



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**CAUSE NO. 2119 OF 2014**

**KENYA CHEMICAL AND ALLIED WORKERS UNION .....CLAIMANT**

**VERSUS**

**EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED....RESPONDENT**

**(Before Hon. Justice Hellen S. Wasilwa on 6<sup>th</sup> May, 2016)**

**RULING**

1. The Application before Court is the one dated 2.10.2015 where the Applicant seeks orders for stay pending appeal. The Application was filed under Certificate of Urgency and brought through a Notice of Motion filed under Articles 159, 162 (2), 164 (3) of the Constitution, Sections 12 (3) (i) & (viii), 7 (1) & (2) of the Employment and Labour Relations Court Act 2011 Rule 16 of the Industrial Court (Procedure) Rules 2010 and all the enabling provisions of the Law and the inherent powers of the Court.

2. The Applicant seeks orders as follows:

1. *That this Honourable Court certifies this Application as urgent and the same be placed before the Honourable Judge and be heard ex-parte in the first instance.*
2. *That pending the hearing of this Application interparties, this Honourable Court be pleased to issue a temporary stay of execution of the Judgment delivered on 6<sup>th</sup> July 2015 and all consequential Orders thereto in the first instance.*
3. *That pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary stay of execution of the Judgment delivered on 6<sup>th</sup> July 2015 and all consequential Orders thereto.*
4. *That this Honourable Court be pleased to issue a temporary stay of execution of the Judgment delivered on 6<sup>th</sup> July 2015 and all consequential Orders thereto pending the hearing and determination of the Appeal against the Judgment of this Honourable Court.*
5. *That the Costs of this Application be in the cause.*
6. *That this Honourable Court be pleased to issue such other or further Orders that it may deem fit and just to grant.*

3. The Application is grounded on the annexed affidavit of Mr. John N. Ole Kimanjoi, the Respondent's Head of Human Resource and Administration and on the following grounds:

1. *That the Respondent herein being aggrieved by the Judgment of this Honourable Court delivered on 6<sup>th</sup> July 2015 has filed an Appeal against the said Judgment.*
2. *That the Claimant has demanded that the Respondent implements the Judgment herein during the pendency of the Appeal herein and declined to negotiate for the terms and conditions applicable to fixed term contract employees.*
3. *That in the event that the Claimant executes the Judgment before the hearing and determination of the Appeal, the subject matter of the Appeal would be spent and the Appeal rendered nugatory occasioning irreparable loss and damage to the Respondent since the Claimant would not be in a position to refund to the Respondent the decretal sum of over Kshs.1 billion to over 600 contract staff since 2013 being the Collective Bargaining Agreement arrears for the period 2013 to 2015 in the event the Respondent is successful in its Appeal.*
4. *That the Claimant's means as to its ability to refund to the Respondent the decretal sum of over Kshs.1 billion to over 600 contract staff since 2013 is not known to the Respondent.*
5. *That the Orders of stay of execution sought herein would not occasion irreparable damage or prejudice to the Claimant in the event that the Respondent's Appeal is dismissed since this Honourable Court has extensive jurisdiction in making Orders for compensation of any loss that the Claimant may suffer as a result of the stay.*
6. *That the Respondent's intended Appeal against the Judgment herein has very high chances of success for reasons that:*
  - a. *That the Learned Judge erred in law and in fact by holding that the Appellant breached the terms and conditions of the Collective Bargaining Agreement (CBA) by implementing the Collective Bargaining Agreement in favour of permanent employees only when both the Appellant and the Respondent had agreed to the said implementation.*
  - b. *That the Learned Judge erred in law and in fact by failing to have regard to the fact that since the year 1961 until the filing of the Claim in Court, the terms for fixed term contract employees were not covered by the Collective Bargaining Agreement instead the same were determined outside the Collective Bargaining Agreement.*
  - c. *That the Learned Judge erred in law and in fact in failing to recognize the separate Agreement for payment of wages of the Appellant's employees on fixed term contracts and casual staff executed in the year 2009 and exhibited as Annex 3 of the Appellant's defence.*
  - d. *That the Learned Judge erred in law and in fact by failing to hold that the Respondent had not made any proposal to incorporate the employees on fixed term contracts into the Collective Bargaining Agreement at any Collective Bargaining Agreement negotiation cycle to entitle the said employees to benefit from the Collective Bargaining Agreement for the period 2013 to 2015.*
  - e. *That the Learned Judge erred in law by holding that any member of the Respondent was entitled to benefit from the Collective Bargaining Agreement when the Appellant and the Respondent had been negotiating separately for the contract staff outside the Collective Bargaining Agreement from the year 1961.*
  - f. *That the Learned Judge erred in law and in fact in holding that the Appellant was discriminating against the fixed term contract staff without having regard to the fact that the Appellant and the Respondent had negotiated separately for the terms affecting contract staff*

*outside the Collective Bargaining Agreement from the year 1961.*

- g. That the Learned Judge erred in law and fact by failing to appreciate sufficiently the practice, facts and the law between the Appellant and the Respondent.*
- h. That the Learned Judge erred in law and fact by proceeding to construct a contract of employment and terms and conditions between the Appellant and the fixed term employees without negotiations which terms and conditions cannot be sustained by the Appellant.*
- i. That the Learned Judge erred in law by failing to consider the pleadings, evidence and submissions by the Appellant on record.*
- 7. That it is in the best interest of justice that the stay of execution sought herein be granted pending the hearing and determination of Appeal against the Judgment.*
- 8. That there has been no inordinate delay in bringing this Application for stay of execution of the Judgment delivered on 6<sup>th</sup> July 2015 after the collapse of the negotiations between the Claimant and the Respondent in September 2015.*

4. The gist of this Application is that the Respondents have preferred an Appeal against the Judgment of this Court dated 6.7.2015 and they aver that they have an arguable Appeal which would be rendered nugatory should the Appeal succeed.

5. They aver that they stand to suffer irreparable loss and damage if the Application is not allowed as it involves payment of 1 billion to over 600 contract staff since 2013 being Collective Bargaining Agreement arrears for the period 2013 to 2015. They contend that the Claimant does not have the capacity to refund the said amounts.

6. The Claimant/Respondent opposed this Application and filed their replying affidavit sworn on 16.10.2015 by the Claimant's National Secretary General. They contend that the Application is an abuse of the Court process, bad in law and has no merit. They contend that the Respondent's intention is to delay this case and has no chances of success.

7. Having considered the averments of both parties, I rely on the provisions of Order 42 Rule 6(b) of the Civil Procedure Rule 2010 which states as follows:

***“(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.***

8. This Court would not deny a stay whose effect would be to render the intended Appeal nugatory and also given the colossal sum of money involved. I therefore allow the Application for stay as prayed.

9. Costs in the cause.

Read in open Court this 6<sup>th</sup> day of May, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mweke holding brief Nyabena for Claimant – Present

No appearance for Respondent

