



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 2101 OF 2012

BENARD AMUKAKA LUDESHI.....
CLAIMANT

VERSUS

**KENYA NATIONAL PRIVATE SECURITY WORKERS
UNION.....RESPONDENT**

RULING

1. By a motion dated 21st November, 2014 the applicant seeks several orders from this Court the sum effect of which would be to permit the applicant to proceed with the execution of the decree issued by the Court on 4th March, 2014.
2. The application is grounded on the allegation that the Respondent has refused and or failed to comply with the consent order recorded on 16th Jul 2014, and that the application for stay pending appeal being Misc. No. 71 of 2014 having been withdrawn, the consent order had lapsed.
3. The Consent Order of 16th July 2014 had one of its clauses the provision that the amount deposited in the joint account act as security pending the outcome of the Court of Appeal Civil Appeal No. 71 of 2014 filed by the Respondents.
4. Mr. Nyabena for the applicant, reiterated the averments in the application and the supporting affidavit which he said he was relying on entirely. Counsel submitted that the Respondent having failed to honour the consent order, they sought through the application to invoke the execution clause of the consent order.
5. Mr. Namada for the Respondent submitted that the application was brought in bad faith.
6. According to counsel, the instalment payments were to start upon the opening of a joint account and that the amount was to be deposited pending the outcome of the appeal not the application of the stay.
7. According to Counsel, there was misdescription on the appeal case number that is, the correct appeal case number was 69 of 2014 and not 71 2014 the latter being a miscellaneous document. Counsel however submitted that the parties were clear in their mind that the deposit was to abide the outcome of the appeal.
8. Regarding the joint account, Mr. Namada submitted that as at 31st September, 2014 there was no joint account opened. According to him the account opening documents were forwarded to Mr. Nyabena on 6th October, 2014.

9. The Bank called for further documents before the account could be activated. The account became operational on 29th October, 2014 and that his clients had deposited the instalments for September, 2014 in the account. Counsel therefore submitted that his client had complied with the consent order hence no need to vary it.

10. I have reviewed the application and the grounds upon which it was brought. I also had the advantage of listening to submissions by counsel for the parties. It would seem to me that there was some lapse or miscommunication between counsel for the parties. This is normal in conduct of human affairs and in extreme cases miscommunication has caused serious fatalities even war.

11. The resolution of this application therefore turns around the understanding of the intention of the parties when they signed the consent dated 16th July, 2014 and their interaction thereafter.

12. As stated earlier, one of the clauses in the consent provided that the amount to be deposited on the joint account was to act as security pending the outcome of the Court of Appeal Civil Appeal No. 71 of 2014.

13. Mr. Namada has submitted that the correct appeal number should have been 69 of 2014 and not 71 of 2014 the latter being a miscellaneous application. Mr. Nyabena in his response to Mr. Namada's submission did not comment or dispute this submission.

14. It is presently an emerging rule of construction of documents and or statutory interpretation, to "read in" or "out" certain provisions or words in a statute or document where to fail to do so would either occasion injustice or hardship to the parties.

15. It would seem to me that parties to this suit were clear in their mind that there was an appeal filed by the Respondent. If it turned out that appeal No. 71 of 2014 was not an appeal or if it was, it did not relate to the matter before me then the only reasonable interpretation would be to construe reference to 71 of 2014 to mean 69 of 2014 for to do so would not remove or negate the substance of the consensus and idem of the parties that they were consenting to deposit the decretal sum in a joint account as security for the outcome of the appeal. The withdrawal of the application for stay pending appeal to pave way for the hearing of the main appeal therefore sounds plausible and reasonable.

16. Mr. Namada has reasonably laid the factual background on why there may have appeared to be delay in depositing the instalment payment in the joint account. He has further exhibited a deposit of Kshs.425,000/= being deposit for the months of September through to November, 2014. This submission was not denied by Mr. Nyabena.

17. In the circumstances I am persuaded that the Respondent has not failed to honour the terms of the consent dated 16th July, 2014 as claimed by the applicant with the consequence that the application is found without merit and is hereby disallowed with costs to the Respondent.

18. It is so ordered.

Dated at Nairobi this 13th day of February 2015

Abuodha J. N.

Judge

Delivered this 13th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge