



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1314 OF 2011

PETER MBUGUA KANOI1ST CLAIMANT

PETER MUGAMBI LINTARI.....2ND CLAIMANT

PETER KIEMA KALUTU.....3RD CLAIMANT

FLORENCE M. MALA.....4TH CLAIMANT

JULIUS KIAUTHA KINITO.....5TH CLAIMANT

WILLIAM OKALIO EPAYE6TH CLAIMANT

VERSUS

COFFEE BOARD OF KENYA RESPONDENT

RULING

By a notice of motion dated 23rd July 2013 and filed in Court on the same day under certificate of urgency the Respondent seeks the following orders:-

1. **THAT**, this Application be certified as urgent and be heard ex-parte in the first instance.
2. **THAT**, pending the hearing and determination of this Application, this honourable Court do order a stay of execution of the Award delivered by the Honourable Justice MAUREEN ONYANGO on the 12th day of July, 2013.
3. **THAT**, this Honourable Court be pleased to grant a stay of execution of the award pending the hearing and determination of the Appeal.
4. **THAT**, pending the hearing and determination of this Application, the temporary order of stay of execution granted by this Honourable Court on the 12th day of July, 2013 be and is hereby extended for a further period of Thirty (30) days until the hearing and determination of this "Application.
5. **THAT**, the Respondent/Applicant do furnish security for the performance of the award by providing a Bank guarantee for the sum of Kshs. 14,508,309/- and consequently thereon, there be a stay of execution pending the hearing and determination of this Application and Appeal.
6. **THAT**, in the alternative, this Honourable Court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this Application.
7. **THAT**, the costs of this Application be provided for.

The application is supported by the affidavit of FRANKIE WELIKHE and on the following grounds:-

1. That an award was delivered by this Honourable Court on the 12th day of July, 2013 by the Honourable Justice MAUREEN ONYANGO.
2. The said award was against the respondent.
3. That the main compelling issues taken into consideration by the learned Judge in delivering the said award was the computation of the claimants liquidated demand as contained in the Memorandum of claim.
4. The said computations were made based on erroneous/incorrect basic salary figures and therefore inflated and/or higher amounts were awarded than contemplated.
5. The said computations were purportedly based on section 40(1)(g) of the Employment Act which provides for 15 days for each complete year of service **BUT NOT** 30 days as computed by the claimants.
6. That in the Reply to the Memorandum as well as in the submissions, the Respondent did raise issues that the claimant's liquidated damages as calculated were based on erroneous and/or incorrect figures as the basic salary, a fact which this Honourable Court failed consider in making the Judgment.
7. That in the Reply to the Memorandum of claim, the Respondent also did raise issues that the claimant's liquidated damages as calculated were not based on the number of days as provided for under the Employment Act, 2007, a fact which this Honourable Court also failed to consider.
8. That the Respondent does not have any funds at its disposal to meet the conditions in the award should execution proceed.
9. That the Respondent would suffer great loss and damage for the fact that the claimants have been awarded inflated relieves than provided for under the Employment Act.
10. The Respondent is justifiably apprehensive that the claimants will seek to execute the decree before this Application for stay of execution is heard and determined, which Decree has already been drawn.
11. That in view of the forgoing, there is good and sufficient cause for granting stay of execution as prayed and Appealing the said award.
12. That this Application has been made diligently as the Respondent has been making all efforts to obtain the necessary documents so as to enable it lodge its Appeal.
13. That unless the orders of stay are granted as prayed:-
 - a. The claimants would unduly benefit to the detriment of the Respondent.
 - b. In the circumstances, the Respondents Appeal will be defeated.
 - c. The Respondent would suffer great prejudice in advancing its case.
14. That accordingly and in the interest of Justice and fairness, the said order of stay of execution pending the hearing and determination of this Application and Appeal sought for in this Application ought to be granted as prayed.

