



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 925 OF 2013

FARIDA SHAEEN.....CLAIMANT

VS

HIGHLANDS MINERAL WATER COMPANY LTD.....RESPONDENT

RULING

Introduction

1. On 29th October 2014, I delivered an award in favour of the Claimant in the following terms:

- (a). 6 months' salary in compensation for unfair termination....Kshs. 870,000
- (b). 1 month's salary in lieu of notice.....Kshs.145,000
- (c) Leave pay 145,000/30x26.5.....Kshs.128,083
- (d) Salary for December 2012.....Kshs..145,000

Total.....Kshs.1,288,083

2. Being dissatisfied with my decision, the Respondent filed a notice of appeal on 4th November 2014 and an application for stay of execution on 27th November 2014.

The Respondent's Application

3. The Respondent's application brought by way of Notice of Motion under Certificate of Urgency dated 27th November 2014 and filed in Court on even date seeks orders for stay of execution of the award of the Court dated 29th October 2014 pending determination of the Respondent's appeal in the Court of Appeal.

4. The application which is supported by the affidavit of Paul Chege sworn on 27th November 2014 is based on the following grounds:

- (a) That the Respondent has an arguable appeal with a high probability of success;
- (b) That the Claimant is not in a position to refund the decretal sum in the event that the Respondent's appeal succeeds and the appeal will thus be rendered nugatory;

(c) That the Respondent is ready and willing to comply with such terms as may be set by the Court in granting the orders sought including depositing of security;

(d) That the application has been made without delay;

(e) That the orders sought would not prejudice the Respondent in any way.

5. When the matter went before the Duty Judge, **Mbaru J** she issued temporary orders and when the parties appeared before **Nduma J** on 11th December 2014, they agreed to proceed by way of written submissions.

The Claimant's Reply

6. The Claimant filed a replying affidavit sworn on 10th December 2014 as well as written submissions dated 10th February 2015. She states that the Respondent's application is premised on unsubstantiated allegations of her inability to refund the decretal sum in the event that the appeal succeeds.

7. The Claimant depones that she is an Accountant by profession and continues to work as such. She adds that she has invested in many ventures. As such, the Claimant considers herself as a person of means who would be able to refund the decretal sum if required to do so. According to the Claimant, the Respondent's appeal is intended to prevent her from enjoying the fruits of her award.

Determination

8. Order 42 Rule 6(2) of the Civil Procedure Rules under which the Respondent's application is brought gives the conditions upon which an order for stay of execution may be granted as follows:

a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;

b) That the application has been made without unreasonable delay;

c) That the applicant has given adequate security for the due performance of such order as may be binding on them.

9. Under case law, there is the additional condition that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see *Reliance Bank Limited Vs Noriako Investments Limited [2002] 1EA 227 (CAK)227 Case No. 937 of 2002*) and *Abel Okoth Okello Vs Kenya Medical Research Institute (Kemri) [2014] eKLR*).

10. Section 17(2) of the Industrial Court Act and Rule 27(4) of the Industrial Court (Procedure) Rules provide that appeals from decisions of this Court lie to the Court of Appeal only on matters of law. It follows therefore that an applicant seeking stay of execution in this Court must demonstrate a clear point of law upon which they seek to proceed to the Court of Appeal.

11. The Respondent's draft Memorandum of Appeal raises the following grounds:

a) That the Court erred in entering judgment in favour of the Claimant and dismissing the Respondent's counterclaim;

b) That the Court misdirected itself on the issues before it for determination and consequently made findings on matters that had not been pleaded or submitted on by the parties ;

c) That the Court erred in law in failing to appreciate that the reason for the Claimant's termination was fair and valid as per the Claimant's employment contract and related to the operational

requirements of the Respondent and was thus fair under the provisions of Section 45 of the Employment Act, 2007;

d) That the Court erred in law in finding that the termination of the Claimant's employment amounted to redundancy;

e) That the Court consequently erred in holding that Section 40 of the Employment Act, 2007 was applicable to the circumstances of the Claimant's termination;

f) That the Court erred in holding that the Claimant was entitled to 6 months' compensation for unfair dismissal;

g) That the Court erred in holding that the Claimant was entitled to notice additional to that which had already been given by the Respondent;

h) That the Court erred in holding that the Claimant was entitled to pay in lieu of notice as well as her salary for December 2012;

i) That the Court erred in holding that the Respondent could not inquire into or seek the Claimant's response to disciplinary issues and the losses incurred subsequent to the Claimant's termination;

j) That the Court failed to consider and/or appreciate the Respondent's evidence on the Claimant's direct involvement in fraud and malpractice at the Respondent's premises through which the Respondent suffered loss and damage attributable to the Claimant;

j) That the Court consequently erred in failing to find that the Respondent was entitled to the sum claimed in the counterclaim;

k) That in all the circumstances of the case the Court failed to render justice to the Respondent.

12. I have considered the Respondent's grounds of appeal and have formed the opinion that they raise some points of law and the Respondent therefore has an arguable appeal meriting the attention of the Court of Appeal.

13. With regard to the ground that the Respondent's appeal would be rendered nugatory if the orders sought are not granted, the Respondent submits that any money paid to the Claimant on account of the award herein would be irrecoverable in case the appeal succeeds. In reply, the Claimant states that she is not a woman of straw and would therefore be able to refund any money paid to her in case the Respondent's appeal succeeds.

14. In determining whether or not to grant a stay of execution pending appeal, the Court is called upon to strike a balance between the Applicant's right of appeal and the Claimant's right to enjoy the fruits of their award. In ***Rosebell Wambui Muthee Vs Freight in Time Limited [2013] eKLR Rika J*** held that in the Employment and Labour Relations Court, employees should be allowed to enjoy the fruits of their awards, unless there are overwhelming reasons demanding that they wait. I agree with my brother Judge on this score and balancing the Claimant's right to realise the fruits of the award in her hands with the Respondent's right of appeal I make the following orders:

a) The Respondent shall release to the Claimant the equivalent of 50% of the decretal sum within the next 14 days from the date of this ruling;

b) The balance, being the equivalent of 50% of the decretal sum shall be paid to an interest earning account in the joint names of Counsel for the Claimant and Counsel for the Respondent within the next 30 days from the date of this ruling;

c) Failure to observe any of the conditions of stay set out above shall lead to an automatic lapse of

the stay hereby granted;

d) The Respondent will meet the costs of this application.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF
FEBRUARY 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Mutemi for the Claimant

Mr. Muhindi for the Respondent