



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 562 of 2012

SHANKAR SAKLANI.....CLAIMANT

VERSUS

DHL GLOBAL FORWARDING (K) LIMITED.....RESPONDENT

RULING

This is an application by the Respondent herein through a Notice of Motion dated 19th December 2012 brought under sections 12(1)(2)(3) of the Industrial Court Act and Rule 16(1)(2)(3)(4)(5), 27(1)(C), 31(2) of the Industrial Court (Procedure) Rules, 2010 and other enabling laws. The application seeks for orders of stay of execution of the award and decree of this Court issued on 23rd November 2012, pending the hearing and determination of the intended appeal by the Respondent who is the applicant. The claimant filed grounds of opposition to the application dated 18th January 2013 on the basis that the application does not comply with Rule 16(2) of the Industrial Court Procedure Rules and that the respondent has failed to furnish a reasonable security to the Court to enable them enjoy the orders being sought.

The application is based on the grounds that the applicant has lodged a Notice of Appeal on 4th December 2012 against the whole of the decision of the Court as delivered on 23rd November 2012 and will therefore incur loss if a stay is not granted and further that the 30 days stay of execution granted by the Court on 23rd December 2012 lapsed on 21st December 2012 and there is fear of execution if the order for stay is not granted. That efforts to obtain the proceeding and certified copies of the award to enable the respondent formulate the memorandum of Appeal has not been possible despite numerous efforts being put in place to have these records from the Court.

The respondent further stated that there is a draft Memorandum of Appeal with arguable issues of law and if the stay herein is not granted, it will become mute. That the claimant was awarded the sum of USD 89,200 and Kshs 193,871.13 together with interest but being resident outside the jurisdiction of this Court, the respondent may not be able to recover these sums if the appeal is a success.

In submissions the respondent reintegrated their application and the grounds and noted that in a case like this the Court should order for a security that is not punitive to either party pending the hearing or determination of the intended appeal. That there is an arguable appeal with high chances of success. That the applicant has complied with Rule 16(2) of the Industrial Court procedure Rules.

In resonance the Claimant stated that provisions of Rule 16(2) have not been complied with and also noting that the claimant is not within the jurisdiction of the court due to his work permit having been cancelled by the respondent. That the respondent being a multinational company, they are likely to close down and if there is no security deposited in Court for due performance in the event the intended appeal is not successful the claimant will suffer loss.

I note that the main purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted rights of appeal is safeguarded and the appeal if successful is not rendered ineffective. The order for a cash deposit against the intended appellant is more geared towards ensuring that an appellant takes steps to have their appeal heard and determined without undue delays since he is denied the use of the money but not in any way to deny a successful litigant of the fruits of his litigation and locking up funds to which on the face of the record he is entitled. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving the security.

I note that respondent has filed Notice of Appeal as attached to the affidavit in support of their application and the draft memorandum of appeal. There are issues of law that the Court of Appeal will determine and without going into the merits of the intended appeal, I note the respondent will suffer loss if the money is paid before the intended appeal is argued and determined.

It is admitted by both parties that the claimant is unemployed and even though he may have invested, there is no evidence as to the nature of his investments thus there is potential loss that will arise to the respondent if a stay is not granted pending the hearing and determination of their intended appeal.

I however note that what is before Court is a Notice of Appeal and no draft Memorandum of Appeal and to ensure that this is not an effort to frustrate the claimant who already has a judgement of this Court and that the respondent takes steps towards having their appeal filed, heard and determined, this Court will grant a conditional stay. It is right and proper that security be given in a way which is least disadvantageous to the respondent but ensure the claimant is adequately protected.

I therefore direct that there be a deposit of 50% of the decretal sum in a joint bank account in the names of both advocates for the parties herein the firms of LJA Associates Advocates and Waiganjo Wachira & Company Advocates.

Costs in the motion.

Dated and Delivered at Nairobi this 25th day of January, 2013.

M. Mbaru

Judge Industrial Court

In the presence of:

Court clerk

.....
.....