



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 109 OF 2015**

**AGGREY LUKORITO WASIKE..... CLAIMANT**

**VERSUS**

**KENYA POWER AND LIGHTING COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 23<sup>rd</sup> September, 2016)

**RULING**

The court delivered the judgment in this suit on 13.05.2016. The court entered judgment for the claimant against the respondent for:

- a) The reinstatement of the claimant in the service of the respondent with effect from 22.10.2013 in the position held before the termination without a break in his service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation; and for that purpose the claimant to report to the respondent's Managing Director for appropriate deployment not later than 18.05.2016 at 9.00am.
- b) Consequential to the reinstatement the respondent to pay the claimant all withheld monthly salaries and allowances from 22.10.2013 and the claimant to compute and serve the respondent the same within 7 days from today with a view of recording the same in court on a date convenient to the parties.
- c) The respondent to pay the claimant's costs of the suit.

On 03.06.2016 the respondent filed an application through Sing'oei Murkomen & Sigei Advocates and the learned counsel Phanice A. Kwegah from that firm of Advocates appeared for the respondent for purposes of urging that application. The application invoked Order 42 Rules 6 and 7 of the Civil Procedure Rules, Section 3A, Section 12 of the Employment and Labour Relations Court Act, and the inherent powers of the court. The application prayed for orders:

1. That the application be certified as urgent and be heard on priority basis.
2. That the judgment and orders issued by the honourable court on 13.05.2016 be stayed pending the hearing and determination of this application.
3. That pending the lodging, hearing and determination of the Applicant's intended appeal, the execution of the decision of the Honourable Court dated 13.05.2016 be stayed.
4. That costs and incidental to the application be provided for.

The grounds to support the application as set out in the application are as follows:

1. The applicant, the respondent, being dissatisfied with the judgment delivered on 13.05.2016 intended to file an appeal in the Court of Appeal and the notice of appeal was on record.
2. That the applicant had an arguable appeal with good prospects of success.
3. That the appeal would be rendered nugatory if the stay is not granted.
4. That the applicant intends to raise fundamental issues of both law and fact which relate to the practicability of the order of reinstatement.
5. The claimant will suffer no prejudice if stay is granted. In the contrary, the applicant shall greatly suffer if the judgment is enforced and the chances of recovery of any damage from the claimant are uncertain.
6. The applicant is willing to comply with whatever conditions the Honourable Court shall give for stay of the execution of judgment.
7. The application has been made within reasonable time in the circumstances and in very good faith.
8. It is in the interest of justice that there be a stay pending the hearing of the application and the intended appeal.

The application was supported by the affidavit of Jude Ochieng, the respondent's Chief Legal Officer – Litigation and Criminal Prosecutions.

The claimant opposed the application by filing his replying affidavit on 13.06.2016 through Gori, Ombongi & Company Advocates and the learned counsel George Morara Gori appeared for the claimant. The claimant stated as follows:

1. That his advocates had been served with the notice of appeal.
2. That the intended appeal had the remotest chances of success and would not see the light of the day.
3. In view of the orders in the judgment, nothing would be rendered nugatory if the stay was denied.
4. Evidence was clear that there was a vacancy in the office that the claimant held, the court had considered all relevant provisions of law in making the judgment, and the respondent was obligated to obey the orders in the judgment.
5. The respondent had not disclosed the prejudice it would suffer if the stay orders were denied.
6. The decree to be stayed had not been annexed on the supporting affidavit.
7. Conditional stay was not available in view of the nature of the orders in the judgment and the respondent must comply.
8. The application was brought with a lot of punctuated malice and very bad faith.
9. That the claimant's case was one whereby reinstatement was the best remedy because he had done nothing wrong against the respondent so as to warrant a dismissal.

The claimant had on 24.06.2016 filed a notice of motion being an application for contempt of court against the respondent's managing director alleging disobedience of the orders given in the judgment. In particular the claimant lamented that he had not been reinstated (been allowed to resume working) as per order (a) in the judgment. It was later confirmed to the court that he had subsequently been reinstated as he had been allowed to resume duty. Thus on 29.07.2016 the court, having considered the parties' respective submissions, ordered as follows:

1. The application date 24.06.2016 is hereby marked settled in view of the claimant's reinstatement per judgment's order.
2. The application for stay of execution dated 02.06.2016 be negotiated between the parties with a view of the same being allowed subject to the respondent depositing the judgment sum in an interest earning account opened in parties' Advocates' joint names or subject to providing such other acceptable security.
3. Mention on 14.09.2016 at 9.00am to record consent on application of 02.06.2016 or for appropriate directions.

The parties failed to reach a compromise as was envisaged in the order and they made submissions to support their respective positions. The respondent having complied with the order on reinstatement, it might appear that the application is pending only in so far as the money due in order (b) of the judgment is concerned.

