



**Njuguna v Attorney General & another (Petition 17 of 2013)**  
**[2015] KEELRC 1521 (KLR) (2 October 2015) (Ruling)**  
*Gilbert Mwangi Njuguna v Attorney General & another [2015] eKLR*  
Neutral citation: [2015] KEELRC 1521 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION 17 OF 2013**  
**MN NDUMA, J**  
**OCTOBER 2, 2015**

**BETWEEN**

**GILBERT MWANGI NJUGUNA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Notice of Motion Application serving before Court dated 24<sup>th</sup> June 2015 and filed on the same date seeks for orders:

That this Honourable Court be pleased to grant stay of execution of the Judgment and Decree of 28<sup>th</sup> January 2014 pending the hearing and determination of intended Appeal in the Court of Appeal. Prayers 2 and 3 seeking leave to file the Notice of Appeal out of time were withdrawn by the 2<sup>nd</sup> Respondent / Applicant before the Application was heard.

2. The Application is premised on the grounds set out on the face of the Application and in the sworn Affidavit of Winfrida Mokaya which may be summarized as follows:
3. Judgment was delivered on 28<sup>th</sup> January 2014, but the 2<sup>nd</sup> Respondent / Applicant only became aware of the Judgment on 26<sup>th</sup> March 2014 when the Petitioner served it with the Decree.
4. On 4<sup>th</sup> April 2014, the 2<sup>nd</sup> Respondent / Applicant approached the Hon. Attorney General requesting to be furnished with copies of the pleadings to enable it to consider whether or not to lodge an appeal. On 5<sup>th</sup> May 2014 and 29<sup>th</sup> May 2014, reminders were sent to the Hon. Attorney General on the matter.



5. On 16<sup>th</sup> June 2014, the Respondent / Applicant requested Issa & Company Advocates to take over the conduct of this suit and the firm filed its Notice of Change of Advocates on 20<sup>th</sup> June 2014.
6. The Law firm eventually obtained copies of pleadings and Judgment delivered on 18<sup>th</sup> January 2014 by Hon. Justice Nderi Nduma in February 2015.
7. Upon review of the record the Advocates were instructed by their client to note an appeal against the entire Judgment and Award in February 2015.
8. The Notice of Appeal dated 6<sup>th</sup> February 2014 was filed on 11<sup>th</sup> February 2015.
9. That the delay in filing of the Notice of Appeal is therefore excusable in the circumstances of this case, and the Court should exercise its discretion in favour of the 2<sup>nd</sup> Respondent / Applicant.
10. That the intended appeal is meritorious, raises arguable points of law that ought to be determined by the Court of Appeal and has high chances of success. The intended appeal will therefore be rendered nugatory in the event that the Application is not allowed.
11. That the Respondent will have suffered substantial loss in the event the appeal is successful should the stay not be granted as the Petitioner will not be in position to refund the decretal sum.
12. The balance of convenience therefore lies in favour of the Applicant.
13. That the 2<sup>nd</sup> Respondent / Applicant being a constitutional commission is funded by the public and it would be in the public interest that a stay is granted.

## **Response**

14. The Application is opposed vide a Replying Affidavit of Gilbert Mwangi Njuguna, the Petitioner / Respondent sworn on 15<sup>th</sup> July 2015. The Petitioner / Respondent deposes that until 1<sup>st</sup> July 2015 when the firm of Issa & Company Advocates came on record for the 2<sup>nd</sup> Respondent / Applicant, pursuant to a consent filed vide order 9 rule 9 of the Civil Procedure Rules, the 2<sup>nd</sup> Respondent / Applicant was represented by the Hon. Attorney General.
15. That, until 1<sup>st</sup> July, 2015, when the said firm came on record properly, it has undertaken illegal and improper proceedings in this matter, including its application for stay dated 24<sup>th</sup> June 2015 and filed on the same date.
16. That the Petitioner / Respondent was employed by the 2<sup>nd</sup> Respondent / Applicant herein on 1<sup>st</sup> September 1986 and rose through the ranks and at the time of dismissal from the employment on 23<sup>rd</sup> June 2008, he was serving as Ag. Senior Principal Magistrate at Chuka Law Courts.
17. That on 28<sup>th</sup> January 2014, the Honourable Court delivered its Judgment in favour of the Petitioner / Respondent. That at the time of dismissal, the Petitioner / Respondent was forty seven (47) years old and at the time of delivery of Judgment, the Claimant was fifty four (54) years and was remaining with only six (6) years before retirement.
18. The Petitioner / Respondent is now fifty five (55) years and has five (5) years shy of retirement.
19. That immediately the Judgment was delivered a decree was extracted and served upon the Respondents for them to comply in March 2015.



