



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 752(N) of 2009

PHINIAS ASENEKA NGERESA.....CLAIMANT

VS

SAROVA HOTELS LIMITED T/A SAROVA STANLEY..... RESPONDENT

Mr. Masese for the Respondent/Applicant

Mr. Achoki for the Claimant/Respondent

RULING

The Respondent/Applicant in the Notice of Motion dated 16th August, 2011 seeks stay of execution of the Ruling of the Honourable Justice Charles Chemmutut delivered on 26th July, 2011 pending the hearing and determination of an Appeal. The Notice of Appeal was filed on the 15th August, 2011. Interim orders were granted on 18th August 2011, and the Claimant/Respondent was directed to file a replying affidavit on or before 26th August, 2011 and the Application be heard *interparties* on 1st September, 2011 at 10.00 a.m.

On 1st September, 2011 there was no appearance for the Respondent/Applicant and the Claimant/Respondent appeared in person. The Application was dismissed for non-appearance and a go-ahead to execute the decree was issued.

The Application was subsequently reinstated and the orders dismissing it for non-appearance set aside.

The matter was heard eventually on 19th November, 2012 with Mr. Masese appearing for the Respondent/Applicant whereas Mr. James Achoki appeared for the Claimant/Respondent.

Though the Respondent/Applicant makes a bare statement that the Intended Appeal has good prospects of success, no reasons for such believe have been set out in the Notice of Motion itself nor in the Supporting Affidavit of Mercy Njoroge.

Furthermore, this matter was heard on 19th November, 2012 more than 1 year from the date the Notice of Appeal was filed yet there was no indication from the Applicant that the Appeal itself had been filed setting out grounds on Points of Law for the intended appeal.

However, Mr. Masese submitted that the Award of the Court delivered on 24th April, 2010 had a patent mistake in that the judge had erred in the tabulation of the Award in that gratuity was calculated on

the basis of 35 years service whereas the claimant had only served 20 years.

Furthermore, the Claimant was awarded house allowance in spite of the fact that he had all along been paid house allowance during his 20 years service. This was also erroneously calculated on the basis of 35 years.

Also the Claimant was said to have been a supervisor, not covered by the Collective Bargaining Agreement and therefore was not entitled to payment of severance allowance at all.

Mr. Masese added that the intended appeal will be rendered nugatory if the Application for Stay of Execution is not granted.

That the Respondent/Applicant was ready and willing to deposit the decretal sum in a joint interest earning account of the Advocates for the Claimant/Respondent herein and Federation of Kenya Employers pending the hearing and determination of the Appeal.

Finally, he submitted that the Respondent/Applicant will suffer irreparable loss and damage if the Award is executed and the Claimant/Respondent is not able to refund the decretal sum in the event the appeal was successful.

Mr. Achoki James for the Claimant/Respondent opposed the Application on grounds that there has been inordinate delay by the Applicant in bringing the Application and it is only meant to deny the Claimant the fruits of the Award.

That the suit had proceeded *ex parte* in default of appearance by the Respondent/Applicant and therefore the Applicant cannot now be heard to fault the Award having failed to attend the hearing of the matter.

That the Respondent/Applicant having lost an application to review the Award is estopped from having a second bite on the cherry especially because it was in default of appearance. That there are no new circumstances to warrant a review of the ruling that denied the Respondent/Applicant review of the Award.

As stated earlier, the Notice of Motion and the Supporting Affidavit does not disclose the grounds verbally relied upon by Mr. Masese. The Award itself was not annexed to the Application. It is also clear that there was inordinate delay to file a memorandum of Appeal and no reasons whatsoever are preferred by the Respondent/Applicant in its papers for the said delay.

Submissions by counsel must be based on the averments in the papers filed which unfortunately is not the case in the present matter. These reasons leave the court with no choice but to find that no case has been made out by the Respondent/Applicant to Stay the execution of the Award delivered by Justice Chemmutut on 26th July, 2011 pending the filing and disposal of the Intended Appeal.

The Application is dismissed with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 13th day of March, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE