



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 3/2012

(Before Hon. Justice Hellen Wasilwa on 18th February, 2014)

JOSEPH OKOTH OPIYO CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION RESPONDENT

R U L I N G

The application in court is the one dated 15.11.2013. It is brought by way of a Notice of Motion dated the same day and brought under S. 12 of the Industrial Court Act 2011, order 42 rule 6 and 8 of the Civil Procedure Rules 2010.

The applicants seek orders that:-

1. **The application herein be certified as urgent and heard *ex-parte* in the first instance.**
2. **This honourable court be pleased to order stay of execution of this court's judgment dated 25th September, 2013 and all subsequent orders pending the lodgment, hearing and determination of the intended appeal.**
3. **The costs of this application be in the cause.**

The application is based on the grounds that:-

- a) **The applicant is aggrieved by the judgment of this honourable court delivered on 25th September, 2013 and intends to appeal against the whole judgment. In this regard, a Notice of Appeal and a request for typed proceedings have been filed and served.**
- b) **The intended appeal raises several arguable points with very high chances of success.**
- c) **The intended appeal will be rendered nugatory if a stay of execution of the aforesaid judgment is not granted.**
- d) **In the event the intended appeal is successful, the applicant may not recover the said salaries and allowances paid to the respondent while the reinstatement is not capable of being reversed.**
- e) **It is therefore in the interest of justice that pending the lodgment, hearing and determination of the intended appeal, the subject matter of the intended appeal being payment of salary and allowances and reinstatement be preserved.**

f) The respondent will not suffer any prejudice in the event that the orders sought herein are granted.

g) This honourable court has jurisdiction to issue the orders prayed for herein.

The application is also supported by the annexed supporting affidavit of one Simon M. Kavisi the director in-charge of administration of the applicants herein.

The applicants argue that unless the application is granted they stand to suffer substantial loss as the respondent will not be able to pay back if the appeal succeeds. The applicants also argue that they are able to meet any condition set by court but not depositing security in court. They argue that they are a government institution and are capable of paying any claim if the appeal fails. They also argue that the appeal has high chances of success as the trial court erred in its finding by granting illegal orders.

The respondents opposed this application and they filed then their replying affidavit on 21.11.2013. Their argument is that there is no proper appeal in this case as they were served with an unstamped Notice of Appeal as required by the Court of Appeal rules. On merit of appeal, they submitted that it should be on basis of law as envisaged under S. 17(2) of Industrial Court Act. It is their contention that the applicants have not demonstrated the loss they will suffer if claimant is reinstated as he will earn what he has worked for. They insist that the applicants should be able to give security of costs if the application is allowed. They ask court to reject the application and dismiss it with costs.

Having heard submissions of the parties, this court is guided by the provisions of Order 42 rule 6(2) of Civil Procedure Act which states that:-

“(2) No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The test here is substantial loss if the application is not allowed and the fact that the application is made without unreasonable delay. The issue of security for performance and the decree is also key.

On issue of substantial loss, I do not find that the applicants will not suffer substantial loss if the order is not granted as this is not demonstrated. On timeliness, the applicants came to court for this application on 21.11.2013 after judgment was delivered on 25.9.2013. This was 2 months after the judgment which I do not consider to be with undue delay. I will therefore exercise my discretion and grant orders for stay on condition that the decretal sum is deposited in an interest earning account held in joint names of the counsel for the parties within 30 days in default execution to issue.

HELLEN WASILWA

JUDGE

18/2/2014

Appearances:-

Lore h/b Onyango P. D for applicant present

Applicant respondents absent

CC. Wamache

Applicant respondents absent

CC. Wamache