



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 190 OF 2015 CONSOLIDATED WITH CAUSES 192 AND 193 BOTH OF 2015

J.M.M.....1ST CLAIMANT

J.N.G.....2ND CLAIMANT

P.M.W.....3RD CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE ANGLICAN

CHURCH OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th September, 2016)

RULING

On 09.09.2016 the court entered judgment for each of the claimants against the respondent for:

a) Reinstatement with full pay and benefits to the respective position held in the church effective the date of the removal by way of indefinite suspension or withdrawal or cancellation of the licence to officiate and to continue serving in the church with full benefits until the lawful termination of the employment; as the decision as conveyed in the letter of suspension or withdrawal or cancellation of the licence to officiate is hereby set aside.

b) For the purpose of order (a) above, each of the claimants shall report to the Lord Bishop of the Diocese of Mt. Kenya West, not later than 01.10.2016 at 0900Hrs, for appropriate deployment and assignment of Priesthood duties including performance of pastoral and sacramental duties as per the claimant's prevailing oath of canonical obedience, declaration of assent, and the licence to officiate.

c) The respondent to pay the claimant all accrued salary arrears, since the date of removal by way of suspension or cancellation or withdrawal of the licence to officiate, and until the date of this judgment and thereafter to continue paying the claimant full monthly salary, allowances and all applicable benefits until the date of the lawful termination of the employment from the service of the church.

d) In line with the foregoing orders and other findings by the court as set out in this judgment the respondent to pay the 1st claimant **Kshs.2,224,996.00**, the 2nd claimant **Kshs.2,437,780.00**, and the 3rd claimant **Kshs.2,219,814.00** by 01.12.2016 failing interest at court rates to be payable thereon from the date of this judgment until the date of full payment.

e) The respondent to pay each claimant's costs of the suit.

In the judgment, the court awarded each claimant Kshs.2,000,000.00 being compensation for psychological trauma flowing from the circumstances of their termination from their services in the Church.

On 21.09.2016 the respondent filed an urged application by way of the notice of motion dated 19.09.2016. The application invoked section 12(3) (viii) and (4), 17, 20 of the Industrial Court Act, 2011. The respondent prayed for orders that:

1. This application be certified urgent and service thereof be dispensed with at the first instance for purposes of prayer 2 and 3 hereof.
2. The application herein be set down for hearing inter parties as a matter of urgency.
3. There be a temporary stay of execution of the judgment/decree delivered herein on 9th September, 2016 pending the hearing and determination of this application.
4. There be stay of execution of the judgment/decree delivered herein on 9th September, 2016 pending the hearing and determination of the intended appeal to the Court of Appeal.
5. The court be pleased to make such other or further orders as may be just and expedient in the circumstances.
6. The costs of the application abide in the intended appeal.

The application was based on the following grounds:

1. The respondent has filed the notice of appeal against the decision made herein on 9th September, 2016.
2. The application for stay of execution has been promptly made without unreasonable delay.
3. The decretal sum is for Kshs. 6, 882, 590.00 with costs and interest and the claimants were reinstated back to their jobs to resume duty on 01.10.2016.
4. The claimant's means was unknown and if they are paid the decretal sum and the intended appeal succeeded then the respondent will be unable to recover the same. On the other hand if the appeal failed, the respondent could readily pay up the judgment sum.
5. As security for due implementation of the decree if the intended appeal failed, the respondent was willing to deposit such amount of money as the court will order in a joint interest earning account opened in the joint names of the parties' advocates.
6. Granting the application will meet ends of justice.

The application was also supported by the affidavit of Desmond Mtula filed together with the application. The affidavit urged that the respondent had an arguable appeal because the respondent did not ordain, appoint or transfer clergy of the Anglican Church of Kenya; it does not contract employees or members of staff of the Anglican Church of Kenya; and it does not exercise disciplinary powers over the staff or clergy of the Anglican Church of Kenya- and further that the court erred in awarding each claimant Kshs. 2, 000, 000.00 for psychological trauma. It was further submitted for the respondent that if the stay of execution pending appeal is not granted, then the appeal would be rendered nugatory.