The relevant provision to guide this court may appear (and the court will return to this point later in this ruling) to be Order 42 Rule 6 of the Civil Procedure Rules which states as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) 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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate**

**court or tribunal has been complied with.”**

The court has considered that provision against the parties’ respective submissions and, if not for the reasons to be to be stated later in this ruling, the court would make the following findings:

1. The respondent has urged that it may be difficult to recover the judgment sum if the stay order is not made and the judgment having been delivered on 23.05.2016 and the respondent having filed the application on 03.06.2016, the court would return that the applicant, the respondent in the suit, has largely satisfied Order 42 Rule 6 (2) (a).

2. The applicant has submitted that it is willing to comply with whatever conditions the court shall give for stay of execution of judgment and the court would therefore consider that such conditions would include appropriate security for the judgment sum being Kshs.1, 444,940.90 as recorded in court by consent of parties on 17.06.2016. That sum, the court would consider, when deposited in the joint interest earning account in the joint names of the parties’ advocates would, in the opinion of the court, as would be considered, constitute sufficient security and a reasonable condition for stay of execution pending the hearing and determination of the intended appeal.

3. In view of the notice of appeal on record, the court would not have any doubt that the respondent has complied with the rules for a valid appeal for purposes of the present application.

In conclusion and taking into account the orders of 29.07.2016, the court would allow the respondent’s application filed on 03.06.2016 as determined, most likely with orders as follows:

a) There would be stay of execution of order (b) of the judgment delivered on 13.05.2016 in so far as it relates to payment of the money due being consequential to the reinstatement pending the hearing and determination of the respondent’s intended appeal but subject to the respondent depositing **Kshs.1, 444,940.90** in a joint interest earning account opened in the joint names of the parties’ advocates by 31.10.2016.

b) The costs of the application to abide the outcome of the intended appeal.

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.

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."

The court has also considered and followed its opinion in **Patrick Njuguna Kariuki-Versus-Del Monte (K) Limited [2012]eKLR** Ruling delivered on 17.12.2012 where the court stated 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."

If the order of reinstatement is immediate and self executory only subject to its own terms as may be imposed therein, it is this court's view that in a similar vein, an order for reinstatement would not be amenable to an order of stay of execution pending appeal under Rule 5(2) of the Court of Appeal Rules,

2010. The court has particularly considered the dissenting opinion by Mwilu J in the earlier cited case of Co-operative Bank of Kenya Limited-Versus-Banking Insurance & Finance Union (Kenya) [2015]eKLR thus,

**“23. From the above analysis and considering the circumstances of this case, I take the position that this is an opportunity for the court to crystallize and set in motion the jurisprudence relating to the consideration for an application for stay under rule 5(2) (b) where the orders sought to be stayed include an order for reinstatement and the respondent has already been reinstated. I need not repeat but for emphasis reiterate that every case should be looked at based on its own merits and circumstances. I appreciate that I may be sailing in unfamiliar waters and taking a fresh and isolated path but nevertheless feel obliged to do and set the path for the crystallization of the legal position to be applied in these circumstances.**

**23. Consequently, and considering that the grant of orders under rule 5(2) (b) remains discretionary, i must state at this juncture that a stay of execution of judgment on the aspect of reinstatement shall be considered in the context of the following factors:**

- a. where the reinstatement has not been effected following the judgment of the superior court, despite any execution process having been instituted and not concluded;**
- b. whether the employee is a public officer and the applicant is a public institution;**
- c. whether the applicant is a large institution with large station coverage where the applicant can be deployed to another location away from where the employee was previously serving;**
- d. the potential intensity of interaction between the employee reinstated and the officers involved in the termination the basis upon which the reinstatement has been ordered;**
- e. the applicant’s demonstration of the obstacles against the reinstatement; and**
- f. the employee’s willingness to be reinstated.”**

It is clear that our jurisprudence has not established and settled a coherent guidance on how to treat the issue of stay of execution of a reinstatement order (and add a re-engagement order) pending appeal. It is this court’s view that for every order of reinstatement, the employee stands automatically reinstated (and in that sense reinstatement is clearly different from the employer allowing the employee to resume work or duty in compliance with the reinstatement order). This court’s further opinion is that if it is the position that an order for reinstatement is immediate and self-executory subject only to such terms as may be imposed in the order itself, and considering the would be otherwise complex effects of an order of stay of a reinstatement order, then such a reinstatement order is not amenable to an order of stay of execution pending review or appeal and the 6 principles set out earlier in this ruling will apply. Taking that view into account the court finds for the claimant that there is nothing to stay in the circumstances of this case.

The money due in view of the reinstatement order (in absence of the set exception or anything else) will anyway be payable whether the reinstatement order is reversed or upheld upon the Court of Appeal making its judgment. It is the view of the court that such money, which may not have been paid and flowing from the reinstatement order, is recoverable by the employee either in the suit the reinstatement order was made and by way of appropriate application, or by appropriate fresh suit as the circumstances of every individual case may demand.

Accordingly, and for the detailed exposition and reasons in this ruling, the application will fail. In view of the jurisprudential relevance of the emerging issues, each party shall bear own costs of the application.

In conclusion, the application filed for the respondent on 03.06.2016 is hereby dismissed with orders that each party shall bear own costs of the application.

**Signed, dated and delivered in court at Nyeri this Friday, 23<sup>rd</sup> September, 2016.**

**BYRAM ONGAYA**

**JUDGE**