup> applicant or payment of the monies ordered to be paid to the two applicants. The respondents are served with the decree of the court and the non-compliance challenges the dignity and authority of the court and the rule of law.

The petitioners also submitted that they seek the court to allow them to proceed with partial execution before taxation of costs in accordance with section 94 of the civil procedure Act. There is no stay of execution and the application now filed by the respondents is meant to frustrate the execution process. The reasons given for seeking stay are without merit as the judgement of the court has no appeal and the matters before the Supreme Court, if any do not relate to the judgement of this court.

The petitioners relied on the cases of **Stewart Robertson versus Her majesty's advocate, 2007 HCAC 63; ELRC Cause No2486 of 2016 – Council of Governors versus Kenya Medical Practitioners Pharmacists and Dentists Union; Republic versus Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka [2019] eKLR; Sam Nyamweya & 3 others versus Kenya Premier league limited & 2 others [2015] eKLR; and Ochino & another versus Okombo & 4 others [1998] KLR.**

The respondents submitted that they seek stay of execution of the judgement herein pending the hearing of the Supreme Court petition No.33 of 2019 under the principles set out in the case of **Aviation & Allied Workers Union versus Kenya Airways & others Cause No.1616 of 2012** that stay of execution can be allowed by the court and which is discretionary and which discretion is to be used judicially.

There has been no delay in moving the court as herein, there are good reasons advanced as to why stay of execution should issue and the respondents are willing to deposit security for the due performance of the judgement.

The respondents are before the Supreme Court to challenge the judgement of the Court of Appeal whose judgement had the effect of setting aside the decision of the 10<sup>th</sup> respondent on the basis that the council was illegally constituted when it held disciplinary hearing for the petitioners. The petitioners were recruited by the same council and where the actions of the council were held illegal, the council cannot be punished as such would be approbation and reprobation and which question is now before the Supreme Court.

If the decree is executed, there is no chance of recovery of the judgement amount from the petitioners. The respondents are willing to deposit the total judgement sum in a bank as security.

The respondents have relied on the case of **Republic versus Principal Magistrate's court at Mavoko & another ex parte Joseph Ole Lenku Governor Kajiado County & another [208] eKLR; Joseph Mburu Gathuru & 28 others versus County Government of Nakuru [2018] eKLR; and C C M versus MNM [2018] eKLR.**

From the Motions before court and the submissions of the parties the issues which arise for determination can be summarised as to whether there is contempt of court with regard to the judgement and decree issued herein on 9<sup>th</sup> July, 2019; whether the respondents should be punished therefrom; whether the court should allow for partial execution of the decree given on 9<sup>th</sup> July, 2019; and whether there should be stay of execution of the court judgement and decree therefrom.

With regard to the last issue on whether the court should stay execution of the judgement delivered on 9<sup>th</sup> July, 2019 and as well articulated by the respondents in their submissions with regard to the applicable principles set out in the case of

**Aviation & Allied Workers Union No.1616 of 2012** and also set out in **Abukar Hassan [2017] eKLR** that;

**versus Kenya Airways & others Cause Amal Hauliers Limited versus Abdulnasir**

- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

It is common cause that judgement herein was delivered on 9<sup>th</sup> July, 2019 following the Court of Appeal judgement in **Civil Appeal No.55 and 58 of 2017 – Hosea Sitienei & Ezekiel Kiprop versus University of Eldoret & Others.**

Upon the delivery of judgement herein the respondents have moved the court seeking stay of execution on the grounds that such stay should issue to preserve the subject of suit and pending hearing and determination of the Appeal currently pending in the Supreme Court in Petition No.33 of 2019 – University of Eldoret versus Hosea Sitienei & another.

In support of the motion the respondents filed the Affidavit of Mr Anditi the legal officer of the 10th respondent and who attached a ruling of the **Court of Appeal in Civil Application No.1 of 2019 (Nyeri)** and where the applicants, the respondents herein were seeking a review of the judgement of the Court of Appeal in **Civil Appeal No.55 and 58 of 2017 – Hosea Sitienei & Ezekiel Kiprop versus University of Eldoret & Others** and which was considered among other prayers and the same dismissed with costs on 9<sup>th</sup> July, 2019.

Attached to the motion is draft the application by the respondents to the Supreme Court seeking to address the ruling by the Court of Appeal delivered on 9<sup>th</sup> July, 2019 and which dismissed application seeking to review the court judgement among other prayers.

This court going through the records before it, there is no appeal against the judgement herein delivered on 9<sup>th</sup> July, 2019. The matters now set out as before the Court of Appeal and the Supreme Court do not relate to the judgement of this court.

On the principles therefore required to apply in the grant for orders of stay of execution, there is no appeal pending; there is nothing that is subject and stopping the execution of the judgement herein; there is no material before the court to apply so as to stay the execution; and there are no special circumstances set out to justify the grant of stay of execution.

Even upon the offer by the respondents to deposit the judgement amount with the bank as security, such must be premised on a good foundation that there exists an appeal which is likely to be negated if stay is not granted and that by allowing stay of execution and the deposit of such security the substratum of the suit is preserved.

Without any appeal from the judgement of the court, the matters now addressed by the respondents before the Court of Appeal addressed and there being no orders of stay from the Court of Appeal or Supreme Court, to issue an order of stay herein will be to defeat the very essence of justice.

The petitioners as applicants should be allowed to enjoy the fruits of their judgement.

On whether the respondents should be held in contempt of court and punished for it, in the judgement of the court the main orders required the respondents and particularly the 10<sup>th</sup> respondent to do the following;

(a) Reinstate Hosea Sitienei back to his position held with the 10<sup>th</sup> respondent and pay his back salaries owing and due from 16<sup>th</sup> January, 2016 to 30<sup>th</sup> June, 2018 and be paid in 30 days;

(b) In the alternative to the reinstatement the payment of terminal dues.

The court also ordered that;

(a) Prof. Ezekiel Kiprop be paid back salaries at ksh.15,146,092; notice pay Ksh.2,837.00; leave pay Ksh.90,000.00; gratuity Ksh.6,015,816.00; passage and baggage Ksh.50,000.00; and costs of the suit.

There is the decree of the court and there is no compliance even with the alternative orders with regard to Hosea Sitienei or the payment of dues directed with regard to Pro. Ezekiel Kiprop.

Whereas the court has the power to punish offenders who deliberately and blatantly choose to disobey its orders as held in the case of **Council of Governors versus Kenya Medical Practitioners Pharmacists and Dentists Union**, cited above, it should be noted that punishment for contempt does not protect the person dignity of the judiciary or private right of the parties or litigants but the fundamental supremacy of the law is challenged as held in **Teachers Service Commission versus Kenya National Union of Teachers & 2 others [2013] eKLR**;

*The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.*

There is no effort(s) made by the respondents to explain why they have failed to abide the orders of the court despite the lapse of 30 days. There is no reinstatement of Hosea Sitienei or payment of the dues set out in the judgement of the court and outlined in the decree of the court and which has since been served and acknowledged.

The reply by the respondents and grounds of opposition pegged on the grounds that the decree issued was two-pronged to either reinstate or pay the applicants the decretal sum and either of the two options would be in compliance with the court judgement is not demonstrated as to how either option is adopted and complied with. The respondents as judgement debtors cannot be left at large to opt and proceed at will. Such would be an affront on the rule of law. One has to give way.

The respondents cannot take refuge in the principles set out in the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR** and claim that the applicants are out to embarrass and or defeat the substratum of the Notice of Motion dated 20<sup>th</sup> August, 2019 seeking stay of execution of the decree and the application before the Supreme Court. Such application dated 20<sup>th</sup> August, 2019 is not part of these proceedings. Where the respondents meant to address application dated 20<sup>th</sup> August, 2019 filed before any other forum, such should be removed herein and addressed on the merits before that forum but cannot be applied herein to avoid liability and failure to comply with the orders of the court.

The court finds no sufficient cause given by the respondents for the non-compliance with the judgement delivered on 9<sup>th</sup> July, 2019.

In the absence of compliance with the orders to reinstatement, the alternative orders take force.

Before the court can consider orders of contempt on the face of the decree of the court, the affirmation that the alternative orders to pay the dues owing issues. This does not in any way remove the respondents jointly and severally and by virtue of their offices from compliance with the court orders. The owing dues and payable to the petitioners shall follow and the court shall not hesitate to punish for contempt.

The petitioners seek for partial execution of the decree of the court. Section 13 of the Employment and Labour Relations Court Act, 2011 read together with section 94 of the Civil Procedure Act allow the court to direct for partial execution where the court considers it necessary and before the amount of the costs incurred in the suit can be ascertained by taxation.

Section 94 of the Civil Procedure Act states that:

**94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation**

Section 94 of Civil Procedure Act gives the court discretion to allow execution before taxation. Good reason(s) must be made for the court to allow such process. In **Bamburi Portland Cement Co. Ltd versus Hussein (1995) LLR 1870 (CAK)** the court stated that;

*Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.*

the court moved by the motion of the applicants seeking to proceed with partial execution, the lapse(s) by the respondents to abide the main order and reinstate the 1<sup>st</sup> applicant and or pay the owing dues now apparent, such forms good basis and grounds to allow for partial execution and pending taxation of the party and party costs. The dues ordered to be paid to the petitioners on the face of the judgement of the court are owing and due for a period of over 30 days.

**Accordingly, application dated 9<sup>th</sup> September, 2017 is hereby allowed in the following terms;**

**1. The petitioners shall proceed with partial execution of the decree issued**

**on 9<sup>th</sup> July, 2019 against the 10<sup>th</sup> respondent in favour of the applicants for the sum of Ksh.38, 903,116.60 before taxation of the Party and Party Bill of costs.**

**2. The petitioners are awarded costs of the application.**

**Delivered at Nakuru this 24<sup>th</sup> day of October, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....