



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 30 OF 2017

(Before D. K. N. Marete)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

FINLAYS (K) LIMITED.....RESPONDENT

RULING

This is an application dated 19th January, 2017 seeking the following orders of court;

- i) **THAT** *this application is certified as urgent and its service be dispensed with in the first instance.*
- ii) **THAT** *there be temporary stay of execution of the judgement of the court delivered on 4th December, 2017 and all the consequential orders arising there-from; pending hearing and determination of this application inter-parties.*
- iii) **THAT** *there be temporary stay of execution of the judgement of the court delivered on 4th December, 2017 and all the consequential orders arising there-from; pending the hearing and determination of the Applicant's appeal.*
- iv) **THAT** *necessary directions be given.*

It is grounded as follows;

- i) **THAT** *judgment on this matter was delivered on 4th December, 2017.*
- ii) **THAT** *the Respondent/Applicant being aggrieved by the judgement of this Honouable court has lodged a Notice of Appeal against it.*
- iii) **THAT** *unless the orders sought herein are granted, there is a real likelihood that its appeal shall be rendered nugatory.*
- iv) **THAT** *this application has been made without undue delay.*
- v) **THAT** *it would be in the interest of justice if this application is allowed*

The claimant/respondent has not filed any reply on this. She chose to file written submissions instead.

This application is consolidated with a similar one in Employment and Labour Relations Cause No.31 of 2017.

The respondent in her written submissions dated 6th June 2018 submits a case of upholding the application on grounds that she has an overwhelming appeal with enhanced chances of success. Further, this appeal shall be rendered nugatory in the event of success in that the decretal amounts are substantial and if paid out to the claimant/respondent may not be recoverable given the claimants/respondents low financial standing.

The respondent in support of her case sought to rely on the authority of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another (UR)** where the Court of Appeal faced with a similar conundrum observed as follows;

“...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 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.”

In further support of her case on the concept of negation of an appeal in the event of success, the respondent/applicant sought to rely on the authority of **Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 244 of 2001, (unreported)** where the Court observed as follows;

“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay”.

The claimant/respondent in opposition to the application sought to rely on the authority of **Cooperative Bank of Kenya Limited vs, Banking Insurance and Finance, Union (Kenya) [2015] eKLR** at paragraph 20 where P.M. Mwilu, J.(as she then was) observed as follows;

...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 unemployment. 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. The grievant, despite what has transpired does not see any difficulty in continuing to work. The applicant on the other hand alleges disruption

and loss of trust. The grievant has not reported for duty pursuant to the judgement of the Employment and Labour Relations Court for the applicant to be in a position to determine the alleged disruption.....

The applicant’s position is therefore at best a mere apprehension. I expected the applicant to at least, on a balance of probabilities, discharge the evidentiary burden set out in section 112 of the Evidence Act cap. 80 Laws of Kenya in respect of the disruption. As expressed by the respondent, the applicant is at liberty to redeploy the grievant to other stations or duties that a Graduate Clerk, such as the grievant can undertake. Reinstatement is in any event a statutory remedy and I find it appropriate here.....

In any event, the applicant did not indicate whether it had replaced the grievant or whether the grievant is a surplus to its requirements. As observed in the Kenya Airways Limited case I am convinced that the applicant is a large company to which the reinstatement of the grievant is unlikely to alter the execution of duties, and interaction between the grievant and the concerned workmates is unlikely to be substantial. Moreover, employees have been known to be suspended, reprimanded or faced other forms of disciplinary processes after which they resumed their employment duties and performed optimally. The grievant through the respondent took immediate steps upon the termination of the employment leading to the judgement reinstating the grievant now sought to be appealed against. For such a large, reputable and experienced financial institution with coverage across the country, I believe that there are sufficient policies, checks and balances to ward off any improprieties on the part of its employees while also addressing the standards and expectations from each of its employees. As such, the reinstatement herein is not an immunity charter to the grievant against any subsequent breaches or termination as provided for under the laws. As I have tried my level best to keep off the merits of the remedy of reinstatement for the bench that will ultimately handle the substantive appeal. I nevertheless felt it necessary to raise the above issues while considering the appropriate order(s) to grant.

