



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 616 OF 2010

BANKING INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

MURATA SACCO SOCIETY LIMITED RESPONDENT

RULING

I Monoru for BIFU appearing for the Claimant

J Kariuki Advocate for Grievants

G. K. Kuria (SC) for the Respondent

1. The respondent, Murata Sacco Society Limited filed their application dated 15th October 2014 through Notice of Motion brought under the provisions of section 12 of the Industrial Court Act, Rule 16 of the Industrial Court (Procedure) Rules, Order 40 Rules 1(a), 10(1) (a), Order 42 Rule 6 and Order 51 Rules 1 to 3 of the Civil Procedure Rules and Section 1A, 1B and 1C and 3A of the Civil Procedure Act. The Respondent is seeking for orders that;

1. *spent*

2. *spent*

3. *there be stay of execution of the judgement delivered herein on 7th October 2014 pending the hearing of this application or until further orders of this honourable court;*

4. *that there be a stay of execution of the judgement delivered on 7th October 2014 pending the lodging, hearing and determination of the respondent's intended appeal against the said judgment delivered herein on 7th October 2014;*

5. *Costs of this application are provided for.*

2. The application is supported by the annexed affidavit of James Kimani Mbui and on the grounds that the Respondent being aggrieved by the judgement delivered on 7th October 2014 filed a Notice of Appeal and has applied for proceedings to enable them file an appeal in the Court of Appeal and unless the judgement herein is stayed the Respondent shall suffer substantial loss taking the form of destruction of its business. Courts are bound to act fairly and justly, to have regard to the substantive justice of the matters before them and weigh the relative hardship of the parties before them and thus do maintain the status quo of the suit property at the time of the ruling as held by the Court of Appeal in **African Safari**

Club versus Safe Rentals Ltd, Court of Appeal at Nairobi, Civil; Application No. 53 of 2010.

3. Other grounds are that the Respondent fears that unless the stay of execution is granted the Claimant will execute the said judgement and all the operations of the Respondent will grind to a halt and stands to suffer substantial loss and the right to appeal will be rendered nugatory. The Court has the jurisdiction to make orders for the preservation of any property pending the hearing of the intended appeal. The object of the stay is to keep the status quo so as not to make the appeal ineffective and in the interests of justice the orders should be granted.

4. The Respondent is willing to furnish security in the terms of 5 million for the due performance of such decree as may ultimately be binding on it.

5. In the affidavit of James Kimani Mbui, he avers that as the Chief Executive Officer of the Respondent he has authority to make the affidavit in support of the application seeking for orders of stay of the judgement herein delivered on 7th October 2014. The Court awarded each grievant to receive 3 months gross pay in damages and 2 months basic pay for each year worked which all amount to Kshs.47,766,512,70. If the award is executed the Respondent business will collapse. Being aggrieved by the judgment the Respondent has filed a Notice of Appeal and applied for proceedings herein. This Court has jurisdiction to grant the orders sought and by putting into account the financial implications of the judgement on the business of the respondent, stay of the judgement can be ordered.

6. In his Further Affidavit filed on 6th May 2015, James Kimani Mbui avers that in the judgement of the Court delivered on 7th October 2014 each Claimant was awarded 3 months' salary as general damages and two months basic salary for each year served and the Labour Officer Murang'a County computed the amounts awarded. On 17th February 2015 the amounts payable were confirmed by the court. The Court then gave directions with regard to the hearing of the respondent's application for stay of the judgement which application is filed on 15th October 2014. On 17th February 2015 the Court confirmed that the amount due in damages was Kshs.4, 859,032.50 and the amounts due in gratuity was Kshs.38, 048,447.70. This is the amount described in the judgment of the Court upon which the Respondent had applied for stay. The decretal amount is Kshs.42, 907,480 and not Kshs.47, 766,512.70 as earlier described which resulted from an error.

7. In reply, the claimants filed Grounds of Opposition on 5th May 2015 and state that the application for stay of execution of the judgement herein is not based on any arguable appeal and no draft memorandum of appeal has been attached. No points of law have been identified upon which the intended appeal is based upon in terms of the Court awarding damages and or compensation at Kshs.4,859,032.50; awarding 2 months basic salary for each year worked amounting to Kshs.38,048,447.70; awarding interest on the basic pay due; and costs. The alleged pecuniary loss by the Respondent is speculative and lack basis and this cannot be a ground for denying the claimants their lawful judgement. The Court rightly held that the parties were bound by the Collective Bargaining Agreement in force at the time of the claimant's termination and the application herein is incompetent. All appeals from the decisions of this Court should be based on questions of law which the Respondent has failed to demonstrate here. A stay of execution application must demonstrate that the intended appeal raises arguable issues and if not granted the appeal shall be rendered nugatory as held in **Freight in Time Limited versus Rosebell Wambui Muthee, Court of Appeal Civil Application Bo. 201 of 2013**. There is no such demonstrate in the current application which must fail.

8. The Claimant also filed the Replying Affidavit of Joseph Tipape on 2nd June 2015 who avers that as the 1st Deputy National General Secretary of the clamant union he is dully authorised to make the affidavit. He states that the Respondent has not demonstrated that they will collapse and suffer substantial loss if the award herein is settled. The Respondent has received over 102 million from the government as loan waivers and can thus settle the decretal amount. There is no appeal or the grounds of any appeal and the Claimant should be allowed to execute the judgement.

