



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
CAUSE NO. 124B OF 2013

AMALGAMATED UNION OF KENYA METAL WORKERSCLAIMANTS

VERSUS

CIVICON LIMITEDRESPONDENT

RULING

BACKGROUND

The Applicant brought this Motion on 17/12/2013 under certificate of urgency. The Motion seeks stay of execution of part of this court's judgment delivered on 6/12/2013. The impugned part of the judgment is the finding that the claimant had recruited a simple majority of the applicants' unionisable staff and as a consequence of which recognition of the union was ordered.

The Motion is supported by the affidavit of Justus Ochieng an officer of the applicant . The gist of the affidavit is that the court was in error when it found that the claimant had met the threshold for the grant of recognition by recruiting 345 out of 580 unionisable staff when the correct figure was 1363.

The Motion was opposed by the claimant vide a replying affidavit sworn on 11/2/2014 by Mr. Justus Maina Otakwa, the General Secretary for the claimant. The gist of the said replying affidavit is that the court was right in finding that 345 out of 580 unionisable staff of the applicant represented more than a simple majority. In addition the deponent accused the applicant of being in contempt of consent court orders recorded in October 2013 by defaulting to remit union dues for the claimants members.

The Motion was disposed of by written submissions.

APPLICANTS' SUBMISSION

The applicant relied on the grounds raised in the Motion and the supporting affidavit. She submitted that the Motion was filed without undue delay on 16/12/2013 soon after the impugned judgment was delivered on 6/12/2013.

She further submitted that she exercised her right of appeal by filing a Notice of Appeal on 11/12/2013 and serving it on the claimant on 18/12/2014. According to her the intended appeal is not frivolous in view of the grounds raised on the draft memorandum of appeal and which appeal will be defeated if stay of recognition is denied.

According to the applicant she will suffer irreparable harm if stay is denied because the appeal will

be rendered nugatory if recognition will have been granted. She offered no security for performance because the nature of the judgment did not lend itself to the provision of security. In any event she submitted that no prejudice will be suffered because union dues would continue to be remitted to the claimant. The applicant has cited several precedents from courts of concurrent jurisdiction which seem to agree that this court has jurisdiction to order stay where the applicant shows that he stands to suffer substantial loss if stay is denied; that the application is made without undue delay and that the applicant is ready to abide by any order as to security that the court may order as a condition for the grant of stay.

THE CLAIMANTS' SUBMISSIONS

The claimant has submitted that the Motion is incompetent because it is founded on the wrong sections of the law. On the other hand she has submitted that both parties herein conducted a verification exercise and found that there were 580 unionisable employees of the applicant out of which 345 were members of the claimant. That the said members of the union represented more than a simple majority of the unionisable staff. She contended that delay in granting recognition of the union by the applicant was an affront to her members fundamental rights with regard to joining trade union and negotiating for better terms and conditions of service.

The claimant further submitted that the Motion and the supporting affidavit were not truthful because the applicant was guilty of contempt of court by failing to remit union dues as ordered by the court in October 2013.

ANALYSIS AND DETERMINATION

After perusing the Motions and the affidavits filed in support and in opposition thereto and upon perusing and considering the written submissions filed by the parties, the following issues arises from determination:

- 1. Whether the Motion is competently before the court.**
- 2. Whether the application has met the threshold for the grant of stay pending appeal.**

Competence of the Motion

The Motion is brought under Section 12 of the Industrial court Act and rule 16 and 27 of the Industrial Court (procedure) Rules. The court has been given a wide discretion under the said Section 12 (3) (iii) of ICA and Article 159 of the constitution of Kenya. I will therefore not waste much effort in finding that the Motion is competently before the court. The court will however wish to point out that a stay of execution pending appeal can also be sought under order 42 rule 6 of the Civil Procedure rules read with rule 31(2) of the Industrial Court (procedure) Rules.

Threshold of granting stay pending appeal

As correctly submitted by the applicant and confirmed by the judicial authorities cited, the principles of granting stay pending appeal at this level are set out under Order 42 rule 6(2) of the Civil Procedure Rules. The said provision in mandatory terms bars the court from ordering stay 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.**
- (b) Such security for the due performance ordered by the court is given by the applicant.**

The court is satisfied that the application was made without any unreasonable delay. The reason for the foregoing finding is that the impugned judgment was delivered on 6/12/2013 and the application was filed in court on 17/12/2013. In the opinion of the court and considering the nature and circumstances of the dispute, a period of 10 days is not unreasonable delay.

As regards whether or not substantial loss will result to the applicant, the same should be proved by affidavit. The materials before the court do not demonstrate any loss to be suffered by the applicant. There is no financial or other form of loss shown which is likely to befall the applicant. If by any chance she succeeds in the appeal after signing a recognition agreement; the same can be revoked.

In view of the foregoing finding, the court will not consider the issue of security. The court will however observe that the applicant has not rebutted the claimants allegation that the applicant was in contempt of court with respect to non-remittance of union dues as ordered by the court in October 2013. That clearly shows the applicants determination to frustrate the claimant and her members in their quest to enjoy the constitutional Rights and freedoms at the workplace. Consequently and in addition to finding that no substantial loss will be suffered, the court will not order stay pending appeal.

DISPOSITION

The Notice of Motion dated 16/12/2013 is dismissed with costs.

Dated, Signed and Delivered this 25th day of April 2014.

O.N. Makau

Judge