The claimants opposed the application by filing on 27.09.2016 the grounds of opposition and the replying

affidavit of Paul Mwangi Warui. The grounds of opposition are as follows:

1. There is no arguable appeal as there is no draft memorandum of appeal on record.
2. The respondent has alleged speculative pecuniary loss and they should pay the entire decretal amount without delaying the claimants' enjoyment of the fruits of their successful litigation.
3. The respondent has not established an arguable appeal with likely success and has not showed that the appeal would be rendered nugatory if stay orders are denied.
4. The application is calculated to continue the perpetuation of a grave injustice upon the claimants who had been condemned unheard and who have been maligned and embarrassed without end.
5. The application lacks merits and should be dismissed.

The court has considered the application, the affidavits and the submissions made for the parties. The court makes findings on the matters in dispute and consideration as follows.

Applications for stay of execution pending appeal will be tested by this court against the provisions of Order 46 Rule 6 of the Civil Procedure Rules. There is no dispute that the application was filed without undue delay. The respondent has offered to deposit the decretal amount in an interest earning account. Thus the remaining condition for stay of execution to be granted is whether the respondent has established substantial loss if the orders are denied.

The court considers that the decree or orders in the judgment are separable into two. First, it is the award of Kshs.2,000,000.00 for each claimant for psychological trauma- and the court considers that subject to appropriate security execution of such money decree may be stayed pending appeal as the amount being substantial, the respondent might suffer loss if the intended appeal succeeds and recovery is to be made against the claimants. Second, it is the order of reinstatement and payment to claimants flowing from the order of reinstatement – and which the court considers is not amenable to stay of execution orders pending the intended appeal in view of the complex emerging issues barring the grant of such stay of execution of the reinstatement order pending the intended appeal. The court will proceed to consider the pertinent issues in that regard.

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 Lighting Company Limited [2016]eKLR 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 executory 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 of reinstatement:

- 1. A reinstatement order takes effect immediately as it is self executory 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 of 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."

The court considers that in the present case, the claimants were reinstated back into employment and by the terms of the orders in the judgment they are to resume duty on or by 01.09.2016. The court has reflected upon the consequence of staying execution of such reinstatement order either under Order 42 Rule 6 of the Civil Procedure Rules or Rule 5(2) of the Court of Appeal Rules (by the Court of Appeal). Under section 2 of the Civil Procedure Rules, "suit" means all civil proceedings commenced in any manner prescribed. The court holds that under that section, an appeal against an order or decree or judgement or ruling of this court is a suit. In that sense, an order of stay of execution of a reinstatement order immediately mutates into an order in the nature of a temporary relief in favour of the applicant pending the hearing and determination of the suit, in this case, the appeal or intended appeal.

By past judicial decisions, it has been established that interim orders should preserve the subject matter in dispute and should not be the final orders. In East African Portland Cement Company Limited – Versus- Attorney General & Another [2013]eKLR the court (Rika J) stated, "25. Interim orders are granted where the Court, exercising its discretion is satisfied that they are necessary due to urgency and nature of the circumstances. They are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The courts must be wary of prejudgment of substantive merits"

In the judgment delivered on 05.04.2016 in Olive Mwihaki Mugenda & Another –Versus- Okiya Omtata Okoiti & 4 Others [2016]eKLR the Court of Appeal upheld its decisions in Vivo Energy Kenya Limited –Versus- Maloba Petrol Station Limited & 3 Others [2015]eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms –Versus- Naftali Ogola [2009]eKLR that an order which

results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.

