



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 4 OF 2013

(Formerly Nairobi Cause No. 1082 of 2011)

**SARAH NYANCHAMA RATEMO-
KIZITO.....CLAIMANT**

-VERSUS-

**TEACHERS SERVICE
COMMISSION.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26th July, 2013)

RULING

The judgment in this case was delivered on 28.06.2013 for the claimant against the respondent for:

- a. **reinstatement of the claimant in the respondent's teaching services as a graduate teacher to teach biology and chemistry with effect from the effective date of the unfair termination being 2.07.2010;**
- b. **the respondent to pay the claimant all the salaries, allowances and other due benefits with effect from 2.07.2010 and by 1.09.2013 failing which interest on the principal amount to be payable from the date of the judgment till full payment;**
- c. **the respondent to deploy and to deliver to the claimant through her Advocates on record the deployment letter to any secondary school or relevant learning institution within Uasin Gishu County by 1.08.2013;**
- d. **dismissal of the respondent's counterclaim; and**
- e. **the respondent to pay costs of the case.**

On 16.07.2013, the respondent filed the Notice of Motion under section 12 of the Industrial Court Act, 2011 Rule 31(2) of the Industrial Court Procedures and Practice Rules, 2010, Order 42 Rule 6 and 8 of the Civil Procedure Rules, 2010. The respondent prayed for the stay of execution of the judgment dated 28.06.2013 and all subsequent orders pending the lodgment, hearing and determination of the intended appeal. The application was supported by the affidavit of Simon M. Kavisi filed together with the application. The grounds supporting the application are:

- a. at paragraph 11 that the court did not consider material evidence tendered by the respondent which would have assisted the court to arrive at a fair judgment in the dispute thereby making the judgment ripe for appeal;

- b. at paragraph 12 of the affidavit that the respondent is a Government institution with perpetual succession under the law and therefore capable of satisfying the decree in event the appeal fails;
- c. at paragraph 13 of the affidavit that the proceedings against the respondent are Government proceedings under the Government Proceedings Act hence the claimant is assured of the fruits of her litigation should the appeal be unsuccessful;
- d. at paragraph 14 of the affidavit that the claimant will not suffer any prejudice, loss, injury, or any injustice if the prayers are granted as prayed for in the application; and
- e. at paragraph (e) that the judgment amount is substantial and if paid and appeal succeeds, the claimant will fail to refund.

The claimant filed her affidavit on 23.07.2013 to oppose the application and she urged:

- a. at paragraph 6 of the affidavit that as reinstated she will render services to the respondent by teaching the children of Kenya and the respondent will not suffer any loss;
- b. at paragraph 7 of the affidavit that if the appeal succeeds she will be able to refund as she owns jointly with her husband substantial matrimonial property and the husband is in stable practice of law;
- c. at paragraph 8 that the respondent has not offered any security as provided in Order 42 Rule 6(2) (b) of the Civil Procedure Rules;
- d. at paragraph 9 of the affidavit that the respondent has not demonstrated that it will suffer any substantial loss if the stay orders are denied and as per Order 42 Rule 6 (2) (a); and
- e. the order of reinstatement will not cause the respondent hardship to enforce especially it serves to alleviate shortage of teachers.

The application was heard on 23.07.2013. The respondent submitted that being a public and Government institution, it did not need to provide security and the claimant's counsel did not object save that it was submitted that in an order of reinstatement, security was not conceivable as it was not a money decree. In the circumstances, it was submitted for the respondent that the claimant complies with the order for reinstatement.

In the ruling in a similar application in **Patrick Njuguna Kariuki – Versus- Del Monte (K) Limited, Industrial Cause No. 953 of 2011**, this court stated as follows:

“Thirdly, in an application for stay of execution pending appeal, Order 42 (6) (2) (b) of the Civil Procedure Rules prescribes the furnishing by the applicant of such security as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant. The court has considered the requirement especially with regard to the order of reengagement. 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.”

The court upholds that opinion and holds that it applies as much to an order of reinstatement like in the instant case.

The claimant submitted that the claimant did not establish any substantial loss it would suffer if the stay orders were denied. Indeed, the court finds that the respondent failed to establish such loss and as submitted for the claimant, the respondent stands to benefit the public interest by reinstating the claimant as ordered by the court and as submitted for the claimant.

In conclusion, the court finds that the respondent’s application lacks merits as it has not demonstrated that the principles for grant of stay of execution pending appeal have been satisfied in this case. The application is dismissed with costs.

Signed, dated and delivered in court at Nakuru this Friday, 26th July, 2013.

BYRAM ONGAYA

JUDGE