



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.57 OF 2019

[Formerly Mombasa ELRC Cause No.53 of 2019]

VENANSIO MBATARU KARIUKI.....CLAIMANT

VERSUS

THE GOVERNOR,

COUNTY GOVERNMENT OF NYANDARUA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA...2ND RESPONDENT

THE COUNTY ASSEMBLY OF NYANDARUA.....3RD RESPONDENT

RULING

The claimant by application dated 16th October, 2019 made under the provisions of section 1A, 1B, 3A and 63 (c) ad (e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and seeking for orders that;

1. Spent.
2. The court be pleased to issue stay of the ruling and order made on 9th October, 2019 together with all the consequential orders pending the hearing and determination of this application.
3. There be stay of proceedings, ruling and order in Nakuru Employment & Labour Relations Cause No.57 of 2019 (formerly Mombasa ELRC Cause No.53 of 2019) pending the hearing and determination of his application inter parties.
4. There be stay of execution of the ruling and order in Nakuru Employment & Labour Relations Cause No.57 of 2019 (formerly Mombasa ELRC Cause No.53 of 2019) by the court on 09.10.19 pending the hearing and determination of his application inter parties.
5. The injunction be granted for 45 days pending the filing, hearing and determination of the claimant's intended appeal in the Court of Appeal.
6. Such orders or directions be issued as may appear to this court just and convenient.
7. Costs of this application be provided for.

The application is supported by the annexed affidavit of the claimant and on the grounds that by application dated 22nd August, 2019 the claimant challenged the decision of the 1st respondent to terminate his employment vide a press release on 28th August, 2019 and by a ruling delivered on 9th October, 2019 the court dismissed the application among them the prayer seeking reinstatement and a bar stopping the respondent from recruiting other person to fill his job and the claimant is keen to appeal against the decision. Aggrieved by the court decision the claimant filed notice of appeal.

Other grounds are that the claimant is apprehensive that the respondents will move to illegally implement their illegally to implement their

unlawful decision to hire another person instead of the claimant. The respondents have already issued public statements on the active steps to be taken towards replacing the claimant despite the notice to file appeal.

The claimant has an arguable appeal and will be overtaken by events if the respondents are permitted to proceed with execution before the appeal is heard. No prejudice shall be suffered if execution is temporarily put in abeyance. The claimant is seeking for stay for 45 days.

The claimant in his affidavit avers that he has since filed Notice of Appeal and applied for written proceedings towards preparation of his intended appeal and thus if the orders sought are not granted the intended appeal shall be overtaken by events as the respondents have actively released public statements on 14th and 15th October, 2019 inviting the 3rd respondent to undertake vetting of appointees of vacant CECM officers including his position.

The claimant filed a List of Authorities.

In reply the 1st and 2nd respondents filed Replying Affidavit sworn by Hiram Mwangi Kahiro and who avers that he is the County Secretary of Nyandarua County and competent to reply herein. The court herein is *functus officio* upon delivery of the ruling delivered on 9th October, 2019 and cannot entertain any further application in the matter.

The application contravenes Order 42 of the Civil Procedure Rule. The claimant having been dissatisfied with the court ruling could only proceed by way of an appeal or seek for a review of the ruling by this court.

Mr Kahiro also avers that the claimant shall not suffer irreparable loss if the stay is denied. The 1st respondent shall be prejudiced as he shall be unable to deliver services to the electorate of the county and the claimant should not be allowed to hold the county government at ransom where he was a non-performer.

The applicant has not satisfied the conditions for an order of stay of execution as he is incapable of grant in the instant circumstances. As soon as the court delivered its ruling on 9th October, 2019 the 1st respondent proceeded to re-organise the government and re-appointed the exiting ministers to serve in acting capacity in the former position held by the claimant. The respondents have replaced the claimant and written to the 3rd respondent to commence vetting process for another member acting in the docket and stopping he processes that have already been activated will cause the county government substantial loss and will be subjecting public resources to waste and plunder.

Mr Kahiro also avers that the application herein is made as an afterthought as it is made a week after the court delivered its ruling. A stay of execution order cannot issue by this court as such has been addressed. The merits of what forms the intended appeal is not for this court.

The prayer inviting court for a stay of execution for 45 days will be asking the court to act *ultra vires* noting that stay pending an appeal where merited is only tenable within the usual 30 days period. Save for seeking to his position the claimant has no other basis as to why he is seeking a reinstatement back to his former position.

Mr Kahiro also avers that the claimant had submitted himself to negotiations for a pay-off from the 2nd respondent and consequently now that he has no order of reinstatement from court he feels he must return to his former position to assert his position and negotiate for a pay-off.

