



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 370 of 2011

JIMIM NHLAPO MASEGE.....CLAIMANT/RESPONDENT

versus

AVIATION & ALLIED WORKERS UNION.....RESPONDENT/APPLICANT

RULING

1. The Respondent filed an Application on 20th March 2013 seeking stay of execution of the judgment and/or decree together with consequential orders, stay of execution of judgment and/or decree pending the hearing and determination of the Application for Review. The Claimant opposed the Application and filed Grounds of Opposition on 26th March 2013.

2. The Respondent's Application was precipitated by a decision of this Court which the Respondent seeks to have reviewed. The Respondent argues that it should be allowed to re-open the case and present its evidence as well as cross-examine the Claimant. Mr. Nyabena for the Respondent filed submissions and cited the case of **Reliance Bank v. Norlake Investments Ltd [2002] 1 EA 227** in support of the Application for stay. He urged the Court to grant stay as failing to do so would render the Application for Review nugatory.

3. The applicant would be required to satisfy the two basic and well known requirements for grant of stay, namely:-

(i) that the applicant's intended review is an arguable one i.e.

that it is not frivolous; and

(ii) that unless I grant the relief sought, if the intended review

were to succeed that success would have been rendered nugatory by the refusal to grant stay.

4. The Respondent is entitled to seek a stay as has been done in this case. One has to satisfy the set of criteria above to enjoy the comfort of the stay. The Applicant has to satisfy the Court that the circumstances existing meet the threshold for grant of stay. These are settled in judicial precedent and the case of *Reliance v. Norlake (supra)* is one I have to consider. Others are **Githunguri V. Jimba Credit Corporation Ltd. (NO. 2) [1988] KLR 838**, **J.K. Industries Ltd. v. Kenya Commercial Bank Ltd. [1982-85] 1 KAR 1988**, and **Exclusive Estates V. Kenya Posts & Telecommunications Corporation And Another [2005] 1 E.A.**

5. Basically a judgment-creditor is entitled to the fruits of his judgment and unless good cause is shown, a Court will not interfere with the judgment by way of stay. Any Court before whom an application for stay comes must consider whether to grant the Orders sought would destroy the rights that have accrued, or render nugatory the intended appeal or review. Before upsetting the *status quo*, a Court must be satisfied of the principles outlined hereabove. It should not be a red-herring. This Court has an unimpeded discretion to grant or refuse a stay. All I am to do is to ensure that I do not exercise this discretion erratically or capriciously but judiciously. In making my decision, the discretion I will exercise must take into account the competing rights of the parties seeking justice.

6. The Claimant's judgment is one he would like to reap the fruits thereof. The Respondent seeks to upset the cart. How is the gravamen of the stay application? Is it viable using the test above? The Review application raises arguable points. This is not to say that there will be automatic success in the Review, it merely places before the Court some material that shows *prima facie* that there are points that can be argued. The arguments raised surrounding Section 31 and 35 are arguable. The fallacy or merit of the review sought will be revealed when the Review proper is considered.

7. I would on the basis of this order that the Respondent is entitled to grant of the Order of stay on the following terms:-

i. The Respondent must furnish security to wit a bank guarantee for the entire decretal sum within 7 days failing which the Application for stay will stand dismissed with Costs.

It is so ordered.

Dated and delivered at Nairobi this 31st day of **May** 2013

Hon. Mr. Justice Nzioki wa Makau
Judge