



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1804 OF 2017

Before Hon. Lady Justice Hellen S. Wasilwa on 27th September, 2018

SARAH NDUTA THENYA1ST CLAIMANT

HELLEN NJERI KANGIRI.....2ND CLAIMANT

PAMELA NDWIGA.....3RD CLAIMANT

VERONICA WANJIKU WAMBUGU.....4TH CLAIMANT

ANGELA SHARU IRUSA.....5TH CLAIMANT

VERSUS

EDELVALE TRUST JAMAA HOME

& MISSION HOSPITAL.....RESPONDENT

RULING

1. The Application before Court is the one dated 1.3.2018. It is filed by the Applicant/Respondents herein seeking stay of execution of the Honourable Court's orders issued on 5/2/2018.

2. The Application is filed through a Notice of Motion Application brought under Section 12(3) (viii) of the Employment and Labour Relations Court Act, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

3. The Application is based on the following grounds:-

1. THAT the Honourable Court on the 5th of February 2018 granted orders allowing the Claimant's Application dated 7th September 2017 in the following terms:-

a. The ex-parte orders issued on 8th September 2017 were confirmed.

b. The Respondent to release salaries withheld to the 1st to 3rd Claimants.

c. The Respondent to continue to pay the salaries of the 1st to 3rd claimants when they fall due until the case is determined.

2. THAT the Respondent being aggrieved by the whole Ruling aforesaid filed a Notice of Appeal and has applied inter alia for certified typed proceedings.

3. THAT the Respondent's intended Appeal is arguable and raises triable issues.

4. THAT if a stay of execution of the orders aforesaid is not granted, the Respondent will suffer substantial and irreparable

damage and its appeal will be rendered nugatory for the following reasons:-

a. In the event that the Ruling aforesaid is overturned on appeal and the Court of Appeal finds that the 1st to 3rd Claimants were lawfully terminated from employment, the 1st to 3rd Claimants do not have any known means or assets to refund the amount that will have been paid to them as salary rendering the intended appeal a mere academic exercise.

b. There is an imminent risk that the strained relationship between the 1st to 3rd Claimants on the one hand and the Respondent on the other hand, will lead to poor provision of critical health services to patients which will eventually endanger the lives of patients at the said hospital.

c. The Respondent is apprehensive that the 1st to 3rd Claimants will also interfere negatively with the smooth operations of other nurses and other members of staff as there already exists a strained relationship between the 1st to 3rd Respondents on the one hand and some of the nurses/other employees working for the Respondent, causing substantial or complete disruption of the provision of health services.

d. The Respondent at the moment is trying to win back the confidence of the public after the same was severely damaged after complaints with respect to the 1st to 3rd Claimants of improperly handling patients were reported. In the circumstances, the slightest form of insecurity or dispute in connection with the 1st to 3rd claimants will completely ruin the Respondent's standing in the provision of medical services.

5. THAT the Respondent is ready, willing and able to furnish such reasonable security as this Honourable Court may direct and prepared to abide by any such conditions as to security as the Court may deem fit and proper.

6. THAT the 1st to 3rd Claimants can be adequately be compensated by an order of costs if the intended appeal is not successful.

7. THAT this Application has been made without unreasonable/inordinate delay.

8. THAT it is in the interest of justice that this application be allowed.

4. The Application is also supported by the Supporting Affidavit sworn by the Respondent's Human Resource Manager who avers that he is conversant with the facts surrounding this case and is duly authorized to swear this affidavit.

5. He reiterates the averments made in the grounds above and depones that they have already filed a Notice of Appeal being aggrieved by the orders of this Court. They therefore aver that the appeal raised arguable and triable issues and the same would be rendered a mere academic exercise if the appeal succeeds.

6. The Respondents/Claimants opposed this Application. They filed a Replying Affidavit sworn by Sarah Nduta Thenya, the 1st Claimant herein who avers that she has the authority of the 2nd and 3rd Claimants to swear the affidavit on their behalf.

7. The Respondents deponed that the orders given by the Court were based on the fact that the Respondents had been on indefinite suspension without pay till 19th March 2018 when their payments were released.

8. They aver that the Applicants have not deposited security due in performance of the decree as the duration the intended appeal will last is unknown.

9. They aver that it is not true that the Court did not grant prayers that were not in the main suit. They also aver that the intended appeal raises no triable issues. They asked the Court to find the Application without merit and intended to delay justice and so should be dismissed.

10. The parties agreed to dispense this Application through written submissions.

11. I have considered the averments of the parties with the submissions filed.

12. Order 42 rule 6(2) of the Civil Procedure Rules provides 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”.

13. Thus in deciding whether or not to grant the prayers for stay or not, I am guided by the law above. I must decide whether substantial loss may result to the Applicant unless the order is made.

14. The Applicants have submitted that they stand to suffer irreparable damage if the Application is not allowed. They aver that the Respondents are not able to refund them moneys ordered paid if the appeal succeeds and therefore the appeal will be rendered an academic exercise.

15. Under Rule 75 (2) of the Court of Appeal Rules, a Notice of Appeal shall be lodged within 14 days from the date of the decision against which it is desired for appeal.

16. The Notice of Appeal was lodged before this Court on 16th February 2018 which was within the requisite period by law. This means there is a proper appeal before the Court of Appeal.

17. This Application was also filed within reasonable period on 1.3.2018 following the Court's decision on 5/2/2018.

18. On security, the Applicants are willing to deposit the requisite security as may be ordered by this Court. There is therefore proof that the Applicants have met the condition for grant of stay orders.

19. I will therefore allow stay on condition that the Applicants do pay the Respondents the salary payable upto the date of this ruling and therefore the Respondents be deemed to be on interdiction in which case they will be entitled to payment of ½ their salary pending hearing and determination of the appeal.

Dated and delivered in open Court this 27th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musili holding brief for Nyasimi for Claimants – Present

Nyandwaro holding brief for Mwaniki for the Respondent – Present