



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO.25 OF 2018

IN THE MATTER OF APPLICATION BY IRENE CHESANG FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION, MANDAMUS, INJUNCTIVE ORDER, DECLARATORY ORDER ANY OTHER ORDER TO MEET ENDS OF JUSTICE

AND

IN THE MATTER OF ORDER 53 RULES 1,2,3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF EMPLOYMENT ACT CAP 226 LAWS OF KENYA (REVISED 2012)

AND

IN THE MATTER OF ARTICLES 41 (A) & 162 (2) (A) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF EMPLOYMENT AND LABOUR RELATION COURT (PROCEDURE) RULES 2016

AND

IN THE MATTER OF THE HUMAN RESOURCE ADVISORY COMMITTEE (HRAC), RURAL ELECTRIFICATION AUTHORITY

BETWEEN

REPUBLIC

EX-PARTE

IRENE CHESANG.....APPLICANT

- VERSUS -

THE HUMAN RESOURCE ADVISORY COMMITTEE, RURAL

ELECTRIFICATION AUTHORITY.....1ST RESPONDENT

RURAL ELECTRIFICATION AUTHORITY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

RULING

The Court delivered the judgment on 16.11.2018 and in conclusion the judicial review application by the notice of motion filed on 03.09.2018 was dismissed with costs.

The applicant filed a notice of appeal on 20.11.2018 through Arusei & Company Advocates. The applicant also filed a notice of motion on 20.11.2018 and prayed for orders:

1. That this Honourable Court be pleased to certify the application as urgent and heard ex-parte in the first instance.
2. That pending the hearing and determination of this application there be a stay of execution of the judgment, decree and order made by Justice Byram Ongaya on the 16th November, 2018.
3. That pending the hearing and determination of the appeal or the intended appeal, there be a stay of execution of the judgment, decree and order made by Justice Byram Ongaya on the 16th November, 2018.
4. That the Court be pleased to issue an injunction order restraining the 1st and 2nd respondents from calling for, from convening, from sitting, from discussing, from deliberating on the disciplinary proceedings concerning the ex-parte applicant convened for the 22.11.2018 or at any date thereafter pending hearing and determination of this application.
5. That the Court be pleased to issue an injunction order restraining the 1st and 2nd respondents from calling for, from convening, from sitting, from discussing, from deliberating on the disciplinary proceedings concerning the ex-parte applicant convened for the 22.11.2018 or at any date thereafter pending the hearing and determination of the appeal or the intended appeal.
6. That the Honourable Court does issue such other directions and orders as the Court may deem just and expedient to grant.
7. That the costs of the application be in the cause.

The application was under sections 1A, 1B, and 3A , Order 40, Order 42 Rule 6 of the Civil Procedure Act, section 12 of the Employment and Labour Relations Court Act, Rule 17 and Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all enabling provisions of the law. The application was based on the petitioner's supporting affidavit annexed thereto, the petitioner's supplementary affidavit filed on 23.11.2018 and the grounds stated in the application.

The respondents opposed the application by filing on 22.11.2018 the replying affidavit of David Gitonga, the 2nd respondent's General Manager, Research, Strategy, and Planning. It was filed through Hamilton Harrison & Mathews Advocates.

The Court has considered the material on record for and against the application and makes findings as follows.

The applicant submits that it has preferred an appeal against the judgment herein. That is not in dispute. Further the applicant submits that stay of execution under Order 42 Rule 6 of the Civil Procedure Rules is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. It is submitted that if an order of injunction or stay is not granted as prayed for and the intended appeal succeeds, the disciplinary procedure preferred against the applicant by the respondents would negate the applicant's essence of appealing. In dismissing the notice of motion, the Court found, "**5.The stay orders will now lapse and the respondents are entitled to continue with the disciplinary case against the applicant from where it had stopped and in accordance with the contract of service (including provisions of the 2nd respondent's HRPPM) and relevant provisions of law.**"The respondent does not deny that it is continuing with the disciplinary process and it is its case that the process is in line with the judgment. Further, in the event the claimant is terminated at the end of the disciplinary process, she will have a recourse being to file a suit in the Court. A stay or injunction is not in the best public interest because the 2nd respondent being a public body, it is crucial that it concludes the disciplinary case against the respondent.

The Court has considered the submissions and returns that the final orders were that the judicial review application was dismissed. It is true that the effect of the dismissal was that the disciplinary proceedings as leveled against the applicant would continue. The Court returns that in view of the final order dismissing the judicial review application, there is no positive order that can be subject of an order for stay of execution. Further as submitted for the respondent, should an adverse decision issue in the disciplinary case, there will arise a new cause of action and the applicant's rights will not be rendered nugatory as a fresh suit may be filed in that regard. To that extent and balancing justice for the parties, the order for stay of execution pending intended appeal was misconceived and on a balance of fairness is not justifiable.

Turning to the injunction, the Court considers that once the application for judicial review was determined by the judgment on record, there would be no suit as a basis for temporary injunction. Order 40 of the Civil Procedure Rules as invoked is on temporary injunctions and interlocutory orders. Section 2 of the Civil Procedure Act defines suit to mean all civil proceedings commenced in any manner prescribed. It is arguable as was done for the applicant that once a notice of appeal was filed, a suit was thereby commenced. However, Order 40 has no provision like in Order 42 rule 6 (4) which provides that for purposes of the rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court a notice of appeal has been given. The Court therefore finds that in the instant case there is no suit as contemplated under order 40 on temporary injunctions and interlocutory orders. There being no pending suit before the Court, the injunction cannot be granted under Order 40 as prayed for and pending a suit that does not in fact exist at all. Needless to state, the Court having rendered its judgment in the matter, it has no jurisdiction to grant a temporary injunction pending hearing and determination of the intended appeal – such jurisdiction to grant an injunction pending the hearing and determination of appeal having been vested in the Court of Appeal under the rules of that Court.

In conclusion, the application filed for the applicant on 20.11.2018 by way the notice of motion is hereby dismissed with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday 7th December, 2018.**

BYRAM ONGAYA

JUDGE