The submissions of the parties notwithstanding, this court embraces and agrees with the philosophy and thinking in the authority of **Aggrey Lukorito Wasike – Versus – Kenya Power and Lightning Company Limited [2016] eKLR** where Ongaya, J. came out as follows;

*The court considers that an order for reinstatement by its nature is incapable of being stayed because all it does is to emplace the employee back into the employment the employee had been removed from by the employer. The court upholds its opinion in the ruling delivered on 23.09.2016 in **Aggrey Lukorito Wasike – Versus – Kenya Power and Lightning Company Limited [2016] eKLR**,(above,) thus,*

“However, the court has carefully considered the claimant’s submission that there is nothing to be stayed. The court has considered the nature of an order of reinstatement. An order of reinstatement means that the employee is restored to the position held, or a position substantially similar to the one held, prior to the removal, or dismissal, or otherwise separation with the employer with full prevailing pay and other benefits. Taking into account the claimant’s submission and the nature of the order of reinstatement, the court returns that an order of reinstatement takes effect immediately and is self executor only subject to such terms as may be imposed in the order itself. An order of reinstatement is not a positive order that requires the employer to do anything other than comply as ordered. Once the court finds that the termination or dismissal or other removal was illegal or unfair or unjustified, the employer is obligated to immediately comply by allowing the employee to resume work and if the employer fails to do so, the employer is nevertheless liable to pay the salary of the employee. Thus, having reflected upon the subject, the court considers that the following principles would apply whenever this court makes an order or reinstatement:

1. A reinstatement order takes effect immediately as it is self executor and only subject to the terms imposed in the order itself.
2. The employer is bound to comply with a reinstatement order by allowing the employee to resume duty as reinstated and to pay full salary and other due benefits from date of the impugned removal or dismissal (being the date of the reinstatement) and to continue paying until the lawful termination of the employment or until the date the reinstatement order is reversed by this court on review or by the Court of Appeal following a relevant appeal.
3. If the employer fails to comply with a reinstatement order by allowing the employee to resume duty, the employer is nevertheless liable to pay the employee's salary from the effective date of the impugned dismissal or termination (being the date of the reinstatement) and to continue paying until the lawful termination of the employment or until the date the reinstatement order is reversed by this court on review or by the Court of Appeal following a relevant appeal.
4. If the Court of Appeal or this court upon review reverses the order of reinstatement, the employer's duty to pay the reinstated employee effectively stops or ends and the employer is no longer required to retain the employee who had been reinstated in continued actual service.
5. If the Court of Appeal upon appeal or this court upon review reverses the order of reinstatement, the employee is not required to return the salary or the pay that the employee had received prior to the reversal of the reinstatement order.
6. If during the pendency of appeal or an application for review, the employer failed to allow the employee to actually resume duty (upon the order of reinstatement) for the period between the order or reinstatement and the date of the order's reversal on appeal or review, the employee will still recover the salaries or wages for that period despite the reversal of the order of reinstatement; the only exception to such recovery being, if it is shown that the delay by the employer to comply with the reinstatement order pending appeal or review was not due to the employer's unjustified action or omission to allow the employee to resume work, or, the employee for unjustified action or omission, failed to resume work as per the order of reinstatement."

Need we add more? The court in **Aggrey Lukorito Wasike** (supra) said it all. The order of reinstatement is self effacing. It is not capable of being stayed.

I am therefore inclined to dismiss this application with orders that each party bears their own costs of the application.

Delivered, dated and signed this 20th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Omwaka for the claimant union.
2. Mr. Koech instructed by Bett & Company Advocates for the respondent