



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 14 OF 2016

(Before D. K. N. Marete)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNIONCLAIMANT

VERSUS

EASTERN PRODUCE (K) LIMITEDRESPONDENT

RULING

This is an application by way of Notice of Motion dated 15th February, 2015 and seeks the following orders of court;

- a) That this application be certified as urgent.*
- b) That service of this application be dispensed with in the first instance.*
- c) That there be stay of execution of the Decree in this suit pending the hearing and determination of an appeal against the judgement of this Honourable Court.*
- d) That this honourable court be pleased to grant temporary stay orders pending the hearing and determination of this application inter-parties and/or further orders of the court.*
- e) That such other orders be made as are just and expedient*
- f) Costs be in the cause.*

This is grounded as follows;

- i. The Respondent has lodged Notice of Appeal against the judgement of the High Court delivered on 31st January 2017.*
- ii. This application has been brought expeditiously and without unreasonable delay.*
- iii. The Respondent will be prejudiced improperly and further the said appeal which is against the entire decision of the High Court Judge will be rendered nugatory if stay of execution is not*

granted and the said appeal succeeds thereafter.

iv. The Respondent is willing to abide by such reasonable stay terms as the court may order in the interests of both parties and justice.

v. The Defendant's application is made in good faith.

vi. The Respondent has a good appeal with overwhelming chances of success by virtue of Section 12 (3) of the Employment and Labour Relations Court Act which limits reinstatement to within 3 years unlike in the decision made herein hence there is an arguable appeal.

In a Replying Affidavit sworn on 1st March, 2017, the claimant/respondent answers the application by denial. It is her averment that the application is intended to forestall the grievant's enjoyment of the fruits of judgement by employment of all manner of tactics and as a consequence of the applicants economic might. This is through endless litigation intended to thwart the reinstatement of the grievants.

The respondent/applicant in her search for stay of execution urged the court to exercise its wide and unfettered discretion for grant of stay execution on the

following grounds as expressed in her written submissions dated 24th March, 2017

- 1. The application is brought out expeditiously and without undue delay.*
- 2. The appeal will be rendered nugatory if stay is not granted.*
- 3. The applicant has an arguable appeal with sufficient cause.*
- 4. Substantial loss will be suffered by the applicant in the event of non grant stay of execution.*
- 5. This court enjoys the discretion to grant stay of execution without security.*
- 6. The respondent undertakes to fast track the appeal so that it is heard and concluded expeditiously and in the shortest time possible.*

The claimant/applicant in her written submissions dated 25th March, 2017, reiterate her opposition to the application. It is her case that reinstatement of the grievants would not in any way prejudice the applicant and should therefore be upheld. In this she relied on the authority of **Co-operative Bank of Kenya Limited – Versus – Banking Insurance & Finance Union (Kenya) [2015]** where Mwilu, J. A, observed as follows;

“20....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 employment. 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....Reinstatement is in any event a statutory remedy and I find it appropriate here.”

The claimant/applicant further sought to rely on the authority of **Aggrey Lukorito Wasike – Versus – Kenya Power and Lightning Company Limited [2016] eKLR** 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.”

In conclusion, I find this application unsustainable. This is because it ostracizes the requisites of reinstatement and or re-engagement as expressed in the existing jurisprudence and law as above cited. It must therefore fail.

I am therefore inclined to dismiss the application with costs to the claimant/respondent.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Omwaka for the Claimant Union/Respondent
2. Mr. Kenei instructed by Kibichiy & Company Advocates for the Respondent/Applicant