



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 344 of 2012

MR. MAGOA ANDREW MOIRORE CLAIMANTS

VERSUS

KENYA BUREAU OF STANDARDS..... RESPONDENT

JUDGEMENT

Judgement in this case was delivered by Hon. Justice Ongaya on 16th November 2012. Mr. Ashitiva on behalf of the Respondent immediately applied for stay of execution for 30 days pending appeal which was granted by the Court. The Claimant also stated in Court that he was expecting a re-instatement since the Court had found that he was dismissed unfairly. The Court then made the following orders:-

- a) Parties be provided typed copies of the proceedings and judgement upon payment of the Court fees.
- b) Parties are at liberty to appeal.
- c) The Court did not grant reinstatement of the Claimant because the same was never pleaded and argued by the parties at the hearing.
- d) Parties are at liberty to file formal applications for stay of execution pending appeal.

Apparently no application for stay was filed and the Claimant applied for execution. The Respondent filed the present application by way of Notice of Motion under Rule 27(1) (a) and (b) of the Industrial Court (Procedure) rules, 2010, Order 42 Rule 6(1) and (2) and Order 51 rule 1 of the Civil Procedure Rules, 2010, and Section 1A, 1B and 3A of the Civil Procedure Act. The application which is dated 7th February and filed on 8th February 2013 seeks the following orders:-

1. **THAT** this application be certified as urgent and that the same be heard ex-parte in the first instance.
2. **THAT** due to the urgency of the matter, service for the application be dispensed within the first instance.
3. **THAT** this Honourable Court be pleased to order stay of execution of the Award delivered by the Honourable Mr. Justice Byram Ongaya on **16th November, 2012** and the subsequent decree issued on **11th January, 2013**, together with any consequential order, pending the hearing and determination of this application.

4. **THAT** this Honourable Court be pleased to order stay of execution of the Award delivered by the Honourable Mr. Justice Byram Ongaya on **16th November, 2012** and the subsequent Decree issued on **11th January, 2013**, together with any consequential order, pending the hearing and determination of the intended Appeal.

5. **THAT** in the circumstances herein, the said stay of execution of the Award and Decree be granted on an unconditional basis and, if otherwise conditional, the conditions be reasonable.

6. **THAT** costs of this application be in the cause.

The Application is supported by the affidavit of **JOSEPHAT BURUDI KALO** and the following grounds:-

(i) **THAT** an Award was delivered and a Decree issued herein on **16th November, 2012** and **11th January, 2013**, respectively, in which the Honourable Court awarded the Claimant the sum of Kshs.709,313.50, plus interest thereon at the Honourable Court's rates, together with 75% costs of the cause.

(ii) **THAT** upon delivery of the said Award, the Claimant expressed dissatisfaction therewith since he was not reinstated as he had hoped and, similarly, the Applicant on its part, also expressed dissatisfaction and indicated, *inter alia*, that it would prefer an Appeal therefrom.

(iii) **THAT** in view of the above sentiments by both parties, the Honourable Court was convinced that both parties wished to appeal and accordingly directed that certified copies of the Award and proceedings be provided to the parties.

(iv) **THAT** it was therefore the legitimate, logical and reasonable expectation of the applicant that since both parties had indicated their respective dissatisfactions and, impliedly or expressly, intentions to appeal, no adverse action would be taken by either against the other until an appeal and Cross-Appeal had been filed, heard and determined.

(v) **THAT**, indeed, on its part, the Applicant promptly initiated the appeal process against the Honourable Court's said Award and, to that end, filed and served upon the Claimant a Notice of Appeal, together with a letter requesting for the certified copies of the Award and the proceedings.

(vi) **THAT**, however, contrary to his earlier sentiments of dissatisfaction, the Claimant has unilaterally extracted a Decree and is proceeding to enforce the Award and execute the Decree by taking out Warrants of Attachment and Sale and has, in fact, already proclaimed the Applicant's movable property and will sell it by way of public auction at any time.

(vii) **THAT**, in any event, the Claimant did not prepare and/or serve upon the Applicant the appropriate draft Decree for perusal and approval, with or without amendments, as is the practice.

(viii) **THAT**, furthermore, the said proclamation

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(viii) **THAT**, furthermore, the said proclamation and/or intended sale by public auction is premature since no costs have been taxed and/or assessed as is also the usual practice, especially considering that the Applicant is, by implication also entitled to 25% of the costs of the cause.

(ix) **THAT** on the face of it, the Auctioneer herein does not seem to have a valid license or authority to operate as such within Nairobi District in which he is now purporting to operate.

(x) **THAT** the intended Appeal has high chances of success yet the same risks being rendered nugatory unless the orders sought herein are granted.

(xi) **THAT** the Claimant does not stand to suffer any harm since the Applicant is a financially sound statutory body capable of meeting any financial obligations that may be imposed in the event that the Appeal does not succeed and therefore the stay orders ought to be granted unconditionally given the said position; whereas, on the other hand, the applicant stands to suffer irreparably if the Claimant is allowed to proceed with the sale of its moveable property.

(xii) **THAT**, however, should the Court so direct, the applicant is ready, able and willing to furnish an appropriate undertaking or offer such security or to comply with any condition and direction as to the Honourable Court may appear just.

