



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA (BIMA TOWERS)

CAUSE NO. 152 OF 2012

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

v

KENYA MARINE CONTRACTORS EPZ LTD.....RESPONDENT

RULING

1. On 23 May 2014 this Court pronounced judgment in which it awarded the Respondent's employees who are members of the Claimant Union a general wage increase of 11% with effect from 1 August 2012 and another 11% wage increase from 1 August 2013 and ordered the parties to sign a Collective Bargaining Agreement within 30 days.

2. The Respondent was aggrieved with the judgment and orders and on 29 May 2014 it filed a Notice of Appeal. On 20 June 2014 it filed a Motion seeking a stay of execution of the judgment/decreed and other consequential orders pending the hearing and determination of its Intended Appeal. That motion is the subject of this ruling.

Respondent's contentions

3. Mr. Sitonik urged the Respondent's case. He submitted that he was relying on the grounds on the face of the motion and the supporting affidavit of Damaris Mwelu.

4. Mr. Sitonik submitted that the Respondent had made the application without unreasonable delay since the Notice of Appeal had been filed on 29 May 2014.

5. He further submitted that the Respondent stood to suffer substantial loss because the Court had awarded a general wage increase and backdated the same to 1 August 2012 which translated into a hefty financial burden on the Respondent and that there was no evidential basis for the increment.

6. He urged that were the Respondent to implement the award, the Grievants would not be in a position to refund the Respondent, were the Respondent's appeal to succeed.

7. He also submitted that the Respondent had a meritorious and arguable appeal, and that an arguable appeal need not be an appeal which must succeed, but one which raises a question which can be reasonably argued.

8. Counsel cited and stated he was also relying on the authorities of *Teachers Service Commission v Sarah Nyanchama Ratemo*, Civil Application No. NAI. 227 of 2013, *Kenya Kazi Security Services Ltd v*

Kenya National Private Security Workers Union, Civil Application No. NAI. 108 of 2013, *Peter Paul Mburu Ndururu v James Macharia Njore*, Civil Application No. 29 of 2009 and *Yusuf Chanzu v Equity Bank Ltd*, Civil Application No. NAI. 251 of 2013.

Union's response

9. The Union was represented by its Industrial Relations Officer, Mr. Omollo. He submitted that the parties have a recognition agreement and that under section 57 of the Labour Relations Act, parties who have signed a recognition agreement are expected to negotiate and agree a Collective Bargaining Agreement. He further submitted that the parties negotiated a Collective Bargaining Agreement and agreed on certain issues but not others. The issues which were not agreed were referred to conciliation under the County Labour Officer and a further 11 issues were agreed at conciliation leaving 9 issues not agreed, and these are the issues which were referred to Court.

10. Mr. Omollo submitted that the Court did not err when it awarded the general wage increments and that it is the workers who generate the revenue of employers and they should benefit from the profits. In his view, the Respondent would not suffer any financial loss were the increments to be implemented because the Respondent was doing well financially.

11. He concluded by submitting that the Respondent did not have an arguable appeal but sought merely to delay the Grievants from enjoying their rights and therefore the motion should be dismissed with costs.

Analysis

Statutory framework and legal principles

12. Before discussing the legal principles relating to applications for stay of execution pending appeal, the Court wishes to observe that the Respondent provided the Court with several authorities in its endeavour to get an order of stay, but these authorities were based on the Court of Appeal Rules and more specifically rule 5(2)(b).

13. The legal principles for grant of stay under rule 5(2)(b) of the Court of Appeal Rules are not exactly the same as the principles applicable in the High Court and other Superior Courts, though the principles cross cut in certain respects. The legal principles under the rule have traditionally been that the jurisdiction to grant stay is discretionary, an applicant has an arguable appeal and whether an appeal would be rendered nugatory if orders sought are not granted.

14. The Respondent anchored its application on sections 3 and 17 of the Industrial Court Act, rule 41 of the Court of Appeal Rules and Order 42 rule 6(1) & (4) of the Civil Procedure Rules.

15. However, the primary statutory provision applicable to applications for stay of execution pending appeal from a decree of the Industrial Court is found in rule 31 of the Industrial Court (Procedure) Rules, 2010. The rule incorporates the rules applicable in the High Court. In this connection, order 42 of the Civil Procedure Rules is implicated and therefore the legal principles developed under the order are material.

16. Order 42 rule (6)(2) of the Civil Procedure Rules have outlined the conditions upon which stay of execution pending appeal may be granted. Briefly, these are that the applicant should satisfy the Court that substantial loss may be occasioned; the application should be made without unreasonable delay and lastly, provision of such sufficient security by the applicant.