20. That the Petitioner personally visited the offices of the 2<sup>nd</sup> Respondent / Applicant including the current Registrar of Judiciary, as well as the Ombudsman seeking to have the order complied with in vain. In fact it is after his visits that the 2<sup>nd</sup> Respondent / Applicant filed the belated Notice of Appeal.
21. That on 20<sup>th</sup> June 2014, the 2<sup>nd</sup> Respondent / Applicant purported to change Advocates from the Attorney General to Issa & Company Advocates.
22. That the Attorney General was fully seized of the matter before he was replaced and the 2<sup>nd</sup> Respondent cannot be heard to criticize the conduct of the matter by the Attorney General in absence of an affidavit by the Attorney General.
23. That since the 2<sup>nd</sup> Respondent / Applicant has withdrawn the prayers for extension of time the alleged reasons for delay in filing the appeal enumerated in paragraphs 2 – 15 of the Supporting Affidavit of Winfrida Mokaya are now irrelevant to this Application.
24. That on 13<sup>th</sup> August 2014, the Claimant’s Advocates wrote to Issa & Company Advocates for the 2<sup>nd</sup> Respondent demanding that their client do comply with the Court orders by re-engaging the Claimant in a level not lower than Senior Principal Magistrate with effect from the date of the Judgment without loss of his accrued pension with respect to past services.
25. To date, the 2<sup>nd</sup> Respondent / Applicant is yet to re-engage the Claimant / Respondent to his employment and it is therefore in contempt of Court orders, which contempt continues, as it seeks indulgence of this Court.
26. That this Application is only meant to delay implementation of the said Court orders. That the Judgment will automatically be defeated as far as re-engagement is concerned if the orders for stay are granted.
27. That the Application is incompetent and there is no basis for stay as there is no competent notice of appeal; hence no pending appeal, a fact the 2<sup>nd</sup> Respondent has conceded.
28. Application for stay should be made in the Court of Appeal which will determine whether time for filing a notice of appeal should be extended, a fact, the 2<sup>nd</sup> Respondent / Applicant has conceded by withdrawing the prayers for extension of time before this Court.

### **Determination**

29. The Principles that govern grant of stay of execution pending appeal were well set out by the Court of Appeal, at Nairobi in Civil Application No. Nairobi 93 of 2002 (50/2002 UR) between *Reliance Bank Limited (in liquidation) v Norlake Investments Limited* thus;

“.... the Applicant must satisfy the Court on two matters, namely;

1. that the Appeal or intended Appeal is an arguable one, that is, that it is not a frivolous appeal; and
2. that if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended Appeal, were it to eventually succeed, would have been rendered nugatory by the refusal to grant the stay or injunction.”



30. In the Civil Application No. NAI 15 of 190, between *Halai & another v Thornton & Turpin (1963) Ltd.*, [1990]KLR 365. The Court of Appeal per Gicheru JA, Chesoni & Cockar Ag. JJA asserted the considerations as follows;
- “ 1. The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”
31. From the foregoing, the Applicant must establish;
1. it has an arguable appeal;
  2. that if the order for stay is not granted the appeal would be rendered nugatory;
  3. that the appeal must be brought without unreasonable delay;
  4. in certain cases, the applicant must furnish security.
32. In the present case, the issue of delay in filing the appeal and this application therefore comes to the fore in that the Appeal was noted in this Court about eighteen (18) months from the date of the Judgment of the Court.
33. The Applicant has opted to file an application for extension of time within which to file the appeal in the Appeal Court.
34. The first issue this Court has to determine therefore is whether the delay in bringing this application is so inordinate as to amount to abuse of the process of the Court and negation of the overriding objective to administer justice without undue delay.
35. The Court is satisfied that the 2<sup>nd</sup> Respondent was at all material times ably represented by the Hon. The Attorney General in the conduct of the suit leading to the Judgment of the Court.
36. The Hon. Attorney General has not deposed to any affidavit on the matter of delay in filing an appeal against the Judgment of the Court or bringing an application for stay of execution of the Judgment of Court pending appeal.
37. The Court notes that this application was brought by Messrs Issa & Company Advocates on 24<sup>th</sup> June 2015 before the firm of Advocates was properly on record which it did on 1<sup>st</sup> July 2015 but the Court is reluctant to rule that this application is incompetent on that basis alone because the rules of this Court are silent on the matter unlike the Civil Procedure Rules cited in Milimani HCCC NO. 1042 of 1992 *Madbupaper International Ltd. & Another v Mutune Investment Limited & others* and Bungoma HCA No. 110 of 2009, *James Ndirangu Ng’ang’a v Karubha Marhebbha Vengela*.
38. However, a delay of one year and six months in bringing this Application is so inordinate that no reasonable Court would condone the same especially in circumstances which clearly suggest that the 2<sup>nd</sup> Respondent / Applicant has wilfully and / or negligently failed to implement the judgment of this Court in failing to re-engage the Claimant and pay him compensation awarded by the Court.
39. Secondly, the Court is not satisfied that the Appeal would be rendered nugatory if the stay of the Judgment of the Court is not granted.



40. To the contrary, the Petitioner / Respondent would be paid for services rendered upon re-engagement. In Nairobi Civil Appeal No. 56 of 2001, *Telkom Kenya Ltd. v. Paul Ngotwa* the Court of Appeal has affirmed the power of this Court to order reinstatement of an employee in circumstances like in the present case.
41. Thirdly, as I had occasion to state in ELRC Case No. 1923 of 2012 *Veronica Chepkemoi v Royal Medical Services*, in a matter where the Court had ordered reinstatement of an employee, the balance of convenience is in favour of declining to grant the order for stay in this matter since the Petitioner / Respondent herein is about to attain the retirement age of sixty (60) years and therefore granting a stay is likely to defeat the Judgment of the Court.
42. Accordingly, the Application for stay lacks merit and the same is dismissed with costs to the Petitioner / Respondent.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**

