



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO. 1661 OF 2016

KENYA QUARRY & MINE WORKERS UNION.....CLAIMANT

VERSUS

NATIONAL CEMENT COMPANY LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion dated 17th August, 2017 the respondent sought stay of execution of the orders of the court pending the hearing and determination of appeal.

2. The application was based on the grounds that:

a. That the respondent/applicant is dissatisfied with the court's ruling and have appealed against the said ruling

b. That, the Honourable Judge had directed that the respondent/applicant do pay any arrears of the agency fees but did not expressly state how much and for how many employees and unfortunately, the parties herein have been unable to agree on the arrears of the agency fees payable as the claimant is insisting that the agency fee payable if so 370 employees who are the difference between the total number of employees being 500 less the employees who were being paid for being 130 employees.

c. That, the total number of employees being 500 is inclusive of the Managerial and casual employees who are not unionisable and the claimant ought not to claim agency fees with regards to such employees.

d. That, furthermore the parties are unable to agree on the period for which the agency fees Is to be paid as the claimant is insisting that the agency fees is payable from the month of January 2013 upto the time of payment yet the CBA came into force on the 20th June 2013 and further the respondent/applicant outsource its workforce from Heritage Workforce Limited from the month of January 2017 which information was timely communicated to the claimant herein even though the same was not on the court record as this happened way after this matter had been reserved for ruling by the court.

e. That, should the claimant proceed with execution as feared, the respondent/applicant's appeal, which it beliefs has a very high chance of success would be rendered nugatory.

f. That, the respondent/applicant would also suffer substantial and irreparable harm if orders for stay of execution are not issued urgently, as it may never recover the sum claimed by the claimant should its appeal be allowed.

g. *That, the respondent/applicant is ready and willing to comply with any conditions for stay of execution to be granted by the Honourable court ending hearing of the present application as well as hearing of the appeal.*

3. The application was further supported by the affidavit of James Mbogo who deponed on the main that:

a. *That in effort to comply with the court order more so on payment of the agency fees the respondent through myself has made several efforts to agree with the claimant on the figure payable as being any arrears of the agency fees but the claimant is insisting that the respondent do pay agency fees for all its employees.*

b. That this prompted the respondent/applicant to advise its advocates to prefer an appeal against the court's ruling reasons that the court did not specify the agency fees hence the stalemate.

c. *That, it has not been disputed by the claimant that the respondent was paying agency fees for most of the employees and actually the claimant has conceded that the respondent has always paid agency fees for 130 employees.*

d. That, the respondent/applicant is reasonably apprehensive that the claimant is likely to proceed and execute the said ruling by extracting a decree based on the numbers of employees with a view to execute the same which will cause irreparable damage to the respondent/applicant.

e. *That the present advocates on record have advised us which advice I verily believe to be true, that they are in the process of preparing a record of appeal and to request for the typed proceedings to avoid any unnecessary delays.*

f. That, as a condition for grant of the orders for stay of execution the respondent/applicant is ready and willing to comply with any conditions that shall be issued by the honorable court.

4. The claimants opposed the application and filed a replying affidavit through its National General Secretary Mr Wafula Wa Musamia who deponed on the main that:

a. That in response to paragraph 3 of the Notice of Motion the claimant avers that the ruling was not delivered in a vacuum and was guided by the pleadings filed by both parties and even without expressly indicating the amount due, the same can be calculated. Furthermore, the claimant went an extra mile in a letter to the respondent, itemized and calculated the counts due.

b. That in response to paragraph 4 and in further response to paragraph 3 of the Notice of Motion, the claimant avers that the total number of the respondent's employee inclusive of the managerial and casual employees is more than 500 as the respondent, in its replying affidavit sworn on its behalf by Stephen Mutuku dated 20th September, 2016 at paragraph 3 stated that the respondent has a large workforce comprising over 500 employees.

