



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 247 (N) OF 2009
BAKERY, CONFECTIONERY, FOOD
MANUFACTURING & ALLIED WORKERS UNION....CLAIMANT
VERSUS
THE WRIGLEY COMPANY (E.A) LIMITED.....RESPONDENT
RULING

1. This is an application for stay of execution of Judgment delivered on 10th November, 2014 by the court pending the hearing and determination of an Appeal.

2. The Application is opposed by the Respondent vide a Replying Affidavit of Francis Ogutu dated 22nd September, 2014.

3. In the Supporting Affidavit of Winfred Bundi sworn on 10th September, 2014, the Applicant states that it has an arguable Appeal; that the Applicant will suffer substantial loss if stay is not granted and that the Application has been brought without undue delay.

4. The Claimant/Respondent on the other hand has submitted that the Applicant has not demonstrated that it has an arguable Appeal; that it only alleges that it would suffer substantial loss which is not a sufficient ground for stay of execution and that the Applicant has not offered to furnish security for due performance of the decree as the court may order.

5. The Applicant relies on the case of **Zacharia Mboni & Another V. Rajiendia Ratilal Sanghaw & Others (2014) eKLR**, where Hon. Kamau J. held that the rubric of order 42 Rule 6 of the Civil Procedure Rules 2010, must be satisfied as follows;

- a. that substantial loss may result unless the orders are made,
- b. that the Application is made without undue delay, and;
- c. the applicant must furnish such security for due performance of the decree as the court may order.

6. The learned Judge held;

“An applying party must satisfy all the three (3) ingredients which are inseparable before he can be granted a stay of execution pending Appeal. The fact of the non-severability of the three conditions aforesaid were reinforced in the case of Mukuna V. Abuoga (1988) eKLR 645 and Trust

Bank Limited V. Ajay Shah & 3 Others.

7. The Respondent submitted that the Applicant herein does not meet the test of non-severability in that the Applicant has not demonstrated that it would suffer substantial loss in the event the orders sought are not granted. The decretal amount is in the sum of Ksh.922,480.00. A mere allegation that the Applicant would not be able to recover this sum from the Claimant does not suffice.

8. The Respondent further submits that, he is entitled to the fruits of the Judgment. In **Republic V. The Commissioner for Enforcement and Investigations exparte Wananchi Group Kenya Limited (2014) eKLR**, Hon. M. Justice Odunga stated;

“It is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant will suffer loss if the money is not paid.....the applicant should show the damages it would suffer if the order for stay is not granted.”

9. It is submitted by the Respondent that the Applicant has failed the test especially in view of the fact that the terminal benefits granted to the Claimant are in respect of service already rendered to the Applicant over a period of many years.

10. The Respondent also submits that the Application was filed many months after the Judgment of the court was delivered on 10th December, 2013. That the Applicant need not have waited for a Judgment on quantum before noting the Appeal. It is submitted that the Applicant has been indolent in bringing the Application and the court should not make its discretion in favour of the Applicant as the delay is inordinate and meant to deny the Claimant timely justice.

11. Determination

Having considered the lengthy submission by both parties, the court is of the considered view that the burden is on the Applicant to demonstrate that the Respondent is unlikely to reconstitute the decretal amount if the Appeal is successful.

12. The Applicant has not discharged its onus in this regard. This is a long protracted matter and the scales of justice tilt in favour of allowing the grievant to enjoy terminal benefits he has waited to get for many years. See **Kenneth Bundi Kabute & 2 Others V. Daniel Njagi David (2007) eKLR**.

13. Though the Appeal is arguable, it has not been demonstrated that such payment would render the Appeal nugatory. Provision of security at this stage, even if it had been offered would not suffice to balance the scales of justice in the protracted matter.

14. Accordingly, the application is disallowed with costs.

Dated and Delivered at Nairobi this 27th day of February, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE