



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1343 OF 2010

CHARLES MUTHAMA.....CLAIMANT

VS

WANANCHI GROUP.....RESPONDENT

RULING

1. The Respondent's application brought by Notice of Motion dated 3rd November 2015 and filed in Court on even date seeks the following orders:
 - a. That there be a stay of execution of any and/or all decrees arising from the Court's Award delivered on 8th October 2015 pending the hearing and determination of the application and the intended appeal;
 - b. That the Court be pleased to grant the Respondent leave to file a Notice of Appeal out of time;
 - c. That the Court be pleased to grant the Respondent leave to appeal;
 - d. That the Respondent be supplied with typed copies of the proceedings and the Judgment made herein;
 - e. That the costs of this application be provided for.
2. The application which is supported by the affidavit of the Respondent's Legal Manager, Judy Njeru is based on the following grounds:
 - a. That the Respondent is aggrieved by the Judgment delivered *ex parte* on 8th October 2015;
 - b. The Court delivered the Judgment on 8th October 2015 in the absence of the Respondent's representative who relied on the Court's cause list indicating that the Trial Judge, **Wasilwa J** was on leave;
 - c. Having believed that the Judge was on leave, the Respondent did not appear in Court and was not able to immediately take remedial steps including seeking stay of execution of the Judgment and filing of its Notice of Appeal on time;
 - d. The Judgment was delivered without notice to the Respondent hence the failure to orally seek stay of execution and to file the Notice of Appeal within the stipulated period;
 - e. The Respondent will be extremely prejudiced if stay of execution and leave to appeal are not

granted as the Respondent is aggrieved by the Judgment which *inter alia* awards the Claimant Kshs.1,680,000.00 being three months' salary in lieu of notice which amount the Claimant admits having already received;

- f. The Claimant has commenced the process of execution and stands to unjustly and unfairly enrich himself with a double payment of Kshs.1,680,000.00 being three months' salary in lieu of notice in addition to maximum compensation at twelve months' salary;
- g. No prejudice will be occasioned to the Claimant if the orders sought are granted;
- h. On the other hand, the Respondent stands to suffer prejudice from the decision of the Court which was made *per incuriam*.

3. In the supporting affidavit sworn by Judy Njeru, it is deponed that after leaving the Respondent's employment, the Claimant secured alternative employment and the Court ought to have taken this into account in making its award. Njeru further depones that the delay in making the application is not inordinate and is excusable in the circumstances. Moreover, the Respondent has an arguable appeal.

4. In a replying affidavit sworn by Crispin Wainaina, Advocate on 6th November 2015, he depones that the parties were duly notified of the judgment date of 8th October 2015. Contrary to the assertion by the Respondent there was no indication either in the cause list or by the Court itself that the judgment would not be read as scheduled. Wainaina contends that the reason given by the Respondent that the Trial Judge was on leave and therefore not in Court to deliver the judgment is without basis.

5. It is further deponed that the Respondent has not satisfied the conditions for grant of stay of execution and the Claimant stands to be greatly prejudiced if the orders sought are granted.

6. Section 7 of the Appellate Jurisdiction Act gives this Court the power to extend time for filing of a Notice of Appeal. That power must of course be exercised judiciously. From the Court's cause list, the Trial Judge, **Wasilwa J** was on leave on 8th October 2015 and from the court file, a coram was written and canceled. The Judgment however shows that it was read in open court on 8th October 2015. It would appear that the Respondent was misled by the court record and the delay in filing the Notice of Appeal is therefore excusable. I therefore grant leave to the Respondent to file its Notice of Appeal within the next seven (7) days from the date of this ruling.

7. That settled, I will now consider the prayer for stay of execution pending appeal.

8. The conditions under which an order for stay of execution pending appeal may be granted are set out under Order 42 Rule 6(2) of the Civil Procedure Rules 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. Additionally, there is the well established condition developed under case law that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see **Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited [2015] eKLR**). An arguable appeal is one that is not frivolous and not necessarily one that will succeed once fully ventilated.

10. In dealing with applications for stay of execution pending appeal, the Court is required to balance the Applicant's right of appeal against the Claimant's right to realise the fruits of an award in their favour. The award amount is a large amount of money and the Applicant's draft memorandum of appeal raises arguable points. The Claimant however has a valid judgment in his favour.

11. I am therefore persuaded to grant a conditional stay of execution pending appeal in the following terms:

a)The Respondent shall release to the Claimant the equivalent of 25% of the decretal sum within the next 14 days from the date of this ruling;

b)The balance, being the equivalent of 75% of the decretal sum shall be secured by a bank guarantee to be perfected 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 costs of this application shall be costs in the appeal.

12. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF DECEMBER 2015

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JUDGE

Appearance:

Mr. Wainaina for the Claimant

Mr. Owino for the Respondent