c. That in response to paragraph 5 of the Notice of Motion the respondent is aware that the ruling is referring to agency fee arrears accruing since the gazettelement of the ministerial order, which is from January 2013. Further, the respondent's action of outsourcing employees since 2017, of which the claimant has no mandate to control, speaks to the respondent's calculated attempts to frustrate the claimant's strong membership and to weaken the same.

d. That the respondent had 30 days to comply with the court ruling and if the respondent was in doubt of the intended amount awarded, it should have made necessary steps and sought clarification and or interpretation to the order rather than wait till the lapse of the 30 days period given to file an

application for stay.

e. That in response to paragraph 8, the claimant too will suffer irreparable and substantial harm if the amount awarded in the ruling against the respondent is not released to the claimant given that the amounts are actually arrears owed to the claimant by statute provisions.

f. That at the very least the respondent should deposit security of cost of the intended appeal. No prejudice is pleaded and none is anticipated.

g. That in response to paragraph 10 of the Notice of Motion the claimant has sound financial means and has not demonstrated any financial incapacity or inability.

5. In his submission in support of the application, the respondent's counsel Mr Isaka submitted that the 500 employees include employees in managerial positions and casual labourers who were not unionisable. Counsel further submitted that the number of employees kept fluctuating from time to time hence no fixed number of unionisable employees can be arrived at.

6. According to Counsel, section 49(2) of the Labour Relations Act required that a list be forwarded to the Minister for gazette with regards to payment of agency fees. No list of such employees had been furnished before the court. Counsel therefore submitted that without the list, it would be difficult to ascertain the exact number of unionisable employees whose agency fee was not paid.

7. Mr Isaka further submitted that the previous advocates on record did not avail to court the proof of payment of the agency fee and the respondent's structure and or hierarchy of the employment cadres to enable the court an opportunity to ascertain the arrears of the agency fees if any. This denied the court an opportunity to determine the exact number of employees who benefited from the CBA.

8. On the issue of arguable appeal counsel submitted that the respondent had an arguable appeal with high chances of success and failure to grant the orders sought would be prejudicial to the respondent.

9. Counsel for the claimant Mr Onyony on his part submitted that the issues raised by the respondent in his submissions were matters that were already canvassed and determined by the court and an attempt to make them core issues was an attempt to have the appeal heard in the wrong forum.

10. On the issue of number of employees who are eligible to pay agency fees, counsel submitted that it was incumbent upon the respondent as an employer to provide the muster roll and copy of all individual employee P9 PAYE forms as evidence of tax returns and failure to do so could only be read in the affirmative that all the 500 employees it has in its payroll should have had their agency fee deducted.

11. The court is being called upon to stay its orders pending appeal. whereas the applicant has averred that it has an arguable appeal no attempt has been made to show which aspect of the judgement is being faulted and would be canvassed on appeal. The applicant appears to take the route to appeal simply because it has been unable to agree with the claimant over the number of employees liable to pay agency fee. The applicant does not deny that the claimant is entitled to receive agency fee.

12. Section 49(2) (b) of the Labour Relations Act provides that a request in accordance with subsection (1) (deduction of agency fee) shall be accompanied with a list of all employees, prepared by the employer, whom deduction shall be made. This therefore meant that it was the responsibility of the applicant to prepare the list of employees to be deducted agency fees. It is not available to the applicant to argue that the absence of the list makes it impossible to agree on the quantum of the agency fees.

13. Whereas the applicant has a right of appeal such right should not be exercised whimsically by filing of appeals with little chances of success. Besides the period for filing such appeal has lapsed and no application has been filed, heard and determined on the extension of time to file an appeal.

14. If the court can offer advice let both parties in this matter discuss and negotiate in good faith on the

issue of the number of employees eligible to pay agency fees.

15. The application before me does not present itself as merited and is hereby dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 8th day of December, 2017

Abuodha J. N.

Judge

Delivered this 8th day of December, 2017

Abuodha J. N.

Judge