Taking into account those principles, first, the court considers that the status quo in the present case which requires protection by way of an interim order of stay of execution pending appeal would be the claimant's enjoyment of the right to work as duly reinstated by the court order. It is this court's opinion that an order staying the reinstatement order would in effect be preserving nothing but in essence unsettling the prevailing parties' rights and obligations flowing from the reinstatement order. While making that consideration, the court has considered the respondent's line of submission that the claimants faced the alleged scandalous homosexual accusations so that the congregants may not allow them back into service of the church as the faithful will not trust the claimants. The court has weighed that against the claimants' submission that the application is calculated to continue the perpetuation of a grave injustice upon the claimants who had been condemned unheard and who have been maligned and embarrassed without end. The court has been guided by the opinion of the Court of Appeal in **Vivo Energy Kenya Limited –Versus- Maloba Petrol Station Limited & 3 Others [2015]eKLR** thus, **“In the present case, before the learned judge were two parties seeking injunctive reliefs in regards to the suit property. The first party's claim was founded on a purported lease with a party who prima facie was not the registered proprietor of the suit property. The second party's lease was prima facie with the registered proprietor of the suit property. The first party's lease was not registered, while that of the second party was duly registered. In our assessment of the affidavit evidence and without expressing a firm position, the learned judge erred by giving primacy to the claim of the first party over that of the second party. Speaking for the court in Mrao Limited-Versus- First American Bank of Kenya Limited & 2 Others (2003)KLR 125 at 138, Bosire, JA. stated as follows regarding what constitutes a prima facie case : ‘[A] prima facie case is more than an arguable case. it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case’.**” In the present case, this court considers that the claimants have already established their case before this court. They have showed that they deserve the order of reinstatement as found by this court and the point the applicant says it will argue at appeal is majorly that the applicant was not the employer; a point which this court needs not repeat itself about as in the court's considered view the Anglican Church of Kenya set out a framework in its Constitution vesting different functions in separate institutions but all working towards the goals of the Church. As this was not and cannot be an application under Rule 5(2) of the Court of Appeal Rules, the less this court avoids the issue whether the appeal has high chances of success the better. The useful point is that weighing the parties' rights and obligations in view of the order of reinstatement, the scales of justice tilt in favour of the claimants enjoying the fruits of the reinstatement as opposed to the applicant unsettling that hard earned order before this court and on account of an intended appeal. In view of the reinstatement order, prima facie, the claimants are entitled to remain and continue in employment until the intended appeal process reverses or upholds the reinstatement order.

Secondly and further taking into account the judicially upheld principles on temporary reliefs, the courts have held that such temporary orders should not be final. In this case, the claimants are back at work by reason of the court's reinstatement order. In the intended appeal, the respondent will be seeking final orders that the claimants should not be so reinstated – that the claimants should not be at work in the service of the Church. It is the opinion of this court that if the stay of execution orders are granted, the respondent will achieve the final orders desired of the appeal process because by the stay orders, the claimants will have been kept away from work. Thus, it is this court's opinion that stay of the reinstatement orders would amount to final orders that the respondents would be seeking in the intended appeal and there being no manifest injustice that will result in this court denying the stay orders, the stay of the reinstatement orders pending appeal will fail.

The court therefore returns that an order of reinstatement, for a second reason, is not amenable to the order of stay of execution pending appeal because it would amount to a final order which is sought in an intended or pending appeal as may be preferred against the reinstatement order, such appeal being a suit under the Civil Procedure Act, Cap. 21.

While taking the foregoing view, the court has considered and been guided by the dissenting opinion in

Co-operative Bank of Kenya Limited-Versus-Banking Insurance & Finance Union (Kenya) [2015]eKLR where Mwilu, J.A, stated, “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.”

