



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 284 OF 2020**

**(Before Hon. Justice Hellen S. Wasilwa on 22<sup>nd</sup> August, 2020)**

**MATILDA TENGE MWACHIA.....CLAIMANT**

**VERSUS**

**KENYA INDUSTRIAL ESTATE LIMITED.....1<sup>ST</sup> RESPONDENT**

**MANAGING DIRECTOR,**

**KENYA INDUSTRIAL ESTATES LIMITED.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. Before this Court is the Respondents' Application dated 17.8.2020 seeking the following orders:-

a. *THAT this Application be certified urgent and heard ex parte in the first instance owing to the urgency.* [Spent]

b. *THAT this Honourable Court be pleased to (sic) the Applicants an order of stay of execution of the Ruling and Orders of this Honourable Court issued by Hon. J. Hellen Wasilwa on 13<sup>th</sup> August 2020 pending the hearing and determination of the application herein.*

c. *THAT this Honourable Court be pleased to grant the Applicants an order of stay of execution of the Ruling and Orders of this Honourable Court issued by Hon. J. Hellen Wasilwa on 13<sup>th</sup> August 2020 pending the hearing and determination of the intended Appeal.*

d. *THAT costs of this application be provided for.*

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Parmain Narikae sworn on 17/8/2020. It has been opposed by the Claimant's Replying Affidavit sworn on 25/8/2020.

**The Applicants' Case**

3. The Applicants aver that this Court delivered a ruling on 13/8/2020 setting aside the disciplinary proceedings including the termination letter, and ordered the reinstatement of the Claimant with immediate effect.

4. They aver that they are aggrieved by the said ruling and intend to appeal the same hence filed a Notice of Appeal. It is their case that the intended appeal raises triable issues and would be rendered nugatory if the Claimant executes the decree.

5. They aver that the issue raised in the intended appeal is a jurisprudential one on whether there can exist a constructive reinstatement without any application to the effect and especially where a court has completely avoided the determination of the principles attendant to reinstatement; or whether the Court can *suo moto* prevent an employer from proving the validity and fairness of the reasons for dismissal as contemplated by law.

6. They urged this Court to allow the Application in the interest of justice and fairness.

### The Claimant's Case

7. The Claimant avers that the temporary *ex parte* orders issued by the Court were irregular and ought to be vacated and/or set aside as they violated the mandatory provisions of rule 17 (4) of the Employment and Labour Relations Court (Procedure) Rules.
8. Further, the Applicants deliberately misled the Court that she had been reinstated *suo moto* yet she had been ordered to continue with her employment. She contends that though she reported back to work, she was barred entry into the Applicants premises. It is her case that the orders sought have been overtaken by events and cannot apply retrospectively.
9. She avers that the Applicants are not entitled to the orders sought as they have not met the threshold set out in Order 42 rule 6 (2) (a) of the Civil Procedure Rules having failed to demonstrate the substantial loss they stand to suffer.
10. She contends that the 'jurisprudential issues' cited by the Applicants are not factors to consider when granting orders for stay and cannot be the reason the Claimant is denied her rights to equal benefit and protection of the law.
11. It is averred that the orders for stay should be denied as they are negative in nature therefore incapable of being stayed. It is further averred that even if reinstatement orders had been issued, the same are also incapable of being stayed as they are self-executing. The Claimant asserts that the substratum of the appeal will not be rendered nugatory as she will only be paid for work done during the pendency of the appeal.
12. She contends that due to the nature of the orders issued by the Court, payment of security of costs is irrelevant in this instance. She therefore urged this Court to vacate the said orders as she stood to suffer a substantial loss by losing her job, which is her only source of income. She also urged this Court to consider the number of years the appeal might take before it is heard and determined. Lastly, she urged the Court to direct the Applicants to reinstate her salary as she had not been paid since July 2020.
13. The Application was disposed of by way of written submissions with both parties filing their submissions.

### The Applicants' Submissions

14. The Applicants submit that when the Court made the order that the Claimant be reinstated, she was not in employment as her services had been terminated. They further submit that the orders directing the Claimant to continue her employment was a positive order capable of being executed but contended that it is yet to be executed by the Claimant.
15. The Claimant wrote a letter to the Applicants demanding her immediate reinstatement and confirmed that she would be resuming work on 14.8.2020. At the time of filing the Application, the Claimant had not resumed work but the Applicants had anticipated that she would enforce the ruling on 17.8.2020.
16. On the issue of whether *ex parte* orders of stay had been issued pending the hearing and determination of the Application, it was submitted that the interim orders were issued due to the urgent nature of the matter and were on injunctive orders. Further, there is no application to vacate the said orders.
17. The Applicants submit that the reinstatement orders issued will be difficult to enforce and will occasion the 1<sup>st</sup> Applicant substantial loss and business. The Applicants submitted that the relationship had broken down irretrievably hence, the reinstatement would cause turmoil at the workplace and that the grave allegations made against the 2<sup>nd</sup> Applicant had still not been determined. They relied on the case of **Kenya Airways Limited vs. Alex Mbugua [2019] eKLR** to support their position.
18. Finally, the Applicants submitted that the substratum of the appeal will be rendered nugatory if the orders sought are not granted. It was their position that by filing the appeal, they had demonstrated that they intended to dispose of the appeal timeously. They therefore urged this Court to allow the application.