The Claimants opposed the application through the Replying affidavit of Peter Mbugua Kanoi the 1st Claimant who deponed that the application is frivolous, bad in law and filed in bad faith. That the Application is fatally defective for failure to annex a draft memorandum of appeal to inform the court of grounds to be relied upon on the intended appeal, that there is no evidence on facts to show that the Respondent has an arguable appeal to warrant stay of execution and there is no evidence to show the Respondent will suffer irreparable damage. That the ground that the Respondent does not have is an irrelevant and immaterial consideration in the application.

The applicant Respondent was granted *ex parte* stay orders pending the determination of the application.

The application was argued on 3rd February 2014. Ms Mumbi instructed by Keengwe & O Advocates represented the Applicant /Respondent while Mr. Koceyo Titus instructed by Koceyo & Co. Advocates appear for the Claimants.

It was submitted for the Respondents that the grounds upon which the Respondent intends to appeal are that the computation in the judgment are based on erroneous or incorrect salary figures, that the

computations are said to be based on Section 40 (1) (g) which provides for 15 days for each year of Service but the court computed on 30 days for each year, that the Respondent is willing to deposit bank guarantee for the entire decretal sum, that the Claimants will not be prejudiced, that if stay of execution is not granted the appeal would be rendered nugatory. That Section 12 (3) of Industrial Court Act. Empowers this court to grant preservatory orders. Ms Mumbi relied on the case of **JOSEPHINE SERAPHINE WADEGU V KENYA POWER & LIGHTING COMPANY LTD** [213] eKLR where decree Justice Wasilwa granted the applicant stay pending appeal.

Mr. Koceyo for the Claimants opposed the application on the grounds that the Respondent has not demonstrate by way of a draft memorandum of appeal that they have an arguable appeal. That if their grounds for the intended appeal is that the court used erroneous or in correct salaries they must state what the correct salaries were. Mr. Koceyo further submitted that Section 40 of the Employment Act is based on gross salaries. That in all the authorities relied upon by the Claimant the court used the last gross salaries to determine the compensation. That the other ground being that the court granted 30 days instead of 15 days per year worked is also not arguable as this is a matter that has been settled by the court of Appeal in CA NO.207 of 2012 Telkom Kenya v John O Ochanda.

Mr. Koceyo further submitted that the conduct of the Respondent in this matter shows that this appeal was filed to frustrate the Claimants. That since they filed a notice of appeal on 18th July 2013 they had not made any follow up on the proceedings. That there was also bad faith on the part of the Respondent who has not made any offer to permit the part of the claim that was admitted.

On the issue of securities Mr. Koceyo submitted that a bank guarantee cannot be a valid security as the Respondent has in the supporting affidavit given the reason for not depositing the decretal sum in court to be that the Respondent has no money to support the conditions of the Award.

The Respondent /Applicant relied on the following authorities:-

1. Industrial Cause No. 34 of 2013 Josephine Seraphine Magendi vs KPLC.

The Claimant relied on the following authorities:-

1. Judgment in Cause No. 665 of 2011 Beatrice Achieng Osir – vs – Board of Trustees Teleposta pension Scheme.
2. Award in Cause No. 621 of 2012 Jane Wairimu Machira – vs – Mugo Waweru and Associates.
3. Ruling in Cause No. 1123 of 2012 Edwin Kabogo Munene – vs – Equity Bank Limited.
4. Patani & another versus- Patani - Nairobi CA No. NAI 190 OF 2003 – (2003) KLR.
5. Johnstone Musengi versus – Joseph Mwangi Mwangangi – Mombasa C.A. No. 223 of 2010 (2012)Eklr.
6. HCCC No. 216 of 2007 John Ochanda – versus – Telkom Kenya Limited Ruling.
7. HCCC No. 216 of 2007 John Ochanda – versus – Telkom Kenya Limited – Judgement .
8. CA.No. 207 of 2012 Telkom Kenya Limited – versus – Johan Ochanda.

I have considered the grounds stated on the face of the notice of motion and the affidavit in support thereof. I have also considered the Replying affidavit filed by the Claimant in opposition to the application, the submissions by counsel for both parties and the authorities relied upon by the parties.

The principles for the grant of stay of execution pending appeal have been well articulated in decisions of the courts.

The appellant must show that his appeal is an arguable one and secondly that of the order of stay if not granted the appeal would be rendered nugatory.

In the Draft memorandum of Appeal filed by the Respondent, it has listed 4 grounds of appeal as follows:-

1. That the Learned Judge erred in Law and in fact by basing the award on incorrect basic salary figures thereby awarding the Claimants underserved amounts.
2. That the Learned Judge erred in law and in fact by basing the award of severance pay at the rate of 30 days' pay for each completed year of service instead of the rate of 15 days for each completed year of service thereby inflating the award of damages
3. That the Learned Judge erred in law and in fact by not considering that the Claimant's liquidated claims were not in accordance with the employment Act, 2007.
4. That the Learned Judge erred in law and in fact by disregarding and/or ignoring the material and pertinent evidence that were in favour of the Respondent thereby arriving at an award that was not supported by evidence.

The main grounds are that the salary upon which the award was based is incorrect as it should have been based on basic salaries; and the second ground is that the court used 30 days instead of 15 days for each complete year of service.

On the first ground, that the court should have used basic salary, it is not clear which law the Respondents were referring to.

Section 40 (1) (g) provides that the redundant employee be paid severance pay at the rate of "not less - than 15 days' pay for each completed year of service." It does not state 15 days basic pay. There is nowhere in the whole of the Employment Act where the Act provides for payment of terminal benefit to be based on basic pay.

On the Contrary, Section 36 and 38 provide for payment of notice base on remuneration while Section 49 (1) provides for payment based on gross monthly wage on salary. Since redundancy pay is at a terminal benefit which court's have generally granted based on gross pay and since the law does not provide for payment based on basic pay I do not see any chances of success of that ground appeal.

I am constrained to remind the applicant that appeals from the decisions of this court to the court of appeal only lie on matters of law as provided in S. 17 of Industrial Court Act. An issue relating to money calculation of terminal benefits is not a matter of law but a matter of fact. The remedy for such lies in a review, not an appeal.

The second ground, of Appeal is that I used 30 days instead of 15 days . Section 40 (1) (g) of the Employment Act provides for payment of "not less than 15 days' pay". This means that the employer is given the discretion to set the amount payable as severance pay provided that it is not below 15 days. In this case the Respondent exercised that discretion and set the rate payable at 30 days.

The Respondent went ahead to pay all employees released from employment at a severance rate of 30 days and gone ahead and paid the employees declared redundant at the said rate, they cannot fault my decision on the basis that I did not use 15 days addition, paying less would be discriminatory of the Claimants as their colleagues were paid at the rate of 30 days per year worked.

This issue has been settled by the court of appeal in Civil Appeal No. 207 of 2012 Telkom Kenya Limited V. John Ochanda. In that case Telkom Kenya retrenched employees in two phases. The first phase involved employees above 50 years which the second phase involved employees below 50 years. Those above 50 years were paid severance based on the years remaining to retirement while those below 50 years were paid for every completed year of service. The court of Appeal held that this was discriminatory and in such a case "equality of treatment is key." Further that "the appellant deliberately decided to use a formular which resulted in preferential treatment of employees , that action amounted to blatant discrimination."

I therefore find that the appeal has no chance of success.

The other reason advanced by the Respondent is that it does not have money to pay the Claimants. The Respondent did not submit any accounts to show that it has no money. In any event the evidence on

record is that the money for the retrenchment exercise was sourced from the Government. It is a matter of public knowledge that the government of Kenya is not broke. Even if this were the case, the financial ability of the Respondent on judgment debtor is not a consideration for a court not to pronounce judgment against the judgment debtor. It can only become a factor in the execution of the decree.

For these reasons I find that the application for stay of execution has no merit and dismiss the same with costs.

Delivered and signed in open court on 4th April 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ilako for Claimant in person

Ms. Mumbi for Respondent