



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 919 OF 2010

CAPTAIN MOHAMMED NOOR.....CLAIMANT

VERSUS

CMC AVIATION LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion dated 1st July, 2015 the respondent seeks an order for the release of the sum of Kshs.10,020,000/= which is the equivalent of USD120,000 deposited into Court on 22nd November, 2012. The respondent further seeks an order that the sum of USD5,075 and the pay for leave accrued in the sum of USD1,122.40 be computed and paid to the claimant at the exchange rate of Kshs.83.50 to the dollar being the rate at which the Court converted the decretal sum when it was paid into Court on 22nd November, 2012 which sum to be stated at Kshs.517,649.90 subject to applicable statutory deductions.

2. The application was brought on the main grounds that:-

(a) On 20th November 2012 this Court made an order requiring the Respondent to deposit the decretal sum into Court as a condition for stay of execution of the decree of the Industrial Court.

(b) By an order made by the Court of Appeal on 16th January 2013, the Court ordered that the decretal sum deposited into Court continue to be held therein and was not to be released to any party until the application was heard and determined.

(c) On 23rd September, 2013 the Court of Appeal extended its order given on 16th January 2013 directing that the deposited funds were not to be released until the substantive appeal being Civil Appeal Number 199 of 2013 had been heard and determined.

(e) The Respondent's appeal was allowed on 24th April 2015. The Award of the Industrial Court was set aside and substituted with an order awarding the Claimant one month's pay in lieu of notice in the sum of USD5,075 and leave accrued and not taken of 5.25 days.

(f) The Respondent requires the release of the deposited sums to enable it to comply with the judgment of the Court of Appeal as well as to meet its other financial

operations.

(g) Undue hardship and prejudice has been suffered by the Respondent as the money would have earned interest over the three years. Further delay in the release of the money would be unjust and unfair.

3. The grounds were further supported by the affidavit of Michi Kirimi which in essence reiterated the grounds upon which the application was brought.

4. The claimant opposed the application by way of a notice of preliminary objection and a replying affidavit sworn on 22nd June 2015.

5. On point of law, the claimant contended that this Court was functus officio and could not issue the orders sought and that the application was res judicata.

6. The claimant further argued that this Court had no jurisdiction to vary, set aside or interfere in any manner with a decision of the Court of Appeal as this would go against the principle of hierarchy of the Courts and further that the orders sought if issued would conflict with orders issued by Lady Justice Mbaru on 21st December, 2012 which orders have never been reviewed, stayed or set aside.

7. The claimant further in his replying affidavit sworn on 22nd July, 2015 depones in the main that:-

(a) That the Respondent did file an application in the Court of Appeal in Nairobi Civil Application No. NAI 269 of 2011 seeking a stay of execution pending the hearing and determination of an intended appeal to the Court of Appeal from the judgment of the Industrial Court of the 10th November 2011. In this application, on the 16th of January, 2013, the Court of Appeal directed the funds not to be released to any party until the application was determined or until further orders of the Court.

(b) That the Respondent subsequently filed an appeal at the Court of Appeal, being Civil appeal No. 199 of 2013, which was heard and determined by a judgment delivered on the 24th of April 2015. The appeal was allowed in part as per the copy of the judgment annexed to the Respondent's application.

(c) That being dissatisfied with the judgment of the Court, he immediately instructed his advocates on record to file a Notice of Appeal and to challenge the decision at the Supreme Court. He felt that the intended appeal raises, not only constitutional issues, but issues of general public importance relating to termination of employment and assessment of damages payable particularly where there is no dispute that termination was unfair/illegal. The Notice was duly served on the Respondent's advocates and they duly filed a notice of address of serve.

(d) That under the rules of the Supreme Court Act and the provisions of the Kenya Constitution an appeal to the Supreme Court which is not by right must be brought only upon certification by either the Court of Appeal and Supreme Court. That application for certification has since been filed and we are awaiting allocation of hearing dates by the Court of Appeal registry.

(e) That the Petition of Appeal is yet to be filed at the Supreme Court because (1) leave to appeal (certification) is yet to be granted and (2) although we have requested for certified proceedings from the Court, those are yet to be supplied to us to enable us assemble the Petition of Appeal.

