



**REPUBLIC OF KENYA**

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

**CAUSE NO.1421 OF 2014**

**REUWEL WAITHAKA GITAHU.....1<sup>ST</sup> CLAIMANT**

**FERICHINA GATHONI WAWERU.....2<sup>ND</sup> CLAIMANT**

**GIDION KATHILA MUTUKU.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**RULING**

1. The respondent, Kenya Revenue Authority, by application and Notice of Motion brought under the provisions of Article 162(2)(a) of the constitution, section 12 of the Employment and Labour Relations Court Act and Rule 16 of the Industrial Court (Procedure) Rules, 2010 [now the Employment and Labour Relations Court (Procedure) Rules, 2016] and seeking for orders that;

*1. Spent.*

*2. Spent.*

*3. There be a stay of execution of the judgement, and orders flowing therefrom, delivered on 30<sup>th</sup> of May, 2016 by Honourable Justice Monica Mbaru, pending the hearing and determination of the Applicant's application dated 10<sup>th</sup> day of June 2016 filed in Court of Appeal No. C.A. No. Nai 141 of 2016 (UR 113/2016).*

*4. In the alternative, the Court does grant orders of stay of execution pending the hearing and determination of the Appeal file.*

*5. The costs of and incidental to this application do abide the result of the said intended Appeal.*

2. The application is based on the grounds that on 30<sup>th</sup> May, 2016 the Court delivered judgement and reinstated the claimants and an application for stay was filed but turned down. The Respondent went to the Court of Appeal seeking stay of Judgement pending hearing of Appeal No. C.A. 141 of 2016 which has not been allocated a hearing date. There was also filed a Notice of Appeal and request for proceedings and judgement as required by the Court of Appeal Rules.

3. That the Respondent has moved the Court seeking stay of execution without delay and if application is not granted the Court of Appeal matter will be overtaken by events and rendered nugatory. The balance of convenience favours the Respondent as the applicant and great prejudice will be occasioned if the orders

sought are not granted.

4. The application is also supported by the affidavit of Kenneth Kirugi.

5. Annexed to the application is the Supporting Affidavit of Crispine A Agata.

6. **Upon** perusal of the application, there is no Supporting Affidavit of Kenneth Kirugi.

7. On the Affidavit of Mr Agata, he avers that he is the manager, Human Resources Department of the Respondent in charge of Employees Relations. The claimants were employed by the respondents until 23<sup>rd</sup> July, 2014 when they were dismissed. They filed suit and judgement delivered on 30<sup>th</sup> May, 2016 with an order for reinstatement from 2<sup>nd</sup> June, 2016. The Court failed to put into account that the department under which the claimants were working, Road Transport Department no longer existed as a department of the Respondent as this has since been moved to the national Transport Safety Authority and hence the difficulty in complying with the order of reinstatement.

8. The Respondent is aggrieved by the Court award intends to move the Court of Appeal hence the application herein to seeking to set aside the orders and judgment of 30<sup>th</sup> May, 2016.

9. In reply, the claimants filed Replying Affidavit of the 1<sup>st</sup> Claimant, Reuwel Waithaka Gitahi. He avers that the in the orders of the Court on 30<sup>th</sup> May, 2016, account was taken of the fact that the NTSA has since taken the functions the claimants were undertaking and hence orders a re-engagement. The Respondent witnesses confirmed that the staff under the department taken over by NTSA were retained for other duties. Before termination of employment, the Claimant had been moved to new departments, the 1<sup>st</sup> Claimant to the Reconciliation Unit within Finance Department, 2<sup>nd</sup> Claimant in Internal Audit and Risk Management Department, and the 3<sup>rd</sup> Claimant to Validation Section in the Revenue Division.

10. That when the claimants reported on duty on 2<sup>nd</sup> June, 2016 to the human resource and Deputy Commissioner, Patrick Munuhe, he shared with the claimants letter dated 31<sup>st</sup> May, 2016 and asking various department heads to receive them – Deputy Commissioner, Finance and Deputy Commissioner, Internal Audit. The transition of Road Transport Department functions to NTSA only came into force in December 2012 when the claimants had exited from this department. There was never a redundancy process undertaken by the Respondent and where such was contemplated, there should have been a Cabinet approval.

11. Mr Gitahi also avers that in 2009, the government increased the retirement age from 55 to 60 years of age. The business of the Respondent will not be adversely affected upon compliance with the Court orders of 30<sup>th</sup> May, 2016, there exists internal controls and mechanisms to check integrity issues and the Claimant will be subjected to such just like any other employee of the respondent. As such the respondent's application lacks merit and should be dismissed with costs.

