



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2044 OF 2012

PHILEMON WACHARA OBENGE.....CLAIMANT

VS

EASY MART LIMITED.....RESPONDENT

RULING

1. On 19th November 2013, I awarded the Claimant the sum of Kshs. 671,000 in compensation for unfair termination of employment and accrued terminal benefits.
2. The Respondent then moved the Court by way of Notice of Motion dated 18th December 2013 brought under certificate of urgency. When Counsel for the Respondent appeared before the Duty Judge, **Rika J** he was granted a temporary stay of execution subject to the Respondent depositing the decretal sum in Court.
3. The Respondent's application which was heard *inter partes* on 31st March 2014 seeks an order for stay of execution of the award delivered by this Court on 19th November 2013 pending the hearing and determination of an intended appeal. The application is based on the following grounds:
 - a. That the Respondent being aggrieved by the award delivered on 19th November 2013, applied for a copy of the award together with proceedings which have not been supplied to date;
 - b. That the Respondent had annexed to the application, a memorandum of appeal against the whole of the award;
 - c. That the Respondent has an arguable and meritorious appeal with good prospects of success;
 - d. That the balance of convenience weighs in favour of the Respondent owing to the substantial amount of money involved as well as the grounds of appeal set out in the draft memorandum of appeal;
 - e. That it is in the interest of justice and fairness that this application be granted.
4. The Claimant filed grounds of opposition on 28th January 2014 raising the following objections:
 - a. That this Court has no jurisdiction to grant the orders sought as no such powers have been donated

by any of the applicable laws;

- b. That the application is fatally defective for being brought under the Civil Procedure Rules which are not applicable in this Court;
- c. That a stay of execution pending appeal from the Industrial Court can only be granted by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules and only where a Notice of Appeal has been lodged in accordance with Rule 75;
- d. That as at the time of filing the present appeal the Respondent had no right of appeal since that right was extinguished by the passage of time. The orders sought in the present application are only available to those with a right of appeal or those that have obtained that right by obtaining leave to appeal;
- e. That there being no appeal filed or even a subsisting right of appeal the allegation that the intended appeal will be rendered nugatory is highly presumptuous;
- f. That the intended appeal is in any case demonstrably frivolous and stands no chance of success since it raises no single point of law.

5. Section 17(1) of the Industrial Court Act, 2011 provides for appeals from decisions of the Industrial Court to the Court of Appeal in accordance with Article 164(3) of the Constitution. According to Section 17(2) of the Industrial Court Act, such appeals only lie on matters of law.

6. Rule 75 of the Court of Appeal Rules, 2010 provides as follows:

1. ***Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court.***
2. ***Every such notice shall subject to rules 84 and 97, be so lodged within fourteen days of the date of decision against which it is desired to appeal.***
3. ***Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.***
4. ***When an appeal lies only with leave, or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.***
5. ***Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging a notice of appeal.***
6. ***A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.***

7. In the instant case, the award was delivered on 19th November 2013 and as at the time of hearing of this application, no notice of appeal had been filed. Mr. Bw'omote, Counsel for the Respondent told the Court that he had not filed the notice of appeal because he had not been supplied with a copy of the award.

8. In response, Mr. Ogola for the Claimant submitted that under Rule 75 of the Court of Appeal Rules the first step towards filing an appeal in the Court of Appeal is to lodge a notice of appeal within 14 days of the award in the court against whose decision a party seeks to appeal.

9. In this regard, it is not necessary to extract the order or decree before filing a notice of appeal. The notice of appeal whose format is provided in the Rules does not require a party to attach the award. Moreover, the Respondent had not applied for extension of time within which to file the notice of appeal.

10. A reading of Rule 75 of the Court of Appeal Rules which I have reproduced above, demonstrates an unfettered procedure that allows a party flexibility to indicate their intention to appeal a decision to the court that rendered the decision in good time.

11. In the submissions made on behalf of the Respondent, it would appear that the Respondent would only have made a decision on whether to appeal or not upon seeing the award which his Counsel claims was not availed to him. Yet, in the letter dated 20th November 2013, addressed to the Deputy Registrar of this Court, Mr. Bw'omote, Counsel for the Respondent states:

“We refer to the above and to the Judgment of Honourable Lady Justice Linnet Ndolo on the 19th November, 2013 in this regard.

Kindly supply us with certified copies of the proceedings and Judgment herein for appeal purposes.”

12. It seems to me therefore that as early as 20th November 2013, the very next day after delivery of the award, the Respondent had already made up his mind that he would be appealing the decision rendered by this Court. No reason has been advanced as to why a notice of appeal was not filed within the prescribed time and apart from a general statement in the Respondent's supporting affidavit that time for filing of the notice of appeal should be extended, there is no application before the Court upon which such a prayer would be granted.

13. It is my considered view therefore that since the Respondent failed to exercise his right of appeal without any valid reason, the Court has no reason to stop the Claimant from enjoying the fruits of his award by granting an order of stay of execution.

14. The Respondent's application dated 18th December 2013 is therefore dismissed with costs to the Claimant. Consequently, the Deputy Registrar of this Court is directed to release the decretal amount deposited in Court to the Claimant within the next 30 days from the date hereof.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF MAY 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....***Claimant***

.....***Respondent***

