



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1264 OF 2010

KIZITO SAVALI CLAIMANT

VERSUS

MARSHALLS EAST AFRICA LTD RESPONDENT

Mr. Adala for Respondent / Applicant

Mr. Nyaburi for Claimant / Respondent

RULING

1. In a Notice of Motion Application dated 2nd April 2014, the Applicant Respondent seeks an order for stay of execution of the Court's Award delivered on 14th August 2013, together with all consequential orders pending the hearing and determination of the Appeal and costs of this application.

2. The Application is supported on the grounds set out in the Notice of Motion as 1 – 3(a – d).

The same is further supported by Affidavit of **Mr. Abhimanyu Garhwal** a Director of the Applicant, Marshalls East Africa Limited.

3. In its judgment, the Court warded the Claimant / Respondent;

- a. Terminal benefits admitted by the Applicant as owed to the Claimant in the sum of Kshs.520,000/=;
- b. Maximum compensation in the sum of Kshs.2,400,000/=;

4. The Court from the outset notes that this Application was brought more than one year and three (3) months from the date of the Judgment and the Applicant has not as a sign of good faith paid the admitted terminal benefits owed to the Claimant since the date of dismissal on 5th May 2010 in the sum of Kshs.520,000/=.

5. The Court further notes that in the main, the grounds of Appeal set out in the draft memorandum of appeal which does not bear any date, largely touch on matters of fact in spite of the provision of **Section 17(2)** of the **Industrial Court Act, 2011** which restricts Appeals from the

Decisions of the Industrial Court to the Court of appeal to matters of Law only.

6. The test for granting stay of execution is as follows:

- i. Whether the Appeal was noted without undue delay;
- ii. Whether the Appeal filed is arguable;
- iii. Whether the Appeal would be rendered nugatory by failure to grant the interim order sought; and
- iv. In whose favour the balance of convenience lies.

Determination

7. The Court observes that the Notice of Appeal was filed on 22nd August 2013, a few days after the judgment and therefore the filing was done without any undue delay.

However, the Application for the stay of execution as noted earlier was brought more than one (1) year and three (3) months down the line.

8. That the Appeal was noted even against the portion of the award that was admitted before Court by the Applicant is indicative of bad faith on the part of the Respondent.

There cannot be any arguable appeal against this portion of the award.

9. The Court is equally not satisfied on the bonafides of the Applicant in raising factual matters in the memorandum of Appeal inspite express provisions of **Section 17(2)** of the **Industrial Court Act 2011**, which remains in force had and has not been repealed and / or annulled by any Court of law,

The arguability of the entire appeal is therefore in doubt.

10. As to whether failure to grant an order for stay would render the appeal nugatory, the Court is not persuaded that the Claimant / Respondent is impecunious and would be unable to repay the decretal amount if the Court of Appeal ruled in favour of the Applicant.

11. The Claimant has waited for a long period without a job, to be paid his terminal benefits and is entitled to immediate enjoyment of the fruits of the judgment.

The balance of convenience is in favour of refusing the order for stay and allow the claimant to receive the proceeds of the award pending the hearing and determination of the Appeal.

The Application is dismissed with costs to the Respondent / Applicant.

Dated and Delivered at Nairobi this 24th day of Sept. 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE