



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2113 OF 2012

BANKING INSURANCE & FINANCE UNION (K) CLAIMANT

Versus

AGRICULTURAL FINANCE CORPORATION RESPONDENT

RULING

1. On 5th March 2015 the Respondent herein, Agricultural Finance Corporation filed application through Notice of Motion seeking for orders;

The Court be pleased to order stay of execution of the decree pursuant to the judgment delivered in this case on 24th February;

Pending the hearing and determination of the appeal lodged by the Applicant at the Court of Appeal against the whole of the judgement delivered on 24th February 2015, this Court be pleased to order stay of execution of the decree issued pursuant to the said judgement

2. The application is supported by the annexed affidavit of Rose Ochanda and on the grounds that judgement herein held the grievant was unfairly terminated and awarded compensation at kshs.428, 221.80 and salaries owing from 8th February 2011 up to her retirement date which is her 60th birthday at kshs.5, 031,606.15. The grievant was also awarded notice pay and her pension due under the Collective agreement and based on her retirement age. The Claimant was awarded costs. Other grounds are that the judgement amounts to multiple awards and being aggrieved, the Respondent has filed an appeal against the whole judgement to the Court of Appeal and seek this Court to preserve the subject matter pending hearing and determination of the appeal in order to ensure efficiency of such relief as may be granted by the Court of Appeal. That unless such stay is not granted the appeal will be rendered nugatory.

3. In the Affidavit of Rose Ochanda she avers that on 26th February 2015 the Respondent filed a Notice of Appeal and a copy of proceedings herein. There is an arguable appeal with high chances of success. If the orders herein are not granted the appeal will be rendered nugatory. The Respondent is willing to abide by reasonable orders that this Court may make with regard to the giving of security.

4. In reply the claimant, Banking Insurance Finance Union (K), filed Grounds of Opposition on 5th May 2015 noting that the application for stay of execution has not pleaded any issues of law that the Respondent wishes to rely on at appeal noting the judgement of the Court delivered on 24th February 2015. There is no multiplicity of awards and the Respondent has misrepresented facts as they failed to produce any witness at the hearing to controvert the claim and the question of *locus standi* has already been addressed by the Court and there is no appeal. There is a Collective agreement between the parties that has not been contravened in the judgement of the Court and the application thus lacks merit. The

application is defective as the subject judgement is not attached to the same as a requirement and the Court has the discretion to grant such an application.

5. In submissions, the Respondent stated that there are arguable grounds of appeal that will be raised before the Court of Appeal especially with regards to payment of the grievant her full salary until retirement which can only be paid if she is physically incapacitated and cannot be able to get new employment. The Respondent relies on **Kenya union of Domestic Hotels Educational institutions Hospitals 7 Allied Workers (KUDHEIHA) versus Nairobi Club [2012] eKLR**. Where the orders sought are not granted and stay of execution directed, the appeal will be rendered nugatory.

6. In response, the Claimant submitted that for an applicant as herein to enjoy the discretion of the Court there must be a demonstration that indeed there is an appeal or an intended appeal in existence. An appeal from a decision of this Court lies with the Court of Appeal as under Rule 82 and 83 of the Court of Appeal Rules, 2010. There is no appeal in this regard as under the Rules and the Notice of Appeal filed herein is not a substitute to the required Appeal.

7. The Claimant also submitted that the principles of grant of stay of execution are enumerated in **Aviation & Allied Workers Union versus Kenya Airways limited & 3 others [2013] eKLR** where an applicant must demonstrate that substantial loss may result, there is no delay and a deposit of such security as may be directed. The question of substantial loss is the cornerstone of such an application and noting there is a money decree and that there is no proof that the Claimant cannot be able to satisfy such an award were the appeal to succeed, then such omission renders the current application fatal.

8. 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.

9. Judgement herein was delivered on 24th February 2015 and the application filed on 5th March 2015. In the application, the Respondent has attached a draft memorandum of appeal. The Respondent has thus moved expeditiously in securing the stay of execution of the orders and judgment of the court. However that only cannot justify the award of the orders sought as the Court must be satisfied that there will be substantial loss if the orders are not granted and that whatever security is directed for a deposit is complied with.

10. As submitted by the claimant, Court of Appeal in the **Kenya Shell Ltd versus Benjamin Karuga [1982-88] 1 KLR 1018**, held that an applicant seeking a stay of execution must demonstrate what substantial loss shall be suffered if the order of stay is not granted as this is the cornerstone for an application of stay of execution. This is what has to be prevented – the substantial loss. This is what this Court re-emphasised in its ruling in **Aviation & Allied Workers Union versus Kenya Airways Limited, Cause No 1616 of 2012**.

11. 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.

13. In this case, the Respondent heavily relies on their grounds of appeal but nothing with regard to what loss shall be suffered in the event the lawful process of execution proceeds. Even though this does not

have to be presented in any particular mathematical formula but it is the qualitative concept which refers to the loss, great or small, that is real worth of value as distinguished from a loss without value or a loss that is merely nominal. This is a duty that the Respondent as the applicant herein fails to discharge.

I however find the Respondent has lodged this application without any delay and all considered, a conditional stay of execution shall be granted in the following terms;

- a. **The Respondent shall release 25% of the total judgement amount to the claimant;**
- b. **Stay of execution granted and Where an Appeal to the Court of Appeal is not filed within the next 30 days, the same shall lapse automatically.**
- c. **Each party shall pay their own costs.**

Delivered in open Court , dated and signed in Nairobi on this 10th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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