



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO.183 OF 2016**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**KENYA NATIONAL LIBRARY SERVICE.....RESPONDENT**

**RULING**

1. The respondent, Kenya national Library Service by application filed under the provisions of Rule 17 (1), to (6) and 32(2) of the court rules is seeking for orders that the execution of the decree of The court commenced on 21<sup>st</sup> February, 2017 be stayed pending the hearing and determination of intended appeal and the costs herein follow the results of the appeal. The application is supported by the annexed **affidavit of Richard Atuti** and on the grounds that the respondent being aggrieved by the judgement of the court read on 19<sup>th</sup> July, 2016 has lodged a Notice of Appeal and commenced preparations for the record of appeal. The claimant has commenced execution of the decree to the substantial detriment of the respondent which solely relies on the National Treasury for financial allocation and does not have money to satisfy the judgement. There is an arguable appeal with high chances of success and if the orders sought are not allowed the same will be rendered nugatory and further ground the operations at the service to the public. The claimant has since sent Tigwoods Auctioneers to proclaim movable properties to satisfy the judgement of Kshs.66 million.

2. In the affidavit of Mr Atuti he avers that as the Director of the respondent he is aware of the court judgement for an award of Kshs.66, 347,316.10 to the claimant. The respondent intends to appeal against the judgement and has filed Notice of Appeal but the claimant has instructed auctioneers to proclaim its goods and unless the orders sought are issued there will be irreparable loss and damage and the appeal will be rendered nugatory.

3. In reply, the claimant filed Replying Affidavit sworn by Mike G Oranga the Assistant Secretary General and who avers that the judgement of the court herein is premised on the fact that the respondent failed to fully implement a CBA registered as RCA No.293 of 2013 and there is judgement for specific performance. The respondent has partially complied with the CBA implementation and paid a portion of the owing dues and the arrears now forming the award in the judgement are due at kshs.66 million. On the stay sought the only reasons for the intended appeal is that the amounts in the judgement are substantial; the respondent is a state corporation but such are matters that do not form the principles for the grant of stay of execution pending the filing of the intended appeal. The averments that the Salaries and Remuneration Commission was not consulted is a matter that the respondent ought to have addressed well in advance but not at this stage.

4. Mr Oranga also avers that the respondent fully participated in the negotiations of the CBA and cannot now turn around and claim the arrears are not due and or payable as being beyond their reach. The respondent has a duty to implement the CBA and there are no plausible reasons given to merit the grant of the orders sought.

5. Both parties made oral submissions in support of their case.

**Determination**

6. The respondent is seeking stay of execution pending the hearing and determination of the intended appeal against the judgement of this court. On the question as to whether or not an appeal would be rendered nugatory, if successful, would ultimately depend on the peculiar circumstances of each case as held in **Reliance Bank Limited versus Norlake Investments Ltd – [2002] 1 EA 227. In this case, both parties agreed that the issue in dispute is the full implementation of the CBA covering the period of 1<sup>st</sup> July, 2010 to 30<sup>th</sup> June, 2012. The respondent as the applicant herein has confirmed that there is partial payment of the owing dues and what remains unpaid is the sum of Kshs.66 million due to the respondent inability to pay the same as they are dependent on the National Treasury for allocation of funds. The fact of the owing dues is admitted. The challenge is inability to pay.**

7. **Noting such circumstances, the court in its judgement of 19<sup>th</sup> July, 2016 gave the respondent 90 days to pay the owing dues. Such time has lapsed and no offer or proposal is made on how to offset the substantial amount. Should stay of execution now be granted to enable the respondent file an intended appeal?**

8. It is now trite that an applicant seeking stay of execution must satisfy that there is an arguable appeal which is to say that it is not frivolous that if the appeal, if filed, or intended appeal, would be rendered nugatory if stay of execution applied for is not granted. See **Co-operative Bank of Kenya Limited versus Banking Insurance & Finance Union (Kenya) [2015] eKLR.**

9. In this case there is no draft memorandum of appeal for the court to see the legal issues set out in terms of the admissions that the debt owes and the only issue that remains to be addressed is inability to pay. The Notice of Appeal filed thus remains an intention that is simply done for purposes of complying with the rules of the upper court, the Court of Appeal. The payment of the due amounts as noted by the claimant would resolve this matter once and for all.

10. There is a legitimate judgement herein and the claimant members should not be denied the fruits of the same on the basis that the respondent as a state corporation has no budgetary allocation and cannot pay until such allocation is made. That would be to render judgements from the courts, once lawfully rendered ineffective on the simple defence that the National Treasury has failed to make a budgetary allocation for such payment whereas such an entity is not party of proceedings herein. To move in that direction would set a very a dangerous precedent where a respondent against whom judgement has been entered would seat back and await a government ministry to act so as to satisfy the judgment of the court.

**I therefore find no merit in the application by the respondent. Application dated 23<sup>rd</sup> February, 2017 I hereby dismissed with costs.**

Dated and delivered in open Court at Nairobi this 6<sup>th</sup> day of April, 2017

**M. MBARU**

**JUDGE**

In the presence of:

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