



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2016**

**IN THE MATTER OF A JUDICIAL REVIEW APPLICATION**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE JUDICATURE ACT (CHAPTER 8) LAWS OF KENYA**

**IN THE MATTER OF THE LAW REFORM ACT (CHAPTER 23) LAWS OF KENYA**

**IN THE MATTER OF EMPLOYMENT ACT. NO. 11 OF 2007**

**IN THE MATTER OF THE INDUSTRIAL COURT ACT 2011**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010**

**IN THE MATTER OF AN APPLICATION BY PROFESSOR JAMES K. TUITOEK FOR  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**BETWEEN**

**PROFESSOR JAMES TUITOEK**

**APPLICANT**

**v**

**THE CHIEF OF STAFF AND HEAD OF**

**THE PUBLIC SERVICE**

**1<sup>ST</sup> RESPONDENT**

**EGERTON UNIVERSITY**

**2<sup>ND</sup> RESPONDENT**

**RULING**

1. In a judgment delivered on 11 November 2016, the Court issued an order prohibiting the Respondents from *amending, varying, vacating or in any way interfering with the applicant's terms of exit package and an order of mandamus compelling the Respondents to effect clause 13 of the terms and conditions of Service of 27 February 2008.*

2. The 2<sup>nd</sup> Respondent was dissatisfied with the decision and it filed a Notice of Appeal on 15 November 2016, and on 9 December 2016, it filed a motion seeking

a) Spent

b) Spent

c) THAT there be a stay of the Judgment of this Court made on 11-11-2016 and/or any decree issued thereof the Judgment pending the filing, hearing and determination of the 2<sup>nd</sup> Respondent/Applicant's appeal in the Court of Appeal.

d) THAT such further or other Orders be made as this Honourable Court may deem just and expedient in the circumstances.

3. The Court declined to grant any *ex parte* order and the 2<sup>nd</sup> Respondent was directed to serve the motion for hearing on 16 January 2017. However, the motion could not proceed as the 2<sup>nd</sup> Respondent sought time to respond to the applicant's replying affidavit which had been filed on 12 January 2017.

4. When the motion next came up for hearing on 22 February 2017, it turned out the 2<sup>nd</sup> Respondent had not served its submissions upon the applicant.

5. The Court directed that the submissions be exchanged and scheduled arguments for 14 March 2017, but because the advocate for the 2<sup>nd</sup> Respondent was bereaved, the hearing was rescheduled to 11 April 2017, when the Court took the arguments.

### **2<sup>nd</sup> Respondent's arguments**

6. The 2<sup>nd</sup> Respondent's case was that it was ready to offer security by way of guarantee for the satisfaction of the decree; that it would suffer substantial loss if stay was not granted because the execution of the decree would involve payment to third parties such as Kenya Revenue Authority as recovery of such statutory payments would be unpredictable, the execution of the decree would violate the principle of equal remuneration for work of equal value in that the applicant would be earning above the set remuneration for professors, execution would lead to a flood of litigation by such other professors, the 2<sup>nd</sup> Respondent was under an obligation to abide by governmental circulars on rationalisation of terms of service within the public service and that it had brought the application without undue delay.

7. In terms of legal framework, the 2<sup>nd</sup> Respondent urged the Court not to apply Order 42 of the Civil Procedure Rules but rather the Constitution, the Law Reform Act and Order 53 of the Civil Procedure Rules.

8. Mr. Wekesa for the 2<sup>nd</sup> Respondent also urged the Court to apply the legal principles enunciated in *Pharmaceutical Manufacturing (K) Co. Ltd & 3 Ors v Commissioner General of the Kenya Revenue Authority & 2 Ors* (2015) eKLR.

9. As regards the opening of litigation flood gates, Mr. Wekesa asked the Court to take judicial notice of Nakuru Cause No. 473 of 2016, *Prof. Mwangi Wathuta v Egerton University* which raise similar questions as were addressed in the judgment sought to be impugned.

### **Applicant's case**

10. The applicant opposed the application and urged that the *Pharmaceutical's* case relied on by the 2<sup>nd</sup> Respondent addressed the legal issue of conservatory orders and not stay of execution pending appeal.

11. Mr. Wena, for the applicant also urged that the 2<sup>nd</sup> Respondent had not demonstrated any substantial loss it stood to suffer and that in any case, the applicant was still in gainful employment with the 2<sup>nd</sup> Respondent.

12. In respect of opening litigation floodgates, Mr. Wena submitted that apprehension of other suits was not one of the grounds for grant of stay of execution.

## **The law**

13. The law and legal principles applicable to an application for stay of execution are now legion and do not require a rehashing of the authorities. In fact, the legal principles are direct derivatives from Order 42 of the Civil Procedure Rules and these are, *that an application is brought without inordinate delay; that substantial loss may be occasioned if stay is not granted and that security for due performance of the decree is provided for.*

## **The case at hand**

### ***Delay***

14. The 2<sup>nd</sup> Respondent filed a Notice of Appeal within days of the judgment and the instant motion was filed within a month or so.

15. The Court therefore can conclude that there was no inordinate delay.

### ***Security***

16. The 2<sup>nd</sup> Respondent offered that it was ready to provide security in the form of a guarantee and therefore nothing much turns on a discussion of this condition.

### ***Substantial loss***

17. Odunga J dealt with the issue of substantial loss and rendered himself in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, thus, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

18. According to the 2<sup>nd</sup> Respondent, it would be occasioned substantial loss because payment of the decretal sum would require payments of income tax to the tax authority, statutory deductions and pension contributions.

19. The 2<sup>nd</sup> Respondent did not deny that the applicant is still in gainful employment with it as a Professor.

20. In the view of the Court, payment of tax liabilities and statutory deductions *per se* cannot amount to substantial loss by an employer.

21. The applicable law provides for mechanisms of claiming reimbursement of such payments and the mere maze of bureaucratic processes and hassles involved should not be used to deny a successful litigant fruits of litigation.

### ***Violation of right to fair labour practices on remuneration***

22. Although the 2<sup>nd</sup> Respondent raised this question, it is the view of the Court that it is a question better left to the Court of Appeal to determine on the merits.

23. In any case, the judgment and orders of Court sought to be impugned were predicated on a *unilateral variation of contractual term* which the 2<sup>nd</sup> Respondent did not deny.

24. If the Court misapprehended the terms of the contract and the law on unilateral variation of a contract, again, that is a matter better left to the determination of the Court of Appeal.

