



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 236 OF 2013

BETWEEN

- 1. IGNAS KARINGO MGHONA..... CLAIMANT**
- 2. MATHIAS OTONYO SESE..... CLAIMANT**
- 3. MIRIAM CHENYE..... CLAIMANT**
- 4. ROSELINE MGHOI KILIO..... CLAIMANT**
- 5. JENNIFER MBINYA JULIUS..... CLAIMANT**

VERSUS

STAR OF HOPE INTERNATIONAL FOUNDATION ... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Kedeki Advocate instructed by Kedeki & Company Advocates for the Claimants

Mr. Odhiambo Advocate instructed by Odhiambo S.E. & Company Advocates for the Respondent

RULING

1. On 11th July 2016, the Court granted an Application dated 1st July 2016, filed by the Respondent. The Application sought to reinstate the Respondent's Application dated 10th June 2016. Under prayer No. 5, the Application sought to have the Auctioneers costs, if any born by the Claimants.
2. The Application dated 10th June 2016 was reinstated, and has been heard today. In the course of the hearing, the Advocates sought clarification on the orders made on 11th July 2016, with respect to prayer No. 5, which relates to Auctioneers charges.
3. The clarification is this; the Court ordered the Application dated 1st July 2016 is allowed. All the prayers including prayer No. 5 were granted. Auctioneers costs, if any should therefore be met by the Claimants.

4. On the application for Stay of Execution dated 10th June 2016, which is supported by the Affidavit of Respondent's Director, Mr. Gilbert Ochieng', sworn on the 10th June 2016, the Respondent submits:-

- a) The principles for grant of stay of execution are whether there is an arguable Appeal; whether if stay is not granted, the Appeal would be rendered nugatory; and whether in particular the Claimants shall be in a position to pay back to the Respondent the decretal amount, if the Appeal succeeds.
- b) The Court has to weigh the interest of both Parties.
- c) The Respondent has filed a Notice of appeal. What remains to be filed is the Memorandum and Record of Appeal. Rule 29 of the Industrial Court (Procedure) Rules 2010, require the Deputy Registrar of the Court to cause the record to be made. Record of the proceedings has not been supplied to the Respondent, despite an application to that end, having been made.
- d) Claimants have not shown they are in a position to refund the decretal sum, which is about Kshs. 1,000,000. The Appeal would be defeated.
- e) The Respondent is willing to comply with any reasonable conditions the Court may impose, in granting stay.
- f) The Claimants concede in their Replying affidavit that they had commenced execution.
- g) They will not suffer any prejudice. The Respondent is an NGO which depends on donor funding, and is bound to suffer, if stay is not granted.
- h) There is no requirement, as suggested by the Claimant, that the Respondent files a draft Memorandum of Appeal with the Application, to justify grant of stay of execution orders.

5. In expounding its submissions on the principles to be considered in grant of stay, the Respondent relies on ***Court of Appeal Civil Application No. NAI 93 of 2002 between Reliance Bank Ltd vs. Norlake Limited, and CA Civil Application No. NAI 203 of 1998 between Malindi Air Services vs. Halimar Abdinoor Hassan.***

6. The Claimants oppose the Application. They rely on the Affidavit sworn by the 2nd Claimant on 12th July 2016.

7. They submit:-

- a) The Respondent is an NGO, which could close down any time.
- b) That the Respondent's Advocates had written to the Claimant's Advocates, indicating their client was ready to satisfy the decree.
- c) Execution commenced only after the Respondent reneged on its undertaking to pay.
- d) The Notice of Appeal was filed out of time.
- e) If the Court is convinced stay is merited, the same should be granted on the ground that the decretal amount is deposited in Court.
- f) There is no draft Memorandum of Appeal attached to the Application for stay.
- g) The Respondent merely intends to frustrate the Claimants.

The Court Finds:-

8. The Respondent wrote to the Claimant's Advocates on 24th April 2016, indicating readiness and willingness to pay the decretal amount, except with regard to Ignas Karingo and Miriam Chenye.
9. The Respondent has not paid as indicated in that letter. Even in making his submissions, Mr. Odhiambo has said nothing of this letter.
10. It has not been explained to the Court also, why Ignas Karingo and Miriam Chenye, should not be paid their decretal amount.
11. The Respondent relies on the same argument adopted in the course of the trial, that it is an NGO which relies on donor support from Sweden, and by meeting its obligation to its former Employees, it would be hampered in its operations.
12. The Respondent's acknowledged financial instability creates the possibility of its winding up, without meeting the Employees' dues. There is merit in the Claimants' submissions that the Respondent could shut down, without meeting its obligation. Financial inability was something persistently argued by the Respondent during trial, as justification in underpaying wages. It would not be right that this argument is extended, to delay payment of their wages after the Court has made its determination.
13. The principles relating to stay of execution must be demonstrated in their totality by the Applicant, for the Court to exercise its discretion in favour of the Applicant.
14. In this Application, there is no draft Memorandum of Appeal, and it is therefore impossible for this Court to tell if the intended Appeal is arguable, particularly given that the intended Appeal seems focused on 2 out of the 5 Claimants.
15. This Court has stated in the past that stay of execution of decrees in employment matters, should only be granted on recondite grounds. We cannot allow a situation where Employees are denied their dues while at work, and continue to be deprived, after termination.

IT IS ORDERED:-

a) The Application for stay of execution dated 10.6.2016 is rejected.

b) Costs of this Application to the Claimants.

Dated and delivered at Mombasa this 15th day of July 2016

James Rika

Judge