



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 408 OF 2010

JORIM WAHORE MARENIA.....CLAIMANT

VS

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

RULING

Introduction

1. On 19th September 2012, Makau J delivered an award issued by Madzayo J (as he then was) on 13th July 2012. The terms of the award were as follows:

- a) That the Claimant's dismissal be and is hereby declared unfair, unlawful and illegal;
- b) That the Claimant be unconditionally reinstated without loss of benefits and payment of all his salaries and dues from the date of his dismissal to the time of his reinstatement;
- c) That the Claimant is ordered to report to the Respondent's Managing Trustee

for direction or report to his place of work within the next seven (7) days from the date of the award.

2. The Respondent sought a review of the award which was declined by Makau J. The Respondent then filed an application for stay of execution pending appeal in the Court of Appeal, which application I allowed by my ruling dated 22nd April 2013.

3. It would appear that the Respondent did not take action towards pursuing his appeal in the Court of Appeal prompting the Claimant to file an application seeking to vacate the order for stay of execution.

The Claimant's Application

4. The Claimant's application brought by way of Notice of Motion dated 26th February 2014 is based on the following grounds:
- a. That on 30th January 2013, the Respondent filed an application for stay of execution pending the hearing and determination of an appeal against the award delivered on 19th September 2012;
 - b. That the Respondent's application was allowed on 22nd April 2013;
 - c. That the Respondent had filed a Notice of Appeal on 26th September 2012;
 - d. That to date the intended appeal by the Respondent has not been filed yet the proceedings were ready by November 2013;
 - e. That it is in the interest of justice that the orders of the Court dated 22nd April 2013 be vacated because the Claimant continues to suffer;
 - f. That the Claimant's application has merit and has been brought without undue delay;
 - g. That the orders sought will not prejudice the Respondent.
5. In a supporting affidavit sworn by the Claimant on 26th February 2014, he depones that it has been over a year since the award was made in his favour and any further delay in executing the said award would only intensify his suffering. The Claimant further depones that the Respondent is using the order for stay of execution to cause him injustice.

The Respondent's Reply

6. In a replying affidavit sworn by the Respondent's Legal Manager, Austin Ouko it is deponed that following the ruling of this Court delivered on 22nd April 2013 granting the Respondent's application for stay of execution pending appeal, the Respondent informed its Advocates on record not to proceed with the intended appeal since the Respondent was exploring the possibility of an out of court settlement.
7. It is further deponed that the Claimant himself wrote to the Respondent on 23rd May 2013 asking the Respondent to consider giving him an exit package. Pursuant to the Claimant's letter, the Respondent's Board at its meeting held on 31st May 2013 resolved that detailed proposals on settlement of the Claimant's case be considered by the relevant Board Committee. At a meeting between the Claimant and the then Managing Trustee of the Respondent, Tom Odongo, the Claimant was asked to make his proposals through the Respondent's Counsel.
8. Ouko goes on to depone that on 7th November 2013, the Claimant wrote to the Cabinet Secretary, Ministry of Labour asking him to intervene in his case and on 6th December 2013, the Respondent wrote to its Advocates again reiterating its instructions that the intended appeal be kept on hold.
9. On 26th February 2014, the Respondent's Advocates notified the Respondent that the Claimant had filed an application seeking to vacate the orders for stay of execution. In response, the Respondent informed its Advocates that the out of court negotiations had not borne fruit and thereby instructed them to proceed with the appeal.

Determination

10. The single issue for determination in this application is whether, in light of the delay by the Respondent to pursue its intended appeal in the Court of Appeal, the order for stay of execution granted by this Court on 22nd April 2013 ought to be vacated. The Claimant pleads that the Respondent is using the order for stay of execution obtained from this Court to deny him the fruits of his award while taking no action to pursue its intended appeal. The Respondent on the other hand states that it withheld pursuing its appeal pending the outcome of out of court negotiations between the parties.

11. Rule 82 (1) and (2) of the Court of Appeal Rules, 2010 provides as follows:

1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

(a) a memorandum of appeal, in quadruplicate

(b) the record of appeal, in quadruplicate

(c) the prescribed fees; and

(d) security for costs of the appeal:

Provided that where an application for a copy of the proceedings to the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule

(1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

12. Rule 82 provides the effect of failure to observe the time lines set out in Rule 81 in the following terms:

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

13. In the instant case, the Respondent filed a Notice of Appeal on 26th September 2012 and on 11th November 2013, the Deputy Registrar of this Court certified the

proceedings. Yet, the Respondent did not file its record of appeal until May 2014. Even discounting any delays occasioned by the Court in preparation of the proceedings, the Respondent's record of appeal clearly falls outside the time lines set by Rule 81 of the Court of Appeal Rules, 2010.

14. The only reason advanced by the Respondent for the delay is that there were negotiations

between the parties towards an out of court settlement. In support of its position, the Respondent referred the Court to two letters written by the Claimant; one to the Respondent dated 23rd May 2013 and another to the Cabinet Secretary, Ministry of Labour dated 7th November 2013. In both letters, the Claimant makes a plea for a speedy conclusion of his case.

15. The Court was also referred to Minute 567/BOT/229 in the proceedings of a meeting of the Respondent's Board held on 31st May 2013 to the effect that detailed proposals on settlement of the Claimant's case be considered by the relevant Board Committee. While this communication indicates some willingness on the part of the parties to explore an out of court settlement, this Court finds no tangible proposals from the Respondent towards this end.

16. At any rate, discussions towards an out of court settlement do not bar a party from taking steps towards pursuing an appeal if indeed that party is interested in the appeal. I therefore find that the Respondent has, without any justifiable cause, sat on the order for stay of execution pending appeal granted by this Court on 22nd April 2013 and hereby vacate the said order.

17. The costs of this application will be borne by the Respondent.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF JUNE 2014

LINNET NDOLO

JUDGE

Appearance:

Ms. Fatuma Wanjiku for the Claimant

Ms. Gladwell Mumia for the Respondent