



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 32 OF 2016

**IN THE MATTER OF A PETITION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS
AND FREEDOMS**

AND

IN THE MATTER OF ARTICLES 41 AND 47 OF THE CONSTITUTION

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT AND THE JUDICIAL
SERVICE ACT**

AND

IN THE MATTER OF THE HUMAN RESOURCES POLICY OF THE JUDICIARY

BETWEEN

JAMES ANG'AWA ATANDA	1st PETITIONER
ONYANGO GRACE MBONE	2ND PETITIONER
SUSAN WAMBUI KAMAU	3RD PETITIONER
CAROLYN NYAKIAMBORI MAKANA	4TH PETITIONER
CHRISTINE ADHIAMBO OKENO	5TH PETITIONER
SHARON SISIMWO TUGEE	6TH PETITIONER
FREDRICK MBEYA ODHIAMBO	7TH PETITIONER
EDWIN ONYONO	8TH PETITIONER
LEONARD OMOGO	9TH PETITIONER
SHERWIN NJOROGE	10TH PETITIONER
MALUKU SCHOLASTICA KIDI	11TH PETITIONER

THE JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. On 24 February 2017, the Court delivered judgment in which it issued a declaration that the unilateral variation of the 1st and 7th Petitioners' contracts of employment from open ended contracts to fixed term contracts was in violation of the right to fair labour practices and awarded each of them Kshs 750,000/-.
2. The Judicial Service Commission (Respondent) was aggrieved with the judgment and on 9 March 2017, it filed a Notice of Appeal.
3. On 30 March 2017, the Respondent lodged a Motion in Court seeking
 1. ... (spent).
 2. Pending the hearing and determination of this application *inter partes* this Honourable Court do issue an order of stay of execution and implementation of the judgment dated 24th February 2017 and the consequential decree and any further proceeding in this suit.
 3. This Honourable Court be pleased to issue an order of stay of execution and implementation of the judgment dated 24th February 2017 and the consequential decree and any further proceeding pending the hearing and determination of the intended appeal.
 4. Costs of this application be provided for.
4. The motion was placed before Court on 12 April 2017, and it allowed proposed order 2 on condition that the decretal sum(s) were deposited in Court before 1 June 2017 (the Respondent had indicated in the supporting affidavit that it was ready to abide by any directions of the Court).
5. The Court further directed that the motion be served for *inter partes* hearing on 20 June 2017.
6. Instead of complying with the stay condition (same has since lapsed for failure to comply with the condition), the Respondent filed another motion dated 26 May 2017 seeking
 1. ..(spent).
 2. This Honourable Court be pleased to review the order issued on 12th April 2017 to the extent of extending the time to which to deposit the decretal sum by 120 days from the 1st June 2017.
 3. Costs of this application be provided for.
7. This latter application was placed before Wasilwa J and she directed that it be served for *inter partes* hearing on 20 June 2017. The Judge also extended the time for depositing the decretal sum(s) to 20 June 2017 (the Respondent indicated in the supporting affidavit that it was ready to comply with the condition and sought for more time).
8. The Petitioners filed *Grounds of Opposition* to the first motion on 20 June 2017, when both motions were canvassed (parties agreed to adopt submission made in a related Petition, Nakuru Petition No. 29 of 2016, *Maxwell Miyawa & Ors v Judicial Service Commission*, and urged same day).
9. The Court has given due consideration to the representations made by the parties and the authorities relied on even though it will not refer to them expressly in this ruling.
10. The Court notes that the Respondent indicated a willingness to comply with directions/conditions as

to the grant of stay in both applications, save that budgetary logistics made it impossible because of the budgetary cycle.

11. The Court also notes that the Petitioners will not be prejudiced if at all as they have not commenced any execution proceedings.

12. In consideration of the expression of willingness by the Respondent to abide by any directions/conditions and considering the Petitioners have not commenced execution proceedings, the Court would reinstate the stay and allow an extension up to 30 October 2017, for the deposit of the decretal sum(s) in Court.

13. As a consequence of extending time to comply and considering that a *Notice of Appeal* had already been filed and that the typed proceedings are ready save for certification, the Court will also allow stay of execution pending appeal on condition as set in the preceding paragraph.

14. However, there is a legal issue the Respondent did not raise on the face of the record, but brought out in the oral submissions which the Court wants to refer to in passing.

15. The issue could or would have been determinative as to whether the condition set by the Court in granting the interim stay had legal anchor (the Respondent buttressed the point by relying on the decision of Lenaola J (as then was) in *Pravin Bowry v Ethics & Anti-Corruption Commission* (2015) eKLR.

16. The *Bowry* case addressed the provisions of section 61A the Anti-Corruption and Economic Crimes Act with reference to section 21 (3) and (4) of the Government Proceedings Act and Order 29 Rule 4(1) of the Civil Procedure Rules which govern execution against the Ethics and Anti-Corruption Commission.

17. The statutory provision being that the Respondent being *government* was exempted from paying security for due performance of a decree by dint of the provisions of Order 42 Rule 8 of the Civil Procedure Rules.

18. The legal principle enunciated in the *Bowry* case is that *governmental* agencies should be protected and insulated from attachments which would paralyse their operations.

19. The Respondent's expression of willingness to deposit the decretal sum would render it moot for this Court to apply the legal principle.

Conclusion and Orders

20. In conclusion, the Court orders as follows

(a) Time for depositing the decretal sum(s) in Court is extended up to 30 October 2017.

(b) Stay of execution pending appeal granted on condition (a) above is complied with.

21. Costs in the Cause.

Delivered, dated and signed in Nakuru on this 10th day of October 2017.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Ongoya instructed by Ongoya & Wambola Advocates

For Respondent Mr. Wakwaya instructed by Rachier & Amollo

Court Assistants Nixon/Martin