



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 47 OF 2014**  
**NAFTALY RUGARA MUIGA.....PETITIONER/RESPONDENT**  
**VERSUS**  
**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND**  
**TECHNOLOGY (JKUAT).....RESPONDENT**

**RULING**

1. By application dated 12<sup>th</sup> March, 2015 the applicant seeks an order of stay of execution pending appeal from the decision of this Court. The application was grounded on the reason that the respondent may apply for execution against the applicant and report to work and further that the applicant being dissatisfied with the judgment, intended to appeal against the same and if the petitioner were to proceed with the execution, the appeal would be rendered nugatory. The applicant further averred that it had an arguable appeal.

2. In support of the application Counsel for the applicant sought reliance on the cases of **Butt vs. Rents Restriction Tribunal (1982) KLR417** and **Aviation & Allied Workers' Union v. Kenya Airways Ltd & 3 others (2013) eKLR.**

3. The petitioner's counsel opposed the application arguing that the Court reviewed the evidence vis-à-vis the law and expressed itself the way it did. Therefore it was not good enough reason to ask the Court to stay its judgment simply because the Court of Appeal may arrive at a different conclusion. For this argument, Counsel relied on the case of **Catherine Monthe Nzila v. KCB Ltd (2015) eKLR.**

4. The case of **Butt v. Rent Restriction Tribunal** sets the principles applicable in considering an application for stay of execution pending appeal. These include:-

- (a) The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- (b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that Appeal Court reverse the judge's discretion.
- (c) A judge should not refuse a stay if there are good grounds for granting it merely

because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

(d) The Court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. It should be noted that the application in **Butt** was to the Court of Appeal under rule 5(2) (b) of that Court's rules after Scriven J had refused a similar application brought under OXLI rule 4(2) (b) of the Civil procedure Rules.

6. Further the decree to appealed on in **Butt** was a money decree which in the opinion of the Court comprised a large amount in rent arrears. The applicant further relied on the case of **Aviation & Allied Workers' Union v. Kenya Airways and Others** where Lady Justice Mbaru stated that the granting of stay of execution by the Court pending appeal is at the discretion of the Court when it has been sufficiently established that substantial loss may result to the applicant unless the order is made, the application is made without unreasonable delay and such security as the Court orders for the due performance of the decree has been given by the applicant.

7. The rules of this Court do not directly provide for procedure in the case of an application for stay of execution however a reading of rule 31 of the rules would import the meaning that a stay being one of the elements of execution process is governed by rule 31 which provides that rules of execution of an order and a decree applicable in the High Court shall be applicable to an order or decree of the Court.

8. Order 42 Rule 6 of the Civil Procedure Rules provide that:-

**(a) no order for stay of execution shall be made under sub rule 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 be ultimately be binding on him has been given by the applicant.**

9. In my judgment which the applicant intends to appeal against, I found that the applicant in suspending the petitioner and eventually dismissing him, had no reason or justifiable reason to do so.

10. Consequently I ordered for the reinstatement of the petitioner with all his benefits, seniority and salary. Whilst there are other complaints about my judgment, this appears to me to be the cradle or thrust of the applicant's intended appeal. Reinstatement is a remedy like any other in settling employment disputes. The Court however admits that it should be ordered only in exceptional cases.

11. This Court in the case of **Catherine Monthe Nzila v. KCB Cause number 336 of 2013** set out some of the factors the Court considers prior to ordering reinstatement which include:-

(a) the length of time the claimant has been out of employment;

(b) existence of minimum necessary confidence between the employee and the employer;

(c) the size of the organization and national network;

(d) the willingness of an employee to take up

reinstatement;

(e) age of the employee

(f) whether the same or a similar post still exists with the employer.

12. The requirement to consider the impracticability of reinstatement necessarily enjoins the Court to have regard to all relevant circumstances of the case relating to the employer and the employee. The Court must however not adopt a general attitude of reluctance to order reinstatement for to do so would mean an employee who has been terminated after accusation of wrong doing but later succeeds in a suit would have been denied access to a primary remedy provided by legislation.

13. The claimant herein was an employee of the applicant having been employed on 16<sup>th</sup> November, 2009 as a teaching assistant Grade 10 in the applicant's Department of Electrical and Electronics Engineering.

14. On 31<sup>st</sup> October, 2012 he was promoted to an Assistant Lecturer, Grade 11 in the same department. In May, 2011 he was elected Deputy Secretary of University Academic Staff Union (UASU), JKUAT Chapter. It was his involvement in UASU activities that triggered the present litigation and in respect of which the Court made the judgment, the subject of the intended appeal.

15. The Court reviewed and analysed the petition, the supporting affidavit and documents. The Court further considered the applicant's response in opposition to the petition together with supporting documents and came to the conclusion it did.

16. Applying first requirement in applications of this nature, to wit the issue of substantial loss, the Court is not persuaded that there would be any substantial loss as the petitioner has simply been reinstated to his employment and will be bound by the terms of his employment contract which in nature will oblige him to work in return for compensation as was the case prior to his termination. For all practical purposes, the petitioner will as an employee be under direct control of the applicant including invocation of disciplinary mechanisms should the petitioner be in breach or suspected to be breach of any of the terms and conditions of service of the applicant.

17. The reinstatement of the petitioner may create discomfort especially to the applicant's officials who presided over the impugned termination but that is not one of the considerations in granting a stay of execution, besides, the applicant is a public institution with national network and can handle the petitioner's reinstatement in way that does not re-invite and sustain any possible interpersonal discomfort that the petitioner's return to work might create.

18. This application is therefore found lacking in merit and is hereby refused with consequence that the same is hereby dismissed with costs.

18. It is so ordered.

**Dated at Nairobi this 17<sup>th</sup> day of July 2015**

**Abuodha J. N.**

**Judge**

**Delivered this 17<sup>th</sup> day of July 2015**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent

**Abuodha J. N.**

**Judge**