(f) That it would be in the best interest of all parties that the funds now deposited in Court are not released to either party pending further orders of the Court of Appeal for the reasons set out in this affidavit and in view of the impending appeal to the Supreme Court.

(g) That he was advised by his advocate on record, which information he believes to be true, that the Respondent in this matter does not merit the granting of the Orders sought as they have come to this Court with unclean hands.

(i) There is a finding by the Court that the Respondent has been guilty of material non-disclosure with reference to the change of name of the Respondent;

(ii) There is a finding by the Court that there was misrepresentation and material non-disclosure as to who the managing director of the company was as two separate directors swore affidavits in the Industrial Court and the Court of Appeal.

(h) That he is reasonably apprehensive that if the funds now deposited in Court are released to the Respondent and he is successful in his appeal to the Supreme Court, he would not be in a position to recover any monies from the Respondent (or DAC Aviation (EA) Limited and the appeal will be in vain.

8. In his submissions before the Court, Mr. Murugara for the respondent submitted that the application was administrative since all the Deputy Registrar of the Court required was an order for the release of the funds deposited in Court. According to Counsel, the money was deposited to secure the judgment of the Court and it was to pend the hearing and determination of the Appeal therefore the production of the judgment was enough to release the funds.

9. Mr. Murugara contended that there was nothing pending on the part of the claimant and that the decision of the Court of Appeal was not capable of being stayed or secured by funds held by the Court. According to Counsel therefore, the funds should be released to honour the decision of the Court of Appeal. Mr. Murugara argued that the Court of Appeal had finalized its duty and there was nothing to be secured with the money and that the application was made to this Court because the money was deposited here and not the Court of Appeal. Counsel denied the Court was *functus officio* or *res judicata*. He further submitted that his client, the respondent did not mind the release of the funds less what was due to the claimant.

10. Mr. Nyaribo for the claimant on the other hand submitted that there was no specific provision of the law under which the application could be made. According to counsel, the Court could not issue the orders sought as the Court became *functus officio* once it issued the award and made the decision on stay pending appeal. The rest, according to counsel, was now left to the Court of Appeal.

11. Mr. Nyaribo submitted that the Court of Appeal issued the stay order the basis of which the funds are still held by the Court and this Court being lower in hierarchy to the Court of Appeal cannot interfere with the latter's order. According to Counsel therefore, the proper place to file the application was in the Court of Appeal.

12. Mr. Nyaribo further submitted that his client was apprehensive that if funds are released, the intended appeal would be rendered nugatory as the claimant was not sure if the respondent would pay the decretal sum if the appeal succeeded. Counsel further took issue with the change in the respondents name and particulars of Directors stating this had been subject of adverse comments by the Court of Appeal.

13. I have reviewed the application herein, the grounds upon which it was brought as well as the objections to the application by the claimant both on point of law and facts as disclosed in the affidavit in opposition to the application. I have also heard occasion to listen to submission by

counsel for either party.

14. The issue that presents itself to me to resolve in this application is which Court has the authority to make orders in respect of the monies that were deposited in this Court on 22nd November, 2012. That is to say, is it this Court or the Court of Appeal?

15. Counsel for the applicant has contended that money was deposited in this Court to secure its judgment pending an appeal hence once the appeal was disposed of the Court had no reason to hold the money any longer. Besides it is this Court with the money and not the Court of Appeal.

16. Counsel for the claimant on the other hand argued that this Court lacked jurisdiction to make the orders sought because it was the Court of Appeal which gave the order against the releasing of the funds deposited in this Court pending the hearing and determination of the Appeal filed in that Court against the award of the predecessor to this Court.

17. According to Mr. Nyaribo for the claimant, if this Court were to issue the orders sought it would go against the hierarchy of our Court system since this Court is lower in rank to the Court of Appeal. Counsel therefore submitted that it was the Court of Appeal that was best placed to entertain the application.

18. The history of the stay order as discernible from the file is that on 20th November, 2012 this Court granted the respondent a stay of execution for 14 days to enable the respondent move the Court of Appeal for a formal stay pending the hearing and determination of the Appeal. The Court at the same time ordered the respondent to deposit the decretal sum into Court within 7 days in default of which the interim stay would lapse.

