



IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 74 OF 2012

BETWEEN

HAMOUD MWINYI MGUZA CLAIMANT

VERSUS

MOMBASA WATER SUPPLY &
SANITATION COMPANY LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

No appearance for the Claimant

Mr. Chamwada holding brief for Mr. Otieno for the Respondent

RULING

The Respondent has applied to the Court for stay of execution of the Judgment of this Court delivered on 11th July 2014, pending hearing and determination of the Intended Appeal at the Court of Appeal of Kenya.

The Application dated 1st September 2014, is made under Sections 3, 12 and 17 of the Industrial Court Act 2011, and supported by the Affidavit of Mr. Kombo Rajab Kombo, sworn on 1st September 2014.

The Claimant opposes the Application and filed an Affidavit sworn on 9th September 2014, stating the grounds why he should not be delayed in enjoying the fruits of his litigation.

Parties agreed to have the Application considered and disposed of on the basis of their written submissions on record.

Relying on *Nairobi H.C.Misc. Civil Application No. 751 of 204 between Ahmednassir Abdikadir & Co. Advocates v. National Bank of Kenya and Bungoma H.C.Misc. Civil Application No. 42 of 2011 between James Wangalwa & Joseph Simiyu Mulenya v. Agnes Naliaka Cheseto*, the Respondent

submits:

- a) The Application has not been made with undue delay.
- b) The Applicant may stand to suffer hardship in event that the Orders sought are not granted.
- c) The process of Appeal has been put in motion.

The Claimant adopts two decisions ***Civil Application No. NAI 189 of 2001 between David Morton Silverstein v. Atsango Chesoni (2002) 1 KLR 867, and Civil Application No. NAI 50 of 2001 (29/2001) UR between Kenya Commercial Bank Limited v. Benjoh Amalgamated Limited & another***, - in urging the Court to find:-

- (a) It is not enough for an Applicant to allege substantial loss of hardship. More needs to be done by the Applicant.
- (b) The Applicant must prove the Appeal would be rendered nugatory.

The Court finds:-

1. An Appeal from a judgment, award, decision, decree or order of the Industrial Court to the Court of Appeal, lies under Section 17(2) of the Industrial Court Act 2011, only on matters of law. It cannot lie on matters of fact, as included, in the Draft Memorandum of Appeal attached to the Application.
2. In the ***Court of Appeal at Nairobi Civil Application No. NAI 201 of 2013 (UR 145/2013) between Freight-In-Time Limited v. Rosebell Wambui Muthee [2014] e-KLR***, the Court held:

- (a) The court exercises unfettered discretion, which must be exercised judicially.
- (b) The Applicant needs to satisfy the Court that the Appeal, or Intended Appeal is not frivolous, that is to say that it has an arguable Appeal.
- (c) The Court must be persuaded that were it to dismiss the Application, and later the Appeal or Intended Appeal succeeds, the result or the success would be rendered nugatory.
- (d) In order that the Applicant may succeed, he must demonstrate both limbs (b) and (c) above. Demonstrating only one limb would not avail him the Order sought.

3. While the Respondent has shown in its Draft Memorandum of Appeal that there could be arguable grounds for Appeal on some matters of Law, there is nothing to show the result or the success of the Appeal would be rendered nugatory.

4. The Judgment comprises 3 months' salary in lieu of notice and compensation for unfair termination, all added up at Kshs.706,302. The Claimant was also awarded costs. The Claimant submits he is gainfully employed by the Kwale County Government. He is not a man of straw. It is in any case for the Respondent to show success on Appeal, would be rendered nugatory, if the Order for stay of execution is not granted. This Court does not think an Employee should be unduly delayed in enjoying the fruits of his judgment.

IT IS ORDERED:-

- (a) ***The Application dated 1st September 2014, seeking stay of execution is declined.***
- (b) ***No Order on the costs of the Application.***

Dated and delivered at Mombasa this 4th day of November 2014.

James Rika

Judge