The 3rd respondent filed a Replying Affidavit sworn by Hon. James Wahome Ndegwa the speaker of the 3rd respondent and who avers that he is privy to occurrences of the 20th August, 2019 where the 1st respondent through a press statement purportedly terminated the employment of the petitioner [claimant] of which he was unaware. As head of the 3rd respondent there was no resolution to remove the claimant from office as required by section 40 of the County Government Act. The removal from office might have been in line with section 31(a) since the 3rd respondent was not involved.

Hon. Ndegwa also avers that the Court of Appeal in **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** that section 31(a) of the County Government Act does not give the 1st respondent unfettered powers to dismiss a county executive committee member as the doctrine of pleasure is inapplicable in the current dispensation and has been replaced with the doctrine of due process. In the case of **Richard Bwogo Birir versus Narok County Government & 2 others [2014] eKLR** the court reiterated the same position.

According to the press statement by the 1st respondent on 20th August, 2019 he did not give any reasons on why the claimant's employment was terminated. Such lacked in due process and in contravention of articles 47 and 50 of the constitution. Under Article 179 of the constitution the contract of employment of a member of county executive committee runs concurrently with that of the governor and can only be terminated in accordance with section 40 of the County Government Act.

Hon. Ndegwa also avers that as head of the County Assembly he is convinced there was no due process in the termination of the claimant's employment.

The parties made oral submissions in court.

The claimant submitted that a notice of appeal has been filed and seek stay of execution of the ruling of the court delivered on 9th October, 2019 to allow for the hearing of the intended appeal. The claimant is seeking to preserve the subject of the suit and there shall be no prejudice to the respondents.

The claimant also submitted that in the case of **Erinford Properties Ltd versus Cheshire County Council (1974) 2 All ER 448** where the court has dismissed a notice of motion seeking injunctive reliefs the same court has power to stay its ruling to allow for an appeal. This is reinstated in the case of **Madhupaper International Ltd versus Kerr (1985) eKLR**. in the case of **Alliance Media Kenya Ltd versus World Duty Free Company Complex Ltd (2005) eKLR** and an injunction can be allowed for a limited period and reiterated in the case of **Abdul Waheed Sheikh & another versus Mas Constructions Limited & others ELC No.1480 of 2014** and **James Juma Muchemi & Partners Limited versus Barclays Bank of Kenya Limited HCCC No.339 of 2011** the claimant also submitted that if the respondents are not stopped with an order of stay of execution the subject of the suit shall be destroyed and seek the court to apply the overriding objectives and the oxygen principle to allow for a limited period a stay of execution.

The court should put into account the **Mutungu Rules** 2, 3, 7, 8 and all other provisions of the law and allow the application. The claimant has filed Appeal No.87 of 2019.

The 1st and 2nd respondents submitted that there is undue delay in filing the instant application following court ruling on 9th October, 2019 whereas the claimant had a chance to apply for stay instantly.

The claimant has been replaced with an acting officer and to return him into office will disturb good order. Parties had commenced negotiations to settle the matter and the claimant is only using the court process to assert his position.

Once the court delivered its ruling it became *functus officio* and the orders sought should only issue in rare circumstances and such has not been established. Even where appeal No.87 of 2019 is heard and determined, the claimant can be compensated in damages. The **Mutungu Rules** are not applicable as this is not a petition grounded on the violation of fundamental freedoms.

The 3rd respondent submitted that it does not support or oppose the application save that stay of execution should be allowed as where the Court of Appeal finds the intended appeal with merit the subject matter of the suit should be preserved not to render the same wasted. If the 1st and 2nd respondents are allowed to appoint new county executive members to replace the claimant public funds will be applied and if the court ruling is reversed on appeal, such funds will have been put to waste. There shall be an absurdity and contrary to article 10 of the Constitution to use public resources to pay a new officer and then force the officer out of office. The 1st and 2nd respondents have submitted that there are acting officers and therefore no prejudice shall be suffered if the application is allowed.

On the application before court the issues for determination can be summarised as follows;

Whether the court should stay the ruling and order made on 9th October, 2019 together with all consequential orders pending the hearing of the claimant's intended appeal;

Whether the court should stay proceedings herein pending the hearing and determination of the claimant's intended appeal; and

Whether the court should allow 45 days stay of execution.

From the issues set out above, it is important to revisit the ruling and orders issued on 9th October, 2019. The claimant filed application dated 22nd August, 2019 seeking to stop the respondents from replacing, dismissing, sacking and firing him from office. The claimant was also seeking to stop the respondents from filling the position of County Executive Committee Member for public Administration and ICT until his suit was heard.