19. By an application dated 3rd December, 2012 the claimant sought the release of the funds deposited in this Court on the grounds that the period for stay that was allowed by the Court for stay had lapsed yet no stay had been granted by the Court of Appeal. The respondent in opposing this application, explained that the reason the temporary stay order lapsed was because of inability to secure in time a date in the Court of Appeal, for the hearing of the application for stay which in any event had by then been fixed for 16th January, 2013.

20. Lady Justice Mbaru who heard the application however allowed the same and ordered the release of the funds to the claimant. However on 16th January, 2013 the Court of Appeal ordered that the decretal sum deposited in this Court be not released to any party until the application for stay pending in the Court of Appeal was heard and determined. On 23rd September, 2013 the Court of Appeal further ordered that the funds be not released until the Appeal, being Civil Appeal No.199 of 2013, was heard and determined.

21. This appeal was determined on 24th April, 2015 and the Court of Appeal in its judgment partially allowed the appeal by setting aside the judgment of the predecessor to this Court and substituting therefore an order that the claimant's dismissal be reduced to a normal termination and that the respondent be awarded one month's salary in lieu of notice in the sum of USD5,075 and commensurate payment of 5.25 days' salary for accrued leave for the year 2010.

22. It is this decision that the claimant states it intends to appeal against to the Supreme Court and the reason for which he objects to the release of the funds deposited in this Court.

23. To buttress his argument in opposition to the release of the funds, Mr. Nyaribo has argued that the respondent no longer trades under its name and that it has changed particulars of its directors. To this extent, counsel argued that it may be difficult if not impossible to execute or realize any funds from the respondent in the event that the appeal to the Supreme Court becomes successful.

24. The order of the Court of Appeal made on 16th January, 2013 and confirmed on 23rd September, 2013 was to last pending the determination of the Appeal against the judgment of this Court. The appeal has since been determined in terms of the judgment of that Court briefly outlined above. It would therefore follow that there would be no reason for this Court to continue holding the funds. The order of the Court of Appeal prohibiting the release of the funds pending the outcome of the appeal is akin to an order of interlocutory injunction or stay granted by any Court which does not have to be specifically discharged by an order in the final judgment if the person in whose benefit the interlocutory injunction or stay was made ultimately does not succeed.

25. The discharge is a natural consequence of the judgment in such a case and does not require a specific pronouncement in that regard.

26. The contention by the claimant that if the appeal from the Court of Appeal to the Supreme Court is certified by either of these Courts and ultimately succeeds, the decision would be rendered nugatory is a new set of scenario which might call upon the claimant to submit a substantive application backed by evidence on possible financial inability of the respondent to satisfy the decretal sum if ultimately ordered. The claimant cannot ride on the back of an order securing an appeal which he has substantially lost, to secure a possible judgment in his favour in the Supreme Court, without demonstrating that he has an arguable appeal with a high probability of success at the Supreme Court. Such a demonstration can only be undertaken through a substantive application either at the Court of Appeal or the Supreme Court.

27. The argument that the respondent has changed its name and particulars of directors is not a sufficient reason for the Court to continue holding the funds deposited to secure its judgment delivered way back in 2011 since a change of name of a business or company is not the same thing as merger, acquisition or sale or transfer of business. An order against the respondent as sued currently will by virtue of the certificate of Change of Name be an order against it under its new name.

28. In the circumstances the Court hereby orders for the release of funds deposited in this Court on 18th December, 2012 to the respondent being the sum of Kshs.10,020,000/= (Ten Million and twenty thousand shillings only) less Kenya Shillings equivalent of USD5,075/= and commensurate payment of 5.25 days' salary on account of accrued leave for the year 2010 which shall be computed by the parties with the help of the Deputy Registrar of this Court at the exchange rate of Kshs.83.50 to the dollar being the rate at which the Court converted the decretal sum when it was deposited into Court, and the same be paid to the claimant.

29. There will be no order on costs of this application.

30. It is so ordered.

Dated at Nairobi this 31st day of July 2015

Abuodha J. N.

Judge

Delivered this 31st day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge