



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1537 OF 2014**

**DICKSON MATINGI .....CLAIMANT**

**VERSUS**

**DB SCHENKER LIMITED.....RESPONDENT**

**RULING**

1. Pursuant to an award of this Court delivered on 8<sup>th</sup> July 2016, the Respondent filed an application for review dated 15<sup>th</sup> August 2016, citing discovery of new evidence on the issue of house allowance.
2. In its application, the Respondent also took issue with the rate of house allowance applied by the Court in its award.
3. I heard the application for review and dismissed it on 13<sup>th</sup> January 2017, with costs to the Claimant.
4. The Respondent then filed an application under certificate of urgency dated 30<sup>th</sup> January 2017 seeking stay of execution of the judgment and any consequential orders pending an appeal to the Court of Appeal.
5. The application which is supported by the affidavit of the Respondent's Human Resource Manager, Moses Nzuya sworn on 30<sup>th</sup> January 2017 is based on the following grounds:
  - a) That the Respondent's application for review dated 15<sup>th</sup> August 2016 was dismissed on 13<sup>th</sup> January 2017;
  - b) That the Respondent sought leave to appeal against the ruling and has since filed a Notice of Appeal and has requested for typed proceedings to facilitate filing of a Record of Appeal;
  - c) That the Claimant has filed a Bill of Costs dated 16<sup>th</sup> January 2017 which was due for taxation on 20<sup>th</sup> February 2017;
  - d) That the Respondent has an arguable appeal with high chances of success;
  - e) That the Respondent has come to Court without undue delay;
  - f) That the Respondent is ready and willing to abide by any orders as to security as may be made by the Court;
  - g) That if a stay of execution is not granted, the Respondent's appeal will be rendered nugatory

thereby visiting prejudice on the Respondent while the Claimant may be compensated by way of costs should the appeal fail;

h) That the Respondent has a right to be heard on appeal;

i) That it is in the interest of justice that the orders sought are granted.

6. The Claimant's response is contained in his replying affidavit sworn on 7<sup>th</sup> February 2017. He depones that the Notice of Appeal dated 19<sup>th</sup> January 2017 which is on the entire award of the Court was filed out of time.

7. The Claimant further depones that since the Respondent chose the review route, then his right of appeal was extinguished. At any rate, no Notice of Appeal on the review ruling had been filed.

8. The Claimant states that the current application is aimed at preventing him from reaping the fruits of his award.

9. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the following conditions for granting of an order for stay of execution pending appeal:

a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;

b) That the application has been made without unreasonable delay;

c) That the applicant has given adequate security for the due performance of such order as may be binding on them.

10. Additionally, there is the now well-established condition under case law that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see *Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited [2015] eKLR*).

11. On the face of it, the Respondent's Notice of Appeal filed on 19<sup>th</sup> January 2017 is against the entire award. The award having been delivered on 8<sup>th</sup> July 2016, a Notice of Appeal thereon ought to have been filed not later than 22<sup>nd</sup> July 2016.

12. The Court therefore finds that the Notice of Appeal dated 19<sup>th</sup> January 2017 was filed way out of time without leave of the Court. That being the case, the application for stay of execution pending appeal is without basis and is dismissed with costs to the Claimant.

13. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI**

**THIS 24<sup>TH</sup> DAY OF FEBRUARY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Muhanda for the Claimant

Mr. Njiru for the Respondent

