



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 11/2013

(From original Nairobi Cause No. 814'N'/2009)

(Before Hon. Lady Justice Hellen Wasilwa on 30.1.14)

UNIVERSITIES ACADEMIC STAFF UNION.....CLAIMANT

VERSUS

MASENO UNIVERSITY.....RESPONDENT

R U L I N G

The respondent Applicants application is the one dated 29.10.2013 brought under Certificate of Urgency. It is an application for stay of this court's Judgment dated 18.9.2013 wherein the court ordered the grievants be paid a total of 10,828,250.50/= together with costs. The respondents were aggrieved by this court's Judgment and filed a Notice of Appeal. The applicants contend that they are a Public University funded by the government and unless stay of execution is granted, they will suffer irreparable harm and its operations will be severally disrupted by claimants execution of judgment. They also argue that the grievants cannot refund the 10,828,250.50/= should the appeal succeed. They contend that the Appeal is arguable and has extremely high chances of success.

The Application is brought under Article 159, 162(2), 164(3) of the Constitution, Section 12(3)(i) and (viii), 17(1) and (2) of the Industrial Court Act 2011, Rule 16 and Rule 27 of the Industrial Court (Procedure) Rules and all the enabling provisions of the law and the inherent powers of the court.

The Application is premised on the grounds that:-

1. **The Applicant is aggrieved by the decision of the Honourable Lady Justice Hellen Wasilwa delivered on 18th September, 2013 in Kisumu in which she awarded the claimants a substantial amount of Kshs 10,828,250.50 made up significantly of Kshs 4,228,418.50 as terminal benefits a provision unknown in law or the contracts of the claimants and was not pleaded by any Party before the court. The respondent has thus lodged a Notice of Appeal against the whole of the said decision as per Rule 75 of the Court of Appeal Rules.**
2. **The Honourable Court when issuing the Judgment on 18th September 2013 did not provide for stay of execution or any window for the Respondent to implement the orders. Although the claimants' Advocate has also filed a notice of appeal against the Judgment of Honourable Lady Justice, it has also commenced execution proceedings.**
3. **The applicant is reasonably apprehensive that unless this application is heard as a matter of urgency and the orders sought herein granted, the claimant shall move to execute the Judgment, an action that would occasion great injustice and prejudice to the Applicant.**
4. **Despite filing a Notice of Appeal against the whole of the award delivered on 18th September**

2013, the claimant has already commenced execution proceedings against the Respondent and served the Applicant with a draft decree for execution.

5. Applicant is a public university funded by the government and unless stay of execution is granted, it will suffer irreparable harm and its operation will be severely disrupted by the claimant's execution of the judgment.
6. The Applicant has an arguable appeal with very high chances of success as per the annexed draft memorandum of appeal.
7. Unless stay of execution is granted, the Applicant's appeal will be rendered nugatory and merely academic in the event that it succeeds.
8. If the payments ordered by the Honourable Court amounting to Kshs 10,828,250.50 together with costs and interest are paid out to the grievants, the same may not be recoverable if the intended appeal succeeds.
9. It is in the best interest of justice that the stay of execution sought herein be granted pending the hearing and determination of Appeal against the Judgment.

10. The Applicant is ready to comply with any directions of the court.

The application is also supported by the Supporting Affidavit of one Elizabeth Ayoo which is undated.

The applicants have also submitted that the applicable test in granting this order is restated in many authorities amongst them in Engineering Registrative Board -Vs- Jeseo Waweru & Others -Civil Appeal No. 263 of 2012 (UR 191/2012) where the Court of Appeal stated at page 4 that;

“In order to succeed in the application , the applicant is required to satisfy the court on two fronts. Firstly that it has an arguable appeal. Secondly that if the orders sought are not granted, the appeal will be rendered nugatory. There are many authorities for that position including the case of Githunguru -Vs- Jumba Credit Corporation Ltd C.A. No. 161 of 1988.”

In the case of Ismael Kagunyi Thande -Vs- Housing Finance of Kenya Ltd, Civil Appeal No. NAI 157 of 2006 this court stated:-

“the jurisdiction of the court under Rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that discretion. These principles are now well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also unless the court grants him an injunction on stay as the case may be success of the appeal will be rendered nugatory”.

The respondents opposed this application. It was their contention that the appeal did not raise any arguable matter and was based on facts and not law. They cited the Court of Appeal in Halan & Another =Vs=Thorton & Turpin (1963) Ltd 1990 KLR where the court stated as follows:

“The High Courts discretion to order a stay of execution of its order on decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the court must be satisfied that the substantial loss would emerge from a refusal to grant stay and thirdly the Applicant must furnish security. The Application must of course be made without reasonable delay”.

Upon consideration of the submissions of the parties, I find that the applicants came to court within reasonable time. They are also raising a legal issue on pension of claimants vis a vis their terminal benefits.

For that reason alone, I will allow the application of the applicants for stay pending appeal but on condition that the decretal sum less the contented part on terminal benefits be deposited in an interest earning account held in the joint names of the counsel for the parties within 60 days. In default execution to proceed. Costs will be in the course.

HELLEN WASILWA

JUDGE

30.1.2014

Appearance

Muasya holding brief Okeche for Applicant respondents – present

N/A for respondents – Absent

C/c- Wamache