



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 68 OF 2015

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

RACHEL CAROL ATAMBA CLAIMANT

-VERSUS-

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY RESPONDENT

RULING

I delivered judgement in this case on 17th December, 2015. The judgement directed the Respondent to immediately redeploy the Claimant to the position of head of department without reduction of rank, remuneration or allowances and further awarded the Claimant damages in the sum of Shs.500,000.

The Respondent being dissatisfied with the Judgement, filed a notice of appeal on 21st December, 2015 and applied for certified copies of proceedings and judgement for purposes of preparing the record of appeal by letter of the same date.

By a motion dated 10th March, 2016 filed under certificate of urgency, the applicant seeks the following orders;

1. **THAT** this Honourable Court certify this Application as urgent and the same be heard *ex-parte* in the first instance.
2. **THAT** pending the hearing and determination of this application Inter parties, this Honourable Court be pleased to issue a temporary stay of execution of the order to pay Kshs.500,000 in the Judgement delivered on 17th December 2015 in the above case.
3. **THAT** pending the lodging, hearing and determination of an intended appeal, there be a stay of execution of the order to pay Kshs.500,000 in the Judgement delivered on 17th December, 2015 in the above case.
4. **THAT** the costs of this application follow the results of the intended appeal.

Among the grounds in support of the motion is that the appeal will be rendered nugatory and the applicant will suffer substantial loss should the orders not be granted as the applicant may not be able to recover the said Shs.500,000 should the appeal be successful. The Respondents further grounds were that the appeal is arguable with high chances of success, that the applicant is willing to comply with any court orders, that the claimant will not be prejudiced by the orders of the court, that the application has been brought without undue delay and that it is in the interest of justice to stay execution pending hearing and determination of the appeal. The application is supported by the affidavit of Professor Joseph Rotich, the

Deputy Vice Chancellor of the Respondent/Applicant.

I considered the application *ex parte* on 10th March, 2016 and granted interim orders of stay pending interpartes hearing and fixed the application for hearing on 24th March, 2016.

The Claimant filed a replying affidavit in which she states that the Respondent has already partly complied with the Judgement by redeploying her to Bungoma campus as Head of Administration on 23rd February, 2016, and the only unsatisfied portion of the Judgement is the payment of Shs.500,000 damages. She states that she is capable of paying the same based on her salary of Shs.409,461.00 gross. As proof of ability to pay she annexed a copy of her payslip.

Determination

I have considered the application together with the grounds in support thereof as well as the supporting affidavit. I have also considered the replying affidavit of the Claimant.

The Principles to be considered in an application for stay pending appeal is governed by order 42 Rule 6 of the Civil Procedure Rules. The power is discretionary and may be granted where there is sufficient cause shown by the applicant where the applicant may suffer substantial loss. The application must also be made without undue delay and on provision of such security as the court may order. The court must also balance the interests of the parties. See **M/s PORTREITZ MATERNITY v JAMES KABIA**.

In this case the only contentious issue is whether the applicant will suffer substantial loss. In **JAMES WANGALWA & ANOTHER v AGNESS NALIAKA CHESETO [2012] eKLR** Gikonyo J stated that;

" 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.... 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 factors 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...."

In this case the Applicant is the employer of the Claimant. Her salary is Shs.409,461.00. It is in the hands of the Applicant who can with ease access it should the appeal succeed. There is no substantial loss that the applicant will suffer should its appeal succeed.

I find that this application is made in bad faith. It is an abuse of court process. It has no merit at all and must be treated accordingly.

For these reasons, I dismiss the application with costs to the Claimant.

Ruling Dated Signed and Delivered this 16th day of June, 2016

MAUREEN ONYANGO

JUDGE