9. In submissions, the Respondent stated that in an application for stay of execution of a judgement,

an applicant has to demonstrate that they will suffer substantial loss if stay is not granted. The Court can order for a deposit of a security. The Respondent is seeking the protection of its business pending the hearing of its appeal. The overriding objective of the Court in addressing an application for stay is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. The Court is to act fairly and equally between the parties; maintain the status quo pending the determination of an appeal; balance the relative hardships of the parties during the period of appeal; and take into account that commercial enterprises ought not to be allowed to collapse pending the hearing and determination of appeals. These are principles outlined in the case of **Reliance Bank limited versus Norlake Investment Limited**. That in the case of **Oraro & Rachier Advocates versus Co-operative Bank of Kenya Ltd** the Court of Appeal held that the Court should consider the situation of each party, the balance of convenience and consider an application for stay of execution of the decree which follows the judgement of the court. The Court can order that only part of the decretal amount to constitute security.

10. In response the claimants submitted that in a similar case filed by the Claimant [**Jackson Muchoki Mwangi versus Murata Sacco Society limited, Cause No. 83(N) of 2009**], the Respondent settled the claim. The judgement of the Court was based on the existing CBA between the parties. The claimants have suffered unfair termination and will continue to suffer if there is stay of execution of the judgment herein. The Respondent shall not suffer any prejudice as they have not established the legal basis for their intended appeal. The Respondent has not demonstrated that the Claimant is unable to settle any money decree where the Court of Appeal allows the intended appeal which in this case does not exist. The Respondent application thus lacks merit and should be dismissed with costs.

Determination

Whether stay of execution of the judgement delivered on 7th October 2014 should issue

Whether stay of execution of the judgement herein pending the lodging, hearing and determination of the intended appeal should issue.

11. An application of this nature must establish the following;
- (a) Substantial loss may result to the Applicant unless the order is made;
 - (b) The application has been made without unreasonable delay and
 - (c) Such security as the Court orders for the due performance of the decree has been given by the Applicant.

12. Sufficient cause being a technical as well as a legal requirement will depend entirely on the Applicant satisfying the Court that ***Substantial loss may result to the applicant unless the order is made***, and therefore the Court may direct for the deposit of ***Such security for the due performance of the decree or order as may ultimately be binding on the applicant*** where an applicant has been able to satisfy to the Court that ***the application has been made without unreasonable delay***. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting stay of execution. The Court of Appeal in ***Mukuma V Abuoga (1988) KLR 645*** reinforced this position.

13. In an application of this nature this Court only seeks to ensure and be satisfied that the appeal is arguable and that if the stay of execution is not granted, its result will be rendered nugatory – see ***Trust Bank Limited & Anor v. Investec Bank Limited & 3 Others – Civil Application No. Nai. 258 of 1999 (UR)***. In this case, no grounds of appeal have been set out or a draft memoranda set out for the Court to be guided in this regard. Can it thus be said that the Notice of Appeal now filed herein is such a safeguard? Such a Notice of Appeal though permitted in law is not an equivalent to the set principles of seeking for a stay of execution as required. Even where an applicant has moved the Court without delay, such expeditious action should have its basis on the grounds of appeal upon which the intended appeal is grounded on as this is a legal requirement too! There is nothing to be negated on appeal as no such an

appeal or grounds of such an appeal exist.

4. Execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein versus Chesoni [2002] 1KLR 867** it was held;

...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

15. The question is; whether the Respondent as the applicant herein has demonstrated that substantial loss will occur unless an order for stay of execution is issued. The Respondent in answer to the above question say that substantial loss will result as their business will be brought to a halt if execution of the judgement is allowed. I find such to be extraneous matters outside the context of the judgement herein as substantial loss to be established must have the basis in the judgement of the court, the findings and the questions of law that may exist that may be subject of appeal as under section 17 of the Industrial Court Act.

16. To stop a lawful process such an execution of a valid judgement, an applicant must not only demonstrate that they will suffer some financial loss. That is not sufficient on itself as the judgement herein is based on its merits and even where the party aggrieved by the same such as the Respondent is keen to proceed with an appeal, such a process cannot stop what is lawful. It is not the deposit of security that will satisfy the judgement; to the contrary it is the execution of such judgement that should satisfy it. Without sufficient cause such a process should be allowed to proceed.

17. The facts surrounding the decision of the Court of Appeal in **African Safari Club versus Safe Rentals Ltd, Court of Appeal at Nairobi, Civil; Application No. 53 of 2010** are fundamentally different from the case here. In that matter the applicant had filed an appeal to the Court of Appeal and the Court in making an assessment was already seized of a memorandum of appeal and in address the question of stay, it was clear to the Court that there were sufficient grounds of law to direct as the Court did. In this case a fundamental requirement in pursuance to section 17 of the Industrial Court Act is lacking. Sufficient cause thus being important has not been established.

18. In the interests of justice and noting the orders now sought by the Respondent and the analysis of the issue as above, the application by the Respondent must fail. I find no merits in the same.

Application dated 15th October 2014 dismissed. Costs to the claimants.

Delivered in open Court at Nairobi this 25th Day of June 2015.

M. Mbaru

JUDGE

In the presence of;

Lilian Njenga: Court Assistant

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