



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 851 OF 2011

JOSEPHAT AMBUBI MUSUMBA1ST CLAIMANT

KASAVU MUSYOKA MUSEMBI.....2ND CLAIMANT

VERSUS

VEGPRO (K) LIMITEDRESPONDENT

RULING

Before me is a Notice of Motion dated 11th January 2013 and filed in Court on the same day under certificate of urgency seeking the following order :-

1. That this application be certified as urgent and the same be heard ex-parte in the first instance.
2. That there be an interim stay of execution and/or enforcement of the Decree dated 11th December, 2012 pending the hearing and final determination of the application herein.
3. That there be a stay of execution and/or enforcement of the Decree dated 11.12.12 pending the hearing and determination of the appeal filed herein at the Court of Appeal.
4. That there be made any other orders that this Honourable Court may deem just and fit to grant in the circumstances.
5. That costs of this application be in the cause.

The application is made under Rule 16 of the Industrial Court (Procedure) Rules and Article 159 of the Constitution, and all enabling Provisions of the law. The application is supported by the affidavit of MUSA JUMA and on the grounds that the applicant has lodged an appeal against the award of this court dated 11th December 2012, that the Applicant filed a notice of appeal on 24th December 2012, that the Claimants intend to execute the award and that if the award is executed the Applicant will suffer irreparable loss and damage.

The Claimants responded to the application through the replying affidavit of JOSEPHAT AMBUBI MUSUMBA, the 1st Claimant in which he depones that the intended appeal does not raise any points of law and is therefore incompetent with no chance of succeeding, that it is intended to deny the Claimants the benefit of the fruits of their judgment and that the Applicant has not demonstrated that it will suffer substantial loss.

The application was argued on 29th July 2013. Mr. Maloba for the Applicant submitted that the intended appeal raised triable issues with a high probability of success, that the Claimants are unlikely to repay the decretal sum should the appeal be successful, that the Applicant is willing to give security as may be ordered by the court, that the application was filed without delay. The applicant relied on the following cases: - **JAMES KIPKONGA KANDAGOR VS MOI TEACHING REFERRAL HOSPITAL**

Mr. Nyabena for the Claimants, who are the Respondents in the application opposed the application. He submitted that the application is intended to delay the Claimants from enjoying the fruits of their judgment, that the applicant has not demonstrated what substantial loss it will suffer or that they have an arguable appeal, that what is raised in the draft grounds of appeal are not based on legal issues but issues of fact which by virtue of Section 17 (2) of Industrial Court Act are not subject to appeal, that the fact that the Respondent has satisfied the decree is not a bar to an appeal and therefore does not render the appeal nugatory, that the Respondent had not filed the appeal 8 months after filing the notice of appeal, that even the hearing of this application which was filed in January 2013 was delayed as the Respondent did not take any steps to have the application heard, that the only ground in the appeal to the effect that the court awarded more than what was claimed means they are not contesting what was awarded, but the amount.

Mr. Nyabena urged that should the court be inclined to grant the application the decretal sum should be deposited into a joint interest earning account.

I have considered the application and the grounds in support thereof as well as the replying affidavit. I have also considered the authorities cited by the Respondent and the relevant law.

Section 17 of the Industrial Court Act provides for appeals from the decisions of this court to the court of Appeal on matters of law only.

The principles to be considered in an application for stay pending appeal have been well set in decision of the courts. In **Cause No. 1123 of 2012: Edwin Kabogo Munene V Equity Bank Limited** Justice Nzioki wa Makau reiterated the principles as set out by Visram J (as he then was) in **Prime Bank V. Esige [2005] 1 KLR 160** as follows:-

“Now the Court of Appeal has developed some principles to guide the exercise of that power so that the same is not left to caprice and those principles are simple and direct as follows:-

- a. The appellant must show that his appeal is an arguable one. In other words he must show that the appeal is not a frivolous one.
- b. The appellant must show in addition that if the order of stay of proceedings is not granted, his appeal, if he were to succeed, would be rendered nugatory.

In the same judgment, Justice Wa Makau also referred to his own ruling in **Industrial Court Cause No. 583 of 2009; Kenya Union of Commercial Food and Allied Workers Union V. British American Tobacco Kenya** as follows:-

“The Appellant need not show that the appeal will be successful. There is no guarantee that each arguable appeal will persuade the judges of appeal to come to a different conclusion. In the nature of things, the appellant may have an arguable appeal with high chances of success but fail in the Court of appeal. The test is “arguable appeal” not “successful appeal”.

I agree with the said decision and adopt them in this case.

The Applicant herein has filed a draft memorandum of appeal with grounds which I can summaries as follows:-

1. That the court erred in awarding the sums of Shs. 479,420 and Shs. 590,988 respectively.
2. That the awards were irregular owing to the reason that they were not prayed for in the claims.
3. That the judge did not take into account the submissions by the applicant; and
4. That the findings were against the weight of the evidence.

The only legal issue raised is in ground No. 2 to the effect that the court granted prayers not prayed for.

A look at the prayers as set out in the judgment and the award would confirm that there were three prayers by each of the two Claimants and the court awarded judgment only on the three prayers namely notice, overtime and compensation. These are the only heads awarded in the judgment.

I find that the draft Memorandum of appeal does not disclose an arguable appeal. I agree with the Claimant's advocates submissions that the application by the Respondent is intended to delay the Claimants from enjoying the fruits of their judgment as the grounds in the draft memorandum of appeal are not based on legal issues but on issues of fact which are not subject to appeal by virtue of Section 17(2) of the Industrial Court Act.

Having found that the draft memorandum of appeal does not disclose an arguable appeal, I do not have to consider the other principles for grant of stay of execution.

The result is that the application by the Respondent for stay of execution pending appeal is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 31st Day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Nyabena for Claimant

Wanjohi for Respondent