In the opinion of this court, there is a third reason why an order of stay of execution of a reinstatement order should not be granted pending appeal- the employer in exercise of the legitimate human resource management powers can lawfully terminate the contract of employment in compliance with a reinstatement order whereas the employee may not have such ready opportunity to mitigate his or her circumstances if the order is stayed pending appeal. In complying with the reinstatement order, the court is not saying that the employer must keep the reinstated employee forever and forcefully so. By an order of reinstatement, the court is saying that the employee is entitled to continue in employment until such time the contract of employment is terminated lawfully. The court follows its opinion in **Patrick Njuguna Kariuki-Versus-Del Monte (K) Limited [2012]eKLR** ruling delivered on 17.12.2012 thus, “The question is: What kind of security would be sufficient to cover the inherent human right to work? A further question related to inability to incarcerate running of time or storage of time is: What security would sufficiently cover for an employee’s lost time to work? The court is of the opinion that every moment of time that an employee works inherently generates satisfaction and the employee’s self esteem which is a necessary component to the employee’s human dignity beyond the mere pay for the employee’s work. Thus, it is the court’s holding that computation of the likely or actual pay in view of stay of an order of reengagement and the willingness of the employer to deposit the same as security would fall short as sufficient security for the human dignity of an employee to work. It is the court’s further consideration that it would be arbitrary and an imbalance of convenience to compute such payment and to require an employer to furnish the same as security. The court is alert to the likely intervening circumstances following a reengagement such as the right of the employer to terminate employment lawfully, the right of the employee to terminate employment lawfully, frustration of the contract of service and such other circumstances. The court does not enjoy precision of a prophet to foresee such intervening circumstances and thereby make a finding on sufficient security in lieu of implementation of an order of reengagement. Accordingly, the court finds that with or without the assistance of the parties, and in this case without the assistance, it is conceivably very difficult, indeed impossible, for the court to order security for stay of implementation of an order of reengagement.”

To sum it up, this court has arrived at the compelling holding that the order of reinstatement is not amenable to an order of stay of execution pending appeal because of the following reasons:

1. A reinstatement order takes effect immediately as it is self executory and only subject to the terms imposed in the order itself.
2. An appeal being a suit, orders staying a reinstatement order would in effect be final orders desired at the end of hearing of the appeal and such stay orders would not preserve the status quo as declared in the reinstatement order, preservation of status quo being the primary focus of interim orders; so that staying a reinstatement order pending appeal is inconsistent with established principles for granting of interim orders.
3. The employer in exercise of the legitimate human resource management powers can lawfully terminate the contract of employment in compliance with a reinstatement order whereas the employee does not have such reciprocal and readily available opportunity to mitigate his or her circumstances entailing the right to work and if the reinstatement order is stayed pending appeal.

Accordingly, the application for stay of execution pending appeal filed for the respondents would fail except that the award of Kshs.2,000, 000.00 for each claimant for psychological trauma may not be

subject of execution proceedings pending appeal and subject to the respondent depositing the said money in a joint interest earning account opened in the joint names of the parties' advocates by 01.11.2016, and, failing, the claimants to be at liberty to execute in the usual manner.

In conclusion, the respondent's application dated 19.09.2016 and filed on 23.09.2016 is hereby determined with orders as follows:

1. Orders (a), (b), and (c) in the judgment shall not be subject to an order of stay of execution pending the intended appeal against the judgment.
2. Order (d) in the judgment shall not be subject to an order of stay of execution pending the intended appeal in so far as the respondent shall pay the 1st claimant Kshs.224,996.00, the 2nd claimant Kshs. 437,780.00, and the 3rd claimant Kshs.219,814.00 by 01.12.2016 failing interest at court rates to be payable thereon from the date of the judgment until the date of full payment.
3. There be stay of execution of order (d) in the judgment pending the intended appeal in so far as the respondent shall pay each of the claimants Kshs.2,000,000.00 for psychological trauma by 01.12.2016 failing interest at court rates to be payable thereon from the date of the judgement until the date of full pay.
4. The stay of execution pending appeal in order (3) above shall be subject to the respondent depositing a sum of Kshs.6,000,000.00 by 01.11.2016 in an interest earning account opened in the joined names of the parties' advocates and failing to make the deposit, the claimants be at liberty to take out the relevant execution proceedings in the usual manner.
5. Parties to bear own costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 30th September, 2016.

BYRAM ONGAYA

JUDGE