

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 200 OF 2011

WILBERFORCE OJIAMBO OUNDO.....CLAIMANT

VS

REGENT MANAGEMENT LIMITED.....RESPONDENT

RULING

1. On 2nd December 2013, I delivered an award in favour of the Claimant in the sum of Kshs. 8,134,643. I also allowed a counterclaim by the Respondent in the sum of Kshs. 130,340. The Respondent then filed a Notice of Appeal on 5th December 2013 and an application of stay of execution of the award on 16th December 2013.

2. When Counsels for the parties appeared before me on 11th February 2014, they had reached a partial agreement that the Respondent's plea for stay of execution be granted subject to posting of security. The terms of the security were however not agreed upon. Mr. Burugu for the Respondent told the Court that the Respondent was willing to release the sums awarded under clauses (c), (d) and (e) of the award subject to statutory deductions with the balance being secured by a bank guarantee.

3. Mr. Oundo for the Claimant told the Court that his client was in need of money to settle a car loan advanced to him by Transnational Bank which is associated with the Respondent. In addition, the Claimant needed to pay legal fees on account of this case as well as a criminal case arising from the same subject matter. Counsel therefore asked that fifty per cent of the decretal sum be paid to the Claimant and that the balance be secured by a bank guarantee issued by a bank other than Transnational Bank.

4. In determining the terms of security in an application for stay of execution pending appeal, the Court is required to balance the right of appeal available to the applicant and the claimant's right to access the fruits of an award made in their favour.

5. The Court was referred to the case of *Michael Kiboi Gatumia Vs Mastermind Tobacco (K) Limited [2013] eKLR* where Mbaru J held that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the appeal is not rendered nugatory. In this regard, an order for a cash deposit is intended to nudge an appellant to take steps towards prosecuting their appeal but not to prevent a successful litigant from accessing the fruits of litigation.

6. Counsel for the Respondent told the Court that the sums awarded under Clauses (c) (d) and (e) of the award were not in dispute. The cumulative figure under these heads is Kshs. 3,164,993 and the Claimant seeks to be paid Kshs. 4,067,321.50 being fifty per cent of the decretal amount. The difference is Kshs. 902,328.50. The Claimant is a highly qualified professional and even though he may be experiencing cash flow challenges at the moment, I do not think he would find it difficult to refund the sum of Kshs. 902,328.50 in the event that the Respondent's appeal succeeds.

7. I therefore direct that fifty percent of the decretal sum be released to the Claimant within the next 14 days from the date of this ruling. The sum of Kshs. 3,164,993 shall be subjected to statutory deductions in the normal manner and a certificate of satisfaction submitted to the

Claimant within 21 days of this ruling.

8. With regard to the bank guarantee to secure the balance of the decretal amount, I find no legal basis for the objection by Counsel for the Claimant against a guarantee by Transnational Bank. I therefore direct that the Respondent shall post a bank guarantee issued by any competent bank within the next 14 days from the date of this ruling.

9. Failure by the Respondent to observe the conditions of stay set herein will lead to an automatic lapse of the stay of execution.

The Respondent will pay the costs of this application.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF FEBRUARY 2014

LINNET NDOLO

JUDGE

In the Presence of

.....*Claimant*

.....*Respondent*