



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO 1270 OF 2010

KUDHEIHA WORKERS.....CLAIMANT

VS

MUTHAIGA COUNTRY CLUB.....RESPONDENT

RULING

1. On 9th July 2014, I delivered an award in favour of the Claimant in the following terms:
 - a. That each of the Grievants (1st - 17th) be paid notice in accordance with the Collective Bargaining Agreement obtaining as at the date of their dismissal;
 - b. That the said Grievants be paid compensation for unfair termination of employment ranging from 1 month's to 12 months' pay.
2. Being dissatisfied with the award, the Respondent filed a Notice of Appeal on 22nd July 2014. Further to the Notice of Appeal, the Respondent filed a Notice of Motion under certificate of urgency on 11th August 2014 seeking stay of execution of the award pending appeal in the Court of Appeal.
3. The Respondent's application which is supported by the affidavit and further affidavit of Graham Nicholls is based on the following grounds:
 - a. That on 9th July 2014 the Court awarded the grievants represented by the Claimant notice pay and damages amounting to Kshs. 1,298,019 ;
 - b. That the Respondent has appealed against the award;
 - c. That the Respondent will suffer substantial loss if the money is paid out as it will be irrecoverable from the Grievants in the event that the appeal is successful;
 - d. That the Respondent is willing to deposit the decretal sum in an escrow account as security for due performance of the orders of this Court within sixty (60) days or such other period as the Court may direct;
 - e. That it is fair and just that the orders sought be granted as the Claimant stands to suffer no prejudice.

4. In a replying affidavit sworn by the 12th Grievant, Joseck Josiah Opunga on 29th September 2014, it is deponed that the Respondent has failed to demonstrate the point of law it intends to put before the Court of Appeal as required by Section 17 of the Industrial Court Act, 2011.

5. Further, the Respondent's intended appeal is based purely on facts and the findings of this Court on the evidence presented before the Court. The Respondent has also failed to show that it would suffer substantial loss or that its appeal would be rendered nugatory if the application is not granted.

6. As stated by **Onyango J** in ***Abel Okoth Okello Vs Kenya Medical Research Institute (Kemri) [2014]*** the conditions upon which a stay of execution pending appeal may be granted are as follows:

- a. That the applicant has an arguable appeal. In this regard, an applicant wishing to appeal a decision of the Industrial Court, must demonstrate the point(s) of law upon which they wish to rely;
- b. That the applicant must show that the appeal will be rendered nugatory if the orders sought are not granted;
- c. That the applicant must furnish security for due performance of the orders of the Court.

7. In a draft memorandum of appeal filed on 31st October 2014 the Respondent/Applicant raises the following grounds of appeal:

- a. That this Court erred in law in relying on allegations contained in the Claimant's pleadings and submissions which had no probative value as no evidence was called in support thereof;
- b. That the Court applied a higher standard of proof than a balance of probability in determining the Respondent's defence;
- c. That the Court erred in law in awarding damages for unlawful termination plus notice pay;
- d. That the Court erred in finding that there was no valid reason for dismissal of the 1st to the 17th Grievants.

8. I have considered these grounds and have formed the opinion that they raise some points of law meriting examination by the Court of Appeal. The first condition for granting of stay pending appeal has therefore been satisfied.

9. With regard to the second ground being that the appeal would be rendered nugatory if the orders sought are not granted, Counsel for the Respondent/Applicant submitted that any money paid to the Grievants on account of the award herein would be irrecoverable in case the appeal were to succeed. In reply, Counsel for the Claimant submitted that the Claimant, being a trade union of many years standing was able to refund any moneys paid in satisfaction of the award.

10. In deciding whether or not to grant a stay of execution pending appeal, the Court is called upon to strike a balance between the Applicant's right of appeal and the Claimant's right to enjoy the fruits of their award. On this score, I agree with the holding by **Rika J** in ***Rosebell Wambui Muthee Vs Freight in Time Limited [2013] eKLR*** that in the Industrial Court, the overriding principle is that employees be allowed to enjoy the fruits of their awards, unless there are overwhelming reasons demanding that they wait.

11. Having considered the Respondent's application in this light I make the following orders:

- a. The Respondent shall release to the Claimant the equivalent of 50% of the decretal sum within the next 30 days from the date of this ruling;
- b. The balance, being the equivalent of 50% of the decretal sum shall be paid to an interest earning account in the joint names of Counsel for the Claimant and Counsel for the Respondent within the

- next 60 days from the date of this ruling;
- c. For the avoidance of doubt, I direct that calculation of the decretal sum shall be based on the Grievants' gross salaries, that is to say basic salary plus house allowance applicable at the time of their dismissal;
 - d. Failure to observe any of the conditions of stay set out above shall lead to an automatic lapse of the stay hereby granted;
 - e. The Respondent/Applicant will meet the costs of this application.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF NOVEMBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Mr.Njuguna for the Respondent