In its ruling the court analysed the matters, the affidavits and responses thereto and addressed the subject of reinstating the claimant back into office as an interim measure and held that such is a final remedy which can only issue upon the court hearing the parties in evidence. The court then issued orders that;

... Application dated 22nd August, 2019 is declined and the interim orders issued on 29th August, 2019 vacated to allow the court to hear the parties on the main suit and which shall be heard on priority basis. Hearing directions shall therefore issue. ...

Thus recognising the matter before it and which required the court to delve into the merits of the substantive suit, the application seeking interim injunctive orders was not allowed and hearing directions were to issue.

Should the court thus stay its ruling and orders of 9th October, 2019? to stay the court ruling and orders would in my humble view return the parties back to situation and position subsisting before 9th October, 2019 where the court sitting at Mombasa on 27th August, 2019 had heard the claimant *ex parte* and allowed for;

... the respondents to maintain status quo as of today as relates to vetting and appointment of another person to hold office held by the applicant [claimant] prior to the dispute in issue.

The interim orders issued remained in place until the ruling of 9th October, 2019.

The court has since heard the parties on the merit and rendered itself.

Should stay issue?

The conditions to be met before stay is granted are provided by the Order 42 Rule 6(2) of the Civil Procedure Rules as follows;

No order for stay of execution shall be made under sub rule (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.

The court or the Court of Appeal once moved have the power to address an application seeking stay of execution as held in the case of **Amal Hauliers Limited versus Abdulnasir Abukar Hassan [2017] eKLR**;

... The argument by the Respondent that the Court of Appeal decisions are inapplicable to applications for stay of execution pending appeal before the High Court. A perusal of the decisions of both courts show that the principles to be applied when considering an application for stay of execution pending appeal are the same.

That power secured, the claimant avers that the loss he shall incur if stay is not allowed is that the position he held with the respondents shall be filled and this shall negate his intended appeal. That this will be prejudicial to his case.

However, in employment and labour relations, the remedy of reinstatement back to employment upon the cessation of the same is matter the court should address on the merit and be guided by the provisions of section 49(4) of the Employment Act, 2007. It cannot issue as an interim order as to do so would be to allow for specific performance at the interlocutory stage whereas the parties have a chance to address the same at a full hearing and give the court the fair chance to have the defences and submissions on the matter. See the Court of Appeal on **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** that;

*The remedy of reinstatement is discretionary. However, the Court is required to be guided by factors stipulated in section 49(4) of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be offered except in very exceptional circumstances. The Court should also balance the interest of the employee with the interest of the employer in **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR** the Court of Appeal relied on the case of **Nampak Corrugated Wadesville versus Khoza (JA 14/98) [1998] Zalac 24** where it was held that;*

The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.

And in in **Alex Wainaina Mbugua versus Kenya Airways Limited [2017] eKLR** where the trial Court had held that:

Reinstatement is the primary remedy under section 49(3) of the Employment Act, 2007 and involves placing the employee back in employment as if the dismissal had never occurred. If the exceptions to the remedy of reinstatement do not apply as set out under section 49(4) the court only has discretion with regard to the extent to which reinstatement should be made retrospective.

The gist of the above matters is that an order of reinstatement should only issue as a final order and upon the court delving into the merits of the suit and such order can issue retrospectively and thus cover the period the employee is out of employment.

The claimant and the 3rd respondent heavily relied on the cases of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR** and **Richard Bwogo Birir versus Narok County Government & 2 others [2014] eKLR** and these put into account, it is my humble view that these judgement issued after the Court of Appeal and the court respectively had heard the parties on the merits and not in the interim.

With regard to the requirement under Order 42 Rule 6 and which requires an applicant to deposit security for the due performance of the decree upon success or the appeal not being a success, this is the claimant's case. Together with the orders seeking stay of execution, the claimant is also seeking to stay the proceedings herein to first address his intended appeal and without delving into the same, this being his

case and the court having ordered on 9th October, 2019 that hearing of the main suit should proceed on the merits but the claimant is keen to proceed on appeal, this right is secured. Stay of proceedings herein shall issue within the provisions of Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The issue on the grant of 45 days stay of execution is thus addressed where the court hereby declines to allow for stay of execution save the court shall allow a stay of proceedings in accordance with Rule 16 as set out above.

Each party shall also bear own costs.

Delivered at Nakuru this 14th day of November, 2019.

M. MBAR?

JUDGE

In the presence of:.....

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