(xiii) **THAT** it is in the interests of justice and fairness that the Orders ought herein be granted.

The application was first heard ex-parte on 8th February 2013 and interim stay orders were granted. The application was thereafter allocated to me for hearing and determination. The parties appeared before me on 21st February 2013 and argued the application.

Mr. Ashitava on behalf of the Applicant informed the Court that he was only seeking prayer No.3 and 4 of the application, that is stay of execution pending the hearing and determination of this application and the intended appeal. He submitted that the decree was extracted by the Claimant ex-parte without involving the Respondent, that the Claimant had expressed his dissatisfaction with the award and the Respondent did not expect him to execute the decree, that the Respondent applied for typed proceedings, judgement and decree on 19th November 2012, lodged a Notice of Appeal on 21st November, 2012, that it was a legitimate expectation of the Respondent that the Claimant wished to appeal and that the execution process was commenced before taxation without leave. He further submitted that the stay should be granted as a matter of course and unconditionally as the Respondents financial position is such that payment of the decretal sum is guaranteed should the appeal fail and that in the alternative the Respondent can give an undertaking. This is because as the Respondent puts it, it is a parastatal enjoying monopoly and performing unique rare functions of regulating and setting standards, and is not about to collapse.

The Respondent further submits that the draft Memorandum of Appeal raises issues of law. He urged the Court to allow the application in furtherance of the interests of justice, and that the only inconvenience to the Claimant would be the delay in the enjoyment of the fruits of the award. He further submitted that the Claimant is an individual whose property is not known and should the appeal succeed the return of the decretal sum is not assured, that weighing the two, the scale tilts in favour of granting the application. He further submitted that the issue of auctioneer's fees can only be determined in the appeal.

In his reply the Claimant submitted that he is not a lawyer and was not represented and stands corrected if he committed any errors on issues of law. He said he relied on his replying affidavit, and submitted that it is Mr. Ashitava who asked for proceedings and judgement and for stay. He further submitted that he had no intention to appeal after the Court clarified to him that he could not be re-instated as he had no grounds on which to appeal, that the notice of appeal is not valid as it is not signed, that he had requested that taxation be done after execution.

He further submitted that he applied for execution of the decree after the stay of 30 days lapsed without the Respondent filing a formal application for stay of execution as directed by the judge. He prayed that the Respondent pay the auctioneer's fees. He urged the Court to dismiss the application so that he can enjoy the fruits of the award as he is currently unemployed.

I have considered the pleadings, the annexed evidence and the oral submissions of the parties.

The Respondent has raised several issues in support of the application for stay of execution. Among them is the legitimate expectation that the Claimant was not going to execute. I find this ground unacceptable. From the record in the file, the Claimant only expressed his disappointment for not being re-instated after the Court found that he had been unfairly dismissed. He did not at any time express the desire to appeal. In any event there was no order against the Claimant that would motivate him to

appeal. On the converse, the Respondent had asked for stay of execution for 30 days which was granted. The Court further advised that either party should apply for stay by way of formal application. Such a situation does not give rise to any legitimate expectation that the Claimant will not apply for execution.

The Respondent further raised the issue that the decree was extracted without their involvement. The record shows otherwise. It is the Respondent who applied for the decree together with judgement and proceedings in their letter to the Deputy Registrar dated 19th November 2012. The Claimant only applied for execution.

The other issue raised is that the application for execution was made before taxation. This is a technical legal issue that the Respondent having been aware that the Claimant is not a lawyer and is unrepresented, would not have expected him to be aware about. Both the Constitution and the Industrial Court Act provide that justice should not be unreasonably restricted by procedural technicalities. In any event this does not explain why stay of execution was not applied for earlier.

I also do not agree with the Respondent that the grant of stay is a matter of course or that the status of the Respondent should give it special consideration when the Court is considering its application for stay of execution.

I however note that appeal is a right in furtherance of justice and that every party should be allowed to pursue the right of appeal to the highest Court provided there are reasonable grounds of appeal.

The Respondent has raised triable issues in its draft Memorandum of Appeal annexed to the affidavit in support of the application. The Respondent has taken reasonable steps towards appeal by applying for proceedings, judgement and decree without undue delay.

The Respondent cannot however expect to be granted an unconditional stay, especially taking into account their lapse in failing to apply for stay before the 30 days stay granted by the trial Court lapsed. There would have been no need for this application had they filed the application for stay in good time. Specifically the auctioneer's costs would not have been incurred. For these reasons I make the following orders:-

1. ***The Respondent is granted stay of execution of the Award delivered by the Honourable Mr. Justice Byram Ongaya on 16th November, 2012 and the subsequent Decree issued on 11th January, 2013, together with any consequential order, pending the hearing and determination of the intended Appeal.***
2. ***The Respondent shall deposit the decretal sum into an interest earning account in the joint names of the Claimant and the Respondents advocates.***
3. ***The Respondent shall pay costs of the Auctioneers.***
4. ***The Respondent shall pay the Claimant Shs.20,000/= being costs of this application.***

Orders accordingly.

Read in open Court and signed on this 28th day of March, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

Andrew Moiroro

In the presence of:- _____ Claimant

Ashitiva

_____ Respondent