



**REPUBLIC OF KENYA**

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

**CAUSE NO.87 OF 2016**

**KENYA UNION OF COMMERCIAL**

**FOOD & ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**ALMASI BEVERAGES LIMITED.....RESPONDENT**

**RULING**

The claimant filed application dated 30<sup>th</sup> September, 2019 and seeking for orders that the Notice of Appeal by the respondent dated 10<sup>th</sup> May, 2017 be struck out and the court do set aside the orders of stay issued on 8<sup>th</sup> June, 2017 and the claimant be allowed to begin the process of recovering the judgement sum. That the respondent to pay costs of the application.

The application is supported by the affidavit of George Obongo and on the grounds that judgement herein was delivered in favour of the claimant on 26<sup>th</sup> April, 2017 and upon which the respondent obtained orders of stay of execution on 8<sup>th</sup> June, 2017 on the reasons that they intended to lodge an appeal.

That there is no evidence the judgement sum was deposited with the court in violation of a consent order recorded in court on 16<sup>th</sup> November, 2017. There is no evidence of any appeal filed. The time allowed has since lapsed and the orders staying execution should be lifted.

In reply the respondent filed the Replying Affidavit of Timothy M Muthini the chief human resource manager and who avers that the court herein is *functus officio* having rendered itself fully.

The respondent has since been substituted with Kisii Bottlers Limited as a respondent and has just given instructions to its advocates.

The consent order of 16<sup>th</sup> November, 2017 was not specifically limited or restricted to the specific appeal lodged by Kisii Bottlers Limited the former respondent herein. The respondent herein having been substituted is entitled to the benefit of the consent.

Mr Muthini also avers that the respondent has since obtained write proceedings in pursuit of an appeal against the judgement of the court and the claimant shall not be prejudiced where the appeal is allowed to proceed. The claimant is aware the respondent filed Appeal No.70 and 71 of 2017 at Nakuru which have not been heard.

Both parties made oral submissions in court and the issues which emerge for determination can be summarised as follows;

Is the court *functus officio*?

Does the substitution of the respondent commence fresh proceedings with regard to execution?

Should the court order as requested; and Who should pay costs.

The claimant as the applicant is seeking for the orders of stay issued herein be vacated as the respondent has failed to meet the agreed upon terms for the issuance of the same. The respondent on their part assert that there was substitution of the respondent and they have since filed an appeal and the court has discharged its mandate

It is common cause that there is judgement herein delivered on 26<sup>th</sup> April, 2017. By application dated 5<sup>th</sup> June, 2017 the respondent applied for stay of execution of the judgement. By consent of the parties on 16<sup>th</sup> November, 2017 it was agreed as follows;

a) That there be a stay of execution of the judgement and decree of this court on condition that the respondent do deposit a sum of ksh.3,450,508.00 being the grieving's net salaries accruing for the period of October, 2017, had the grievants been reinstated, in a joint interest earning account in the names of counsel for the respondent and the claimant union.

b) That the costs of this application be in the cause.

c) That this deposit be effected within thirty (30) days from today.

d) That mention on 13/12/2017 at 900 hours for confirmation of compliance and other directions of the court.

The claimant has revisited these directions, the orders and requirement for stay of execution on condition of a deposit of the judgement sum in a joint interest earning account of both parties within 30 days from 16<sup>th</sup> November, 2017.

The court on its orders is hence not *functus officio*. The orders are alive and the claimant has gone back on these orders of this court.

Since 16<sup>th</sup> November, 2017 the respondent has not complied. The reasons given are that the respondent was substituted and that the appeal has since been filed upon obtaining written proceedings.

The substitution of the respondent from Kisii Bottlers Limited was vide application dated 30<sup>th</sup> October, 2019 way after the 16<sup>th</sup> November, 2017 and this was allowed by instantly. The substitution was to allow for continuity and after the respondent taking over through a business transfer.

There is no gap herein. The respondent as a legal entity carried over liability and including the judgement credit herein.

With regard to obtaining written proceedings, the conditional stay of execution was allowed factoring the respondent needed time to organise its appeal and hence pending such procedures was directed to deposit the judgement sum in a joint interest earning account within a given time period.

There is no compliance with the consent orders of 16<sup>th</sup> November, 2017 and the explanations given lack reasonableness and an outright violation of the terms of the consent and orders of the court.

The averments on the Bar by counsel for the respondent that there was an account opened with Sidian Bank and a deposit made is contrary to the terms of the court orders. Such deposit, if any, and which is not per the court orders, cannot stand the test of being a deposit for stay of execution pending the hearing of the appeal.

It is therefore fair, reasonable and appropriate here to review the terms of the orders of stay of execution issued on 16<sup>th</sup> November, 2016.

**Accordingly, the application by the claimant is found with merit and the court orders as follows;**

**(a) The respondent shall submit evidence of back deposit and declare the interests earned in the stated deposit with Sidian Bank with regard to the stated deposit of ksh.3,450,508 within 14 days through an Affidavit and attach the necessary evidence;**

**(b) The respondent shall cause a deposit of ksh.3,450,503 with the court within the next fourteen (14) days from the date herein;**

**(c) Costs to the claimant upon assessment of (a) above and in the absence of compliance the court shall direct as appropriate.**

**(d) Where there is no compliance to (a) and (b) above, orders of stay of execution herein shall lapse on the 14<sup>th</sup> day from the date hereof and the claimant shall be at liberty to commence execution proceedings.**

**Dated and delivered electronically this 2<sup>nd</sup> June, 2020.**

**M. MBARU**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 the Order herein shall be delivered to the parties via emails. this 2<sup>nd</sup> June, 2020.

**M. MBARU**

**JUDGE**