



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1682 OF 2016

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 29TH JUNE, 2017)

DR. GEORGE WEKESA..... CLAIMANT

-VERSUS-

MULTI MEDIA UNIVERSITYRESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 19th October 2016 brought under Rule 32 of the Employment and Labour Relations Court Act Rules 2016, Section 3A & 66 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of law for orders that:

1. The application be certified urgent and heard ex-parte in the first instance.

2. There be a stay of execution of the orders in the ruling delivered on the 6th day of October 2016 with respect to the application dated 20th August 2015 pending the hearing and determination of this application inter-parties.

3. There be a stay of execution of the orders in the ruling delivered on the 6th day of October 2016 with respect to the application dated 20th August 2016 pending hearing and determination of the Application intended Appeal.

4. The Court be pleased to grant the orders sought subject to any conditions as the Court may deem fit.

5. That costs of this application be provided for.

2. The application is supported by the grounds set out hereunder and the annexed affidavit of Mumbi Mwihuri and such further grounds to be adduced at the hearing of.

1. That the ruling was delivered on the 6th day of October, 2016 in Milimani ELRC Cause 1682 of 2014 in the Claimant's favour.

2. That the Applicant is aggrieved with the whole of the ruling delivered by Honourable Lady Justice Wasilwa therein and intends to appeal against that ruling.

3. That there are currently no orders of stay of execution in force. The Application is reasonably

apprehensive that if stay orders are not granted against the orders sought, the Applicant's intended Appeal will be rendered nugatory.

4. That unless the Applicant is granted the stay orders sought, the Applicant's intended Appeal will be rendered nugatory.

5. That the Application has been brought promptly and no prejudice will be occasioned upon the Claimant.

6. That it would be mete and just that the matter is heard under an urgency basis.

7. That the Applicant has sufficient cause for seeking the orders sought.

8. That it is equitable to grant the orders sought.

3. The Claimant has filed a Replying Affidavit dated 20th January 2017. He submits that the subject matter of the application and intended appeal is his interdiction which was to be for a period of not more than 90 days, already lapsed on the 16th of November 2016, and efforts made to report to work were in vain as he was blocked from accessing his work place.

4. He avers that it was not until 19th October 2016, that the Respondent moved to Court to secure interim orders pending hearing of the application. He wrote a letter dated 7th December 2016 through his lawyers seeking the outcome of the investigation and subsequent status of his employment but received a response dated 9th December 2016, asking him to wait on the Court proceedings.

5. He avers that the Respondents application is presented mala fides and the Court ought to exercise its discretion in its favour. He avers that the interdiction period subject to instant proceedings as lapsed, and that the Court made an order lifting the interdiction on the 6th of October 2016 but the Respondent refused to comply but instead rushed to Court for the instant proceedings.

6. He avers that the Respondents have alluded to Schedule 6 of the University statues and Clause 6.4.5 of the Terms and Conditions of Service for Non-teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories.

7. He avers that the Court order is very clear that the Respondent has no option of commencing fresh disciplinary proceedings against him, none have been commenced and that if there was any justification for his interdiction, the Respondent is free to act.

8. He avers that the Respondent has no arguable appeal and the requirements for stay of execution have not been granted. The Respondent has not demonstrated that they are likely to suffer substantial loss and that they have the option of fresh disciplinary proceedings.

9. The Claimant avers that he is still on half pay and cannot get other employment as he is still under the employment of the Respondent.

10. They ask the Court to dismiss the same with costs.

11. The Respondents have filed submissions dated 14th February 2017. They submit that the Claimants filed a replying affidavit sworn on the 20th of January 2017 in opposition to the application but have failed to date it. They rely on Section 5 of the Oaths and Statutory Declarations Act which sets out as following:

“every commissioner for Oaths before whom any oath or affidavit is taken or made under the Act shall state truly in the Jurat or attestation at what place and date the oath is taken or made. “

12. They submit that the affidavit is of no legal effect and should be disregarded for failing to comply with the mandatory requirement.

13. They submit that they have satisfied the conditions of stay of execution as set out in order 42 Rule 6 of the Civil Procedure Rules. The Applicant submits that the application was brought timeously and without unreasonable delay.

14. They submit that investigations are under way on the allegations of the Claimants failure to adhere to the Respondents' Procurement Regulations.

15. They cite **Maasai Mara University vs. Daniel K Cheboi & 3 Others, 2015 eKLR** the court of appeal held that employers who have demonstrated that the employee may be found to have been in breach of their position of trust or may cause more damage at the employer's costs have been able to enjoy a stay of execution. The Court adopted the finding of the Court of Appeal in **Kenya Revenue Authority vs. Sidney Keitanay Changole & 3 Others [2015] eKLR** where the Court held that to reinstate the Respondent to a position of trust (cashier) where the trust had been lost and if money was lost make the intended appeal nugatory.

16. The Respondent submits that the Claimant was placed in a position of trust where the duties involve managing the University's Clinic, procurement among others. The Applicant is likely to suffer substantial loss if the Claimant is reinstated into that position as indicated above.

17. The Claimant/Respondent has filed written submissions dated 13th February 2017. They submit that in demonstrating substantial loss it has been held that the Applicant must establish other facts which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in appeal. In other words the appeal will be rendered useless but for the stay. This, they cite was the position reflected in **James Wangala & Another v Agnes Naliaka Chesoto Misc Application No 42 of 2011 [2012] eKLR** Gikonyo J stated as follows:

“No doubt, in law the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The Applicant must establish other facts which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silversein vs Chesoni [2002] 1KLR 867 and also in the case of Mukuma vs Abuoga quoted above. The last case referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules respectively. Emphasized the centrality of substantial loss thus:

“the issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. The Claimant Respondent reiterates that the Applicant not shown how he stands to suffer irreparable damage in the event that stay is not granted.

19. They submit that the Applicant has delayed in filing this application. The Court should not exercise its discretion in the applicant's favor. It is not until 19th October 2016 that it was filed, and still continues to deny the Claimant access to his workplace. Moreover, the Claimants submit that the Respondents have not provided any security for the due performance of the order.

20. In conclusion they submit that the Applicant has not demonstrated to the Court any harm that will be

occasioned by refusal to grant stay, while he has demonstrated how he continues to suffer on half pay, inability to get other employment as he is still bound by the Applicant, and the lack of proper communication putting him in suspense and limbo.

21. They submit that the application must fail.

22. I have examined the application before me under Order 42 Rule 6 (2) of Civil Procedure Rules which states as follows:

“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”.

23. In connection with the 1st limits of Order 42 Rule (6), the issue of substantial loss, the Respondent Applicant has submitted that unless the stay order is granted, they stand to suffer substantial loss.

24. They submitted that investigations are being conducted against the Claimant on his failure to adhere to Respondent’s Procurement Regulations. They cited **Maasai Mara University vs. Daniel K. Cheboi & 3 Others (2015) eKLR**, where CA held that employers who have demonstrated that the employee may be found to have been in breach of their position of trust or may cause more damages at the employers costs have been able to enjoy a stay of execution.

25. The Court of Appeal adopted this finding in **Kenya Revenue Authority vs. Sidney Keitany Changole & 3 others (2015) eKLR**; where the Court held that to reinstate the Respondent to a position of trust (as cashier) where trust had been lost and if money was lost would make the intended appeal nugatory.

26. That as it may be in current case, the Claimant was interdicted in June 2016 pending investigations into procurement issues.

27. This Court made an order on 6.10.2016 stating that the process already instituted against the Claimant was flawed as the Respondent Applicant was going against its own rules of procedure. I stopped the procedure and lifted the interdiction but with a rider that fresh disciplinary process against the Claimant could be instituted so long as they follow due process and accord him a fair hearing if at all.

28. In this Court’s view, the person to suffer substantial loss if the stay is granted is the Claimant as he would be subjected to a flawed process.

29. From the cited cases, if money was lost that would make the intended appeal nugatory if stay is not allowed following due process would in my view make the Respondent’s case stronger against the Claimant if indeed the Claimant is in breach. This is what substantive justice entails.

30. It is therefore my position that the Respondent Applicants have not established they stand to suffer substantial loss. In **Osero & Company Advocate vs. Easy Properties Limited (2014) eKLR**, Gikonyo J stated this:

“I should also say here that filing of appeal is not proof of substantial loss occurring in the sense of Order 42 Rule 6 of the Civil Procedure Rules, otherwise there would be no need to apply. Much more is needed depending on the circumstances of each case to show the appeal will be reduced to pious venture unless stay is ordered. In fact the Applicant did not even attempt to establish the loss it will suffer as is always expected in such applications”.

31. It is also my finding that the Respondents have not shown an iota of loss they stand to lose other than merely stating that they have filed an appeal. That in itself is not enough and I therefore find they have not established that requirement under Order 42 Rule 6 of Civil Procedure Rules.

32. On the other requirements, on delay the application was filed within a reasonable time and so that requirement is complied with.

33. On security, it is my view that, that would not vindicate the Claimant given the length of time he has been on interdiction since June 2016, almost 1 year now. I therefore decline to grant the order of stay sought and order that the **Orders of 19th October 2016** be complied with henceforth.

34. Costs to the Claimant.

Read in open Court this **29th day of June, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Cherono holding brief for Miss Nyambura for Claimant – Present

Respondents – Absent

(ADDENDUM TO RULING IN CAUSE NO. 1682/2016 AND CORRECTION OF AN ERROR IN THE RULING)

In relation to the ruling delivered by Court on **29th day of June 2017**, a correction is hereby made on paragraph 33 of the ruling to read:-..... I therefore decline to grant order of stay sought and order that the order given by Court on **6th October 2016** be complied with henceforth.

GIVEN UNDER my hand and the seal of the Court this 11th day of July, 2017.

ISSUED at **NAIROBI** this 11th day of July 2017.

HON. JUSTICE HELLEN WASILWA

JUDGE