12. Both parties made their oral arguments in court. the Respondent has relied on the following cases – **C.A. No.133 of 2015, Cooperative Bank of Kenya Ltd versus BIFU [2015] eKLR; KRA versus Sidney Keitany Changole & 3 Others [2015] eKLR; TSC versus Sarah Nyanchama Ratemo, C.A. No.227 of 2013**

13. the Claimant on their part rely on the case of **Republic versus Registrar of Titles ex parte David Gachina Muriithi [2014] eKLR** where the Court held that where a party has moved the Court of Appeal seeking stay of the lower court's decision, to file a similar application before the same Court is an abuse of Court process. That in **Pithon Mwangi versus Co-operative bank of Kenya [2015] eKLR** the Court held that a party must show that an appeal is not frivolous. That in this case, the respondents intended appeal challenge on facts which is not a matter for appeal and application should be dismissed with costs.

## **Determination**

14. As noted above, the application by the Respondent is by Crispine A Agata. In this context, the general rule is that an affidavit in support of an application must contain facts within the deponent's knowledge; and in interlocutory proceedings one can depose to facts in the affidavit that are based on information and belief. So in the respondent's application, once it is stated in the body of the Notice of Motion that the Supporting Affidavit in terms of the facts and grounds thereto are by Kenneth Kirugi, but there is no such Supporting Affidavit, to attach any other Supporting Affidavit, the core foundation of the application is lost.

15. Order 51 Rule 4 requires that;

*Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.*

16. In **Martin A Sangany versus Villa Care management Ltd, Cause No.1765 of 2015**, the Court dismissed an application that set out in its body that the affidavit in support of the same was different from the one attached. The rationale is that if a wrong statement of fact is made in an affidavit, it makes the statement worthless and may amount to perjury as held in **Simon Kitavo Nduto & another versus Owenga Anjere, Civil Appeal No.170 of 1995**. Where the attached affidavit to the application is by a third party other than the one stated as Kenneth Kirugi, the meaning of this is that the intention of the applicant has been negated.

17. The above notwithstanding, this is a Court of justice, sections 3 and 20 of the Employment and Labour Relations Court Act requires that this Court move expeditious to meet the ends of justice and without undue regard to technicalities. This is also given meaning by article 159 of the Constitution.

18. On the order of stay of the judgement sought by the Respondent as the applicant, the judgement of the Court on 30<sup>th</sup> May, 2016 directed the Respondent to re-engage and not to reinstate the claimants. There is a foundational and fundamental difference between a reinstatement and a re-engagement. Each serve a different purpose. In the Affidavit of Mr Agata, the averments set out relate to the challenge of an order of *reinstatement* which was not part of the orders issued by this Court on 30<sup>th</sup> May, 2016.

19. A re-engagement is giving an employee another job with a former employer while a reinstatement is giving back the same/old job to the employee. Whereas in a reinstatement the employer has to ensure that the employee is accommodated within the same old job that had been terminated, in re-engagement, the employer is given the flexibility of giving a new job that the employee can perform or undertake within the same establishment.

20. The above orders on re-engagement was set out in the judgement noting the circumstances of each party and on the evidence that the department under which the Claimant previous served had been outsourced. The re-engagement has taken effect as this was to be done on 2<sup>nd</sup> June, 2016. The application before Court is filed on 14<sup>th</sup> June 2016.

21. As such, the prayers set out in the Notice of Motion and seeking to have the orders of restatement set aside pending the process before the Court of Appeal; the fact of the re-engagement having taken effect; the claimants are serving officers and are due for pay/salary for work done. Such can suffice until the intended appeal is filed, heard and determined on its merits. I take it the Respondent has since moved the Court of Appeal under C.A. No.141 of 2016, such Appeal, the merits of it is not for this Court to determine.

22. I find no prejudice to be suffered by the respondent, the claimants are constructively engaged in gainful employment with them, and where the intended appeal is a success, the claimants will be due for salary for days worked and where there is affirmation of judgement herein, there will be ongoing employment.

**In conclusion, the stay of orders and judgement of 30<sup>th</sup> May, 2016 shall not issue. Application dated 6<sup>th</sup> June, 2016 is hereby declined, save costs shall be in the motion.**

**Read in open court at Nairobi this 19<sup>th</sup> December, 2016**

**M. MBARU**

**JUDGE**

In the presence of:

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