



IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 109 OF 2012

ANDREW MWANYIKA & 18 OTHERS .....CLAIMANT

VERSUS

PAPILLION DIANI LIMITED .....RESPONDENT

RULING

INTRODUCTION

This is a Notice of Motion filed on 20/3/2014 by the respondent in the main suit. It seeks for stay of execution pending Appeal. It is supported by the affidavit of Mr. Aloice Angila the CEO of the Applicant. The gist of the Motion is that the applicant has preferred an appeal against the whole judgment of this court delivered on 14/2/2014. That the claimants are men of straw and will not be able to repay the judgment debt if the appeal succeeds after the execution of the impugned judgment.

The Motion is opposed by the claimant who has filed grounds of opposition to the Motion. The gist of the grounds of opposition is that the court lacks jurisdiction to entertain the request for stay as that power is only reserved for the appellate court. The Motion was disposed of by filing of written submissions

ANALYSIS AND DETERMINATION

Upon careful perusal of the Motion, affidavits and the submissions filed the following issues arise for determination:

- a. **whether the court has jurisdiction to entertain the Motion.**
- b. **Whether the application meets the threshold for granting stay pending appeal.**

Jurisdiction

Section 12(3) (i) & (viii) of the Industrial Court Act(ICA) and rule 27(i) (g) of the industrial Court Procedure Rules, grants the court jurisdiction to make any orders it deems just for the ends of justice. The objection by the claimants has not demonstrated the lack of jurisdiction under the said Industrial Court Act or rules which donates the unfettered jurisdiction to deal with and make any orders it deems fit in all matters related to employment and labour relations.

In addition rule 31 of the Industrial Court Procedure Rules (2010) ICPRs provides for execution of decisions of this court under Civil Procedure Rules applicable in the High Court. Flowing from the foregoing, a party can seek stay of execution under te Civil Procedure Rules.

Consequently this court finds that it has jurisdiction to entertain the present Motion although the applicant has not cited Order 42 rule 6 or Section 12 of the ICA or rule 27 of the ICPRs.

### **Threshold for granting stay pending appeal**

Order 42 rule 6 of the CPR bar the court from granting stay pending appeal unless it is satisfied that the applicant will suffer substantial loss if stay is declined, the application is brought without inordinate delay, and that the applicant meets the conditions imposed by the court for the stay.

In the present case the applicant has stated that the claimants will not repay the judgment debt if the appeal succeeds because in their own testimonies they stated that they had no income. The claimants did not say anything in response to that allegation by the applicant. The court appreciates that the burden of proof lies with the applicant to prove that the claimants will not be able to repay. There is no reason for this court to deem that the burden of prove has been shifted to the claimants to prove their ability to repay. That the claimant's statement that they have no income is not the same as stating that they are unable to repay the judgment debt awarded to each by the impugned judgment which on average was ksh.70,000. It cannot therefore be assumed that if some one does not have an income earning employment he automatically lacks wealth or property or ability to pay debts.

Consequently the court finds on a balance of probability that the applicant has not proved that she will suffer substantial loss if stay of execution is denied and the appeal eventually succeeds.

In view of the foregoing finding the court sees no point of considering the other requirements for the grant of stay.

As a parting shot, however, the court's attention was drawn to the chronology of the events after the judgment. Firstly, it is alleged that the Notice of Appeal was not acknowledged by the Deputy Registrar of the court immediately after filing. The court does not find that as a valid argument. The court has a Deputy Registrar designated for receiving such notices. It is the burden of the appealing party to ensure that the notice is received and signed promptly. Even if the Deputy Registrar is away, there is always another one appointed to hold brief.

Then the other observation made is that there is no evidence on record or deponed in the affidavit to show that the Notice of Appeal and the request for proceedings and judgment was served on the claimants within the statutory time prescribed under the Court of Appeal rules. Without such this court deems that there may be no appeal pending due to lapse of time for the appeal. The court thought it wise to highlight that observation because the basis for seeking stay is the existence of an appeal. If the appeal has lapsed due to limitation of time provided by the rules for lodging the appeal, then there can never be any reason for ordering stay.

### **DISPOSITION**

The application lacks merits and is dismissed with costs.

**Signed, Dated and delivered this 11<sup>th</sup> July 2014**

**O. N. Makau**

**Judge**