### The Claimant's Application

19. The Claimant submits that the orders for stay should not be granted since the orders issued to her allowing her to continue with her employment are negative in nature therefore incapable of being stayed. This notwithstanding, the Claimant submits that even if reinstatement orders had been issued, the same are also incapable of being stayed as they are self-executing as was held in the case of **Aggrey Lukorito Wasike vs. Kenya Power and Lighting Company Limited [2016] eKLR**.
20. The Claimant submits that the application has been overtaken by events as she already reported back to work. It is her position that orders for stay do not apply retrospectively. She posits that the Applicants' act of chasing her away was a scheme orchestrated to justify the current application for stay and amounts to disobedience of this Court's orders.
21. The Claimant submits that the application has not met the threshold set out in order 42 rule 6 of the Civil Procedure Rules. For instance, the application is devoid of merit due to the Applicants' failure to demonstrate the loss they stand to suffer if the orders are not granted. Additionally, their allegations were not supported by evidence. She relies on the case of **Antoine Ndiaye vs. African Virtual University [2015] eKLR** and **Machira T/A Machira & Company Advocates vs. East African Standard (No 2) [2002] KLR 63** where it was held that the substantial loss likely to be suffered ought to be demonstrated.
22. On the issue of consideration of overriding interest, the Claimant submits that this Court ought to balance interests of justice so as not to

render the Claimant destitute and jobless through stay orders. She relies on the case of **Victory Construction vs. BM (a minor suing through next friend one PMM) [2019] eKLR** to support this position.

23. She urged this Court to adopt the dissenting opinion of the Honourable Lady Justice Philomena Mwilu (as she then was) in **Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR** where she was of the view that reinstatement was the appropriate remedy to uphold the right to economic and social rights under Article 23 (1) of the Universal Declaration of Human Rights.

24. I have examined the averments of the Parties herein. The issues for this Court's determination are as follows:-

**1. Whether the Applicant's application meets the threshold for grant of orders of stay under Order 42 rule 6(2) of the Civil Procedure Act.**

**2. Whether the orders sought to be stayed are capable of being stayed.**

25. On 13/8/2020, this Court delivered its ruling in this matter setting aside disciplinary proceedings including the termination letter and ordered the Claimant to continue working.

26. The Applicants were aggrieved by this Court's ruling and filed a Notice of Appeal and they also filed this application for stay on 17/8/2020. In terms of the requirements for Order 42 rule 6, they indeed sought stay orders without any delay.

27. They also aver that the relationship between the Claimant and Respondent has broken down and therefore she cannot continue working for the Respondent. This would need to be proved.

28. The only missing link in terms of Order 42 is the issue of security for which they have not offered to give due to the nature of the prayers being sought to be stayed.

29. This leads me to the second issue for determination. The order being sought to be stayed is an order putting the Claimant back to her work – basically an order allowing her to continue working. Such an order takes effect immediately and is self-executing. This was the finding of my Learned brother Ongaya J. in **Aggrey Lukarito Wasike vs Kenya Power Lighting and Company Limited** (Nyeri ELRC case No. 109/2015) where he rendered himself thus:-

**1. "A reinstatement 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 unlawful 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....."**

30. While taking the foregoing view, the Court has considered and been guided by the dissenting opinion in **Cooperative Bank of Kenya Limited vs Banking Insurance and Finance Union (Kenya) (2015) eKLR** where Mwilu JA 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 none 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".**

31. In the case of **Lukorito** (supra) Judge Ongaya also considered the opinion in **Patrick Njuguna Kariuki vs Del Monte (K) Limited (2020) eKLR** where the Court rendered as follows:-

**"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."**

32. I want to agree with the above proposition that indeed the orders the Applicants want this Court to stay are self-executing orders and so cannot be stayed. Their nature is even demonstrated in the fact that no security can be given in place of the said orders.

33. The Applicants argued that they have triable issues. Indeed that could be the case but that is not an argument for stay orders. In the circumstances, I find the application for stay as sought cannot be granted. I lift the interim ex parte stay orders granted by this Court and direct that the Respondents should comply with the orders granted by this Court in the ruling of 13/8/2020.

34. Costs in the cause.

**Dated and delivered in Chambers via zoom this 22<sup>nd</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Guserwa with Senior Counsel Muite for Respondent – Present

Ayur and Namada for Claimant – Present