17. Courts have on various occasions discussed and distilled the principles arising out of the statutory provisions. Such cases are *Mukuma v Abuoga* (1988) KLR 645, *Jotham Simiyu Wasike & another v Jackson Ongeru & 4 others* (2013) eKLR, *Tabro Transporters Ltd v Absalom Dova Lumba* (2012) eKLR and *Anthony Kiberenge Kamau v Kibuchi Wamunyi & 3 others* (2010) eKLR.

18. From the authorities cited, the first point that emerges is that an order of stay of execution pending an appeal is discretionary and an applicant must satisfy the Court that the order is warranted. The incidence of proof is placed upon the applicant on a balance of probabilities. An applicant should satisfy the Court in regard to all the three conditions earlier mentioned.

19. The Court will now examine whether the Respondent has satisfied the principles for the grant of the orders sought.

Substantial loss

20. One of the grounds relied on by the Respondent is that the decree would translate into a hefty financial burden upon it were it to implement the general wage increments. This ground is repeated in paragraph 8 of the supporting affidavit of Damaris Mwelu.

21. Closely linked with the deposition was the further deposition and submission by Mr. Sitonik that the Grievants (employees) would not be in a position to refund the Respondent any monies paid as increments. In any case, Mr. Sitonik urged that the Respondent was paying the Grievants wages in accordance with the prescribed minimum wages.

22. It is plausible that the Grievants may not be in a position to refund any monies paid to them as a result of the wage increments ordered by Court. In all likelihood, they depend solely on the wages for their livelihoods. But this alone is not a good enough reason by itself to grant stay of execution.

23. In the *Mukuma* decision, the Court of Appeal addressed its mind to what would amount to substantial loss. The Court was of the view that such loss was that which would render an appeal nugatory thus necessitating the preservation of the status quo.

24. The Respondent did not give any figures/financial statements for 2012/2013 or demonstrate how it would suffer substantial loss were it to implement the general wage increase ordered by the Court.

25. It is on record that the Respondent was making profits save for 2010, and the Court based its award on a report prepared by the Central Planning Unit of the Ministry of Labour, Social Security and Services after interviews, submissions and examination of the parties' records. The report is dated 27 August 2013.

26. Further, the report was crystal clear at pages 12 to 13 that the Respondent was paying some employees/ Grievants wages below the minimum prescribed wage, contrary to the submissions by Mr. Sitonik. This is manifestly illegal. The Court was not informed whether this has been rectified and arrears paid to the affected employees after the issue was raised in the report.

27. In the view of the Court, the Respondent has not placed sufficient material to show it would suffer substantial loss.

Delay in filing the Motion

28. Judgment was pronounced on 23 May 2014 and the application was filed on 20 June 2014. The issue of delay therefore does not arise.

Security for due performance

29. The last condition for grant of stay pending appeal relates to the Court directing an applicant to post such security for the due performance of the decree sought to be impugned.

30. The report from the Central Planning and Monitoring Unit already referred to disclose that were the Respondent to implement an 11% general wage increase, it would incur an additional financial outlay of about Kshs 9.2 million for the two years 2011/2013.

31. The Industrial Court deals with some disputes which are sui generis and the legal principles developed under the Civil Procedure Rules framework may not be strictly applicable, or the principles may need further developed.

32. A case in point is the order in contention here which required the Respondent to conclude and sign a collective bargaining agreement with the Union. As time goes by, the Industrial Court will be duty bound to develop and or reshape these legal principles to fit in with the nature of its specialist role and the relationship between the social partners, Unions and Employers.

33. The proposed Memorandum of Appeal has raised arguable points of law which keep recurring now and then.

34. Because of the peculiarity of some of these disputes and in exercise of its discretion, the Court would accede to the Respondent's application but on conditions.

35. In the case of *Kenya Kazi Security Services Ltd v Kenya National Private Security Workers Union* (2013) eKLR, cited by the Respondent, the Court of Appeal ordered the Applicant to furnish security to the Respondent in the form of a bank guarantee in the sum of Kshs 25,000,000/-.

36. In the view of the Court, this is a suitable case to order the Respondent to provide suitable security.

Conclusion and Orders

37. The upshot of the foregoing is that the Court grants prayer 3 of the Motion dated 20 June 2014 on condition and orders

- a. That the Respondent deposits security in the sum of Kshs 10,000,000/- in the joint names of the Union and Respondent with a commercial bank within 15 days, or alternatively
- b. That the Respondent furnish security to the Claimant Union in the form of a bank guarantee in the sum of Kshs 10,000,000/- within 15 days from the date hereof.

38. Costs in the cause.

Delivered, dated and signed in open Court in Mombasa on this 5th day of September 2014.

Radido Stephen

Judge

Appearances

For Union Mr. Omollo, Industrial Relations Officer, Kenya Engineering Workers Union

For Respondent Mr. Sitonik, instructed by Ndegwa Muthama & Katisya Associates