REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1449 of 2011

KENYA NATIONAL PRIVATE SECURITY

WORKERS UNION ……. CLAIMANT

V

KENYA KAZI SECURITY SERVICES LIMITED ……. RESPONDENT

Rika J
CC. Leah Muthaka

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Mr. D.B. Wati Counsel, instructed by D.B. Wati & Company Advocates for the Claimant

Mr. Kenneth Alison Fraser Senior Counsel, instructed by Hamilton Harrison & Mathews Advocates for the Respondent

RULING

1. This is a Ruling on the application filed by the Respondent, dated 22nd April 2013, which seeks to stay execution of the Second Award, delivered by the Court on 26th March 2013.

2. The application is supported by the affidavit of James Ouya Omwando, the Chief Executive Officer of the Respondent, sworn on 22nd April 2013. The application is opposed. The Claimant filed a replying affidavit, sworn by its General Secretary Isaac G.M. Andabwa. The application was argued on 30th April 2013.

3. The Court gave its first Award on 6th December 2011, requiring the parties to negotiate, conclude and register a collective agreement, within 60 days of the delivery of the Award. The parties did not do so. They negotiated the collective bargaining subjects at length, with the assistance of the Provincial Labour Officer. At some point they negotiated under the chairmanship of Mr. Ambenge, Senior Executive Officer of the Federation of Kenya Employers (FKE), but they were not able to agree on the monetary subjects. It is against this background that they submitted by agreement, the twenty two subjects to the Court, resulting in the Second Award delivered on 26th March 2013.

4. The Respondent filed a Notice of Appeal against the Second Award on 11th April 2013. The Notice indicates the Intended Appeal is with respect to twelve out of the twenty two subjects dealt with in the Second Award. These are: hours of work; leave travelling allowance; night shift allowance; meal allowance; transport/commuter allowance; training allowance; death of an employee; cleaning allowance; general wage increase; and effective date of implementation.

5. The Respondent told the Court that it has an arguable appeal. The Court did not have jurisdiction to hear and determine the dispute. Section 57 of the Labour Relations Act, stipulates that the employer shall conclude a collective bargaining agreement for all unionisable employees covered by the recognition agreement. The Court did not have the jurisdiction to Award only a section of the Respondent's employees. The backdating of the date of implementation is an arguable ground. The Respondent stands to suffer substantial loss if stay is not granted. The increase in allowances for all employees covered under the Second Award is Kshs. 11,679,250 per month. The total arrears from 1st June 2012 to 31st March 2013 is Kshs. 116,792,500. The Respondent is also required to implement wage increases. Implementation would result in unsustainable business. Implementation would jeopardize the employees it is meant to assist. The amount to be deducted from the employees' salaries, in event the appeal succeeds, and they have to repay the Respondent, would be colossal. The appeal is not likely to be heard in the next one year. There is something extra demonstrated by the Respondent to merit stay, in that the contract the Respondent has with the US Embassy Nairobi for provision of security services, would be unsustainable. The Respondent asks the Court to look at the effect of the whole Award, not the individual subjects, in considering the merit of the application. Meal allowance is given to an employee when he/she is away from the principal place of work. If the Court deems it necessary to have the Respondent deposit security in Court, the Respondent shall comply. The Respondent urges the Court to grant stay of execution.

6. The Claimant replies that the appeal would not be rendered nugatory by the full implementation of the decision. The allowances granted by the Court are minimal, amounting to a monthly about Kshs. 5,490 per guard. The wage increase was by 12 % only after a lull of sixteen years. The Claimant's members are employees of the Respondent, and in case the appeal succeeds, it would be possible to recover the increments from the employees. The appeal would not be rendered nugatory. Payment would not result in substantial loss to the Respondent. Payment of what the Court has granted cannot amount to a substantial loss. The Claimant adopts the ruling of the *High Court of Uganda [Justice Lameck N. Mukasa] in High Court of Uganda at Kampala HCT-00-CC-MA-086-2006, between Pan African Insurance Company [U] Limited v. International Air Transport Association*, where the Court stated: ''***the words substantial loss cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words substantial loss must mean something in addition to, or different from that.''*** The submission by the Respondent that the contract it has with the US Embassy would be rendered unsustainable amounted into revisiting of the substantive merits of the dispute. The parties have already been heard on the substantive dispute. The sums granted in the Award are based on the Regulation of Wages [Protective Security Services] Order of 1998. Meal allowance is a given by the law. In 1998 it was roughly Kshs. 300. The Court fixed it at Kshs. 250. It is the law that grants what the Court gave in the Award. If the contract is to collapse at the cost of meeting the demands of the law, it must be left to collapse. The Respondent is under obligation to comply with the local labour law. Even if the Court ordered for deposit of security, it would come to the same effect, with the Respondent having to deposit the money its claims not to have.

The Court Finds and Orders-:

7. This Court heard the parties at length and made an initial Award, dated 6th December 2011. The parties were ordered to negotiate, conclude and register a CBA within 60 days of the Award. It was noted that the parties signed a recognition agreement on 28th February 2007. This is six years back. They have not negotiated and concluded a single CBA.

8. The Court has attributed this to lack of good faith in collective bargaining. Good faith demands that: ***[a] parties are active and constructive in establishing and maintaining a productive employment relationship; (b) are responsive and communicative and use their best endeavour to agree on an effective and efficient bargaining process; (c) meet and together, consider and respond to each others' proposals; and, (d) within a reasonable time conclude a collective agreement.***

9. Parties who entered into a recognition agreement six years ago, and do not have a single registered CBA, cannot be said to have observed good faith collective bargaining. It was for these reasons that the

Court gave its First Award, requiring the parties after five years to come to Court, to register their first CBA within sixty days of the delivery of the Award.

10. What followed the decision of 6th December 2011 reveals a pattern of spirited resistance by the parties, to meet the minimum labour standards of this country. The Court stated in the Second Award that it is not proper to apportion blame to either party, for the delay in putting the dispute to rest. The record however raises fundamental questions on the conduct of the Respondent. It is questionable whether the Respondent desires to meet the minimum labour standards, by having a CBA in place, six years after signing the recognition agreement. The Respondent initially instructed the Law Firm of Kantai and Company Advocates. All manner of technical points of law were raised by the Respondent and disposed of. There have been arguments about the *locus standi* of the Claimant to bring the Claim. The name of the Respondent has been canvassed. The Award of December 2011 was not met. Parties went before the Labour Office for conciliation. They went before the Federation of Kenya Employers who chaired negotiations. Later on the Federation appeared in Court, representing the Respondent. Now, the Respondent has engaged the Law Firm of Hamilton Harrison and Mathews. The parties told the Court they had failed to agree on the monetary subjects, and submitted twenty two issues for the adjudication of the Court. All along, the Respondent has argued that it holds a five year contract for provision of security services at the US Embassy. The fact that the Respondent is on a five year contract, should be all the more reason to ensure there is a CBA in place. Otherwise there is a real danger that the Respondent's successive periodic contracts will end one after the other, without there having been registered a single CBA, notwithstanding that recognition was given in 2007.

11. The Court is not satisfied that there is an arguable appeal based on recondite matters of the law. The Second Award re-affirmed the minimum statutory standards given by the Employment Act and the Regulation of Wages [Protective Security Services] Order 1998. The Order remains in force by virtue of Section 63 of the Labour Institutions Act No. 12 of 2007. The Award of the Court is not entirely executory, but is largely declaratory, advising the parties what the minimum statutory standards are. Terming this as a decision where there is a Decree-Holder and a Judgment-Debtor is not entirely correct. Parties disagreed on twenty two items. The Court upheld the position of the Respondent on a number of items; upheld in part some of the claims by the Claimant; and at all times pointed out to the parties the wage floor, as defined by the Kenyan Law. It is not proper therefore to argue that there is one Decree-Holder and one losing Judgment-Debtor in the dispute, who must be protected by the Court in its appellate endeavours.

12. In determining whether the stay of execution of the executory parts of the Award should be granted, the Court agrees with parties that the principles applicable in determining stay of execution in the High Court, by virtue of Rule 31 [2] of the Industrial Court [Procedure] Rules 2010, are relevant in the proceedings of the Industrial Court. There are certain of those principles that must be given more weight by the Industrial Court, given the nature of the Industrial Court as an Institution specifically created for the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development.

13. Section 17 [2] of the Industrial Court Act 2011, states that an appeal from a judgment, award, decision or order of the Court shall only lie on matters of law. The Court has suggested above, that the Respondent ought to show there are recondite matters of law for appeal, in seeking to stay execution. There is no draft Memorandum of Appeal attached to the application. Senior Counsel Mr. Fraser explains that he has not seen the proceedings, and was not involved in the hearing of the substantive claim. The Notice of Appeal lists specific subjects. The Claimant argues correctly that most of the Award gave what are basic statutory standards. An item like cleaning allowance was proposed by the Respondent at Kshs. 450, against the demand by the Claimant of Kshs. 1,000. The Court granted Kshs. 450 as recommended by the Respondent. The Respondent wishes to appeal against its own recommendation. There are other examples that would lead the Court to form the view that there are no recondite matters of law involved, meriting stay of execution.

14. Among the principles on stay of execution, shown in a succession of Judicial Authorities, are that the Court weighs the rights of the parties; considers the equity of the case and the conduct of the Intended

Appellant; and examines if there are special circumstances. A decision of the Industrial Court seeks to correct a social injustice. We have a role to ensure minimum labour standards are maintained. The Claimant's members have not had a CBA six years after the Respondent granted their trade union recognition. They have not seen the benefit of collective representation. The Respondent argues repeatedly that it has a five year contract with the US Embassy, and cannot sustain the obligations created by the Award. It has been slow in endeavouring a resolution to the dispute. There is a real possibility that its contract finally comes to an end, without the Respondent ever having respected the obligations created under the recognition agreement. At one time the Respondent even argued against the legitimacy of the recognition agreement. The guards have clearly been disadvantaged by the long delay in having a CBA. The Respondent alleges the arrears payable are quite high. This may well be so, but must be seen against the time taken to conclude the process. It would be fair to consider the prolonged period the guards have suffered deprivation. The equity of the case and the conduct of the Respondent, do not warrant any further delay. The Respondent has not shown that there are any special circumstances to merit stay. Special circumstances would include the fact that the appeal would be rendered nugatory; whether the Respondent has good chances of succeeding on appeal; and whether the Claimant would be able to refund the Respondent the amounts paid to employees, in case the appeal succeeds. The Claimant members are employees of the Respondent. They are not third parties or strangers in the contract of employment. Any wage increments granted, can always be deducted from their future entitlements. The Court has not been shown any good and arguable grounds for appeal. The appeal would not be rendered nugatory by implementation of a long-overdue CBA. Further delay would result in grave injustices to the 935 employees working at the US Embassy.

15. In the Industrial Court, the principle that must outweigh all others in considering stay of execution is that employees must be allowed to enjoy the fruits of their Awards, unless there are strong and special circumstances demanding they have to wait. The Court agrees with Mr. Wati that, there must be shown some collateral circumstances, and in some cases some inherent matters, which may unless stay is granted, destroy the subject matter or the proceedings, or foist upon the Court of Appeal a situation of complete helplessness; render nugatory the Order of the Court of Appeal; and paralyze the right of appeal. The Court does not think that whatever happens in the intended appeal, there can be no return to the status quo.

16. It has been argued time and again by the Claimant, and with the approval of this Court, that the US Government requires suppliers of services in its Embassies worldwide, to respect the labour law of host countries. This is standard requirement of International Labour Law, the maxim being ***lex loci laboris***. Loosely translated, the maxim states that the applicable labour law must be the labour law of the place. Labour is highly territorial and the Respondent cannot formulate its own labour standards, to govern employees working in the Kenyan territory. It must respect the law of the place, as guided by the regulations issued by the US Department of State. One cannot conclude a recognition agreement six years ago and not have a CBA to-date, and even when assisted by the Court in settling disputed items, still takes the employees to the Court of Appeal on flimsy grounds, while anticipating the end of the contract without ever submitting oneself, to the Labour Laws of Kenya.

17. The Court does not think that an Order for the Respondent to deposit security pending appeal, would serve any justice to the parties. Such an Order would only have the effect of delaying implementation of what should be the first CBA. The Court gave its reason for the effective date of the CBA. The Respondent ought to recall the effective date desired by the Claimant; the date the parties were supposed to have concluded the CBA under the First Award; and the economic impact the long delay has had on all those involved. The issue of the Court's jurisdiction has no weight. The same parties have been to conciliation, negotiation and adjudication. There is on record an Award made by this Court, which was not challenged through appeal. Section 57 requires a CBA be concluded for all employees covered by the recognition agreement. There is nothing in this law which says a CBA cannot be negotiated for a specific collective bargaining unit. The US Embassy is a special collective bargaining unit, which cannot be lumped together with other unionisable employees. The employees working there, have a distinctive community of interests. Parties have from the beginning gone through negotiation, conciliation and adjudication on this understanding.

18. In the end, the Court notes that it is not in its mandate, to shield businesses which are reluctant to honour minimum labour standards. If existing contracts are going to collapse for being subjected to the rigours of the minimum labour standards, they must be left to collapse. It is wrongly argued that investors must be encouraged to invest and retain their investments in host countries, at any cost. The parties must also realize that the Industrial Court intervenes in most cases, to obviate industrial unrest. An Award of this Court until recently was not executable in this Court, by extraction of a decree. Employers and employees could resort to economic pressure through strike actions and lockouts. Awards are now expressly executable as decisions of this Court, but it is worth noting that strike actions and lockouts are still open to employers and employees in attainment of workplace justice. In giving orders for stay of

execution, the Industrial Court must also be cautious not to push employers and employees into these other means of self-help.

For these reasons, the Respondent's application dated 22nd April 2013 is refused with no order on the costs.

Dated and delivered at Nairobi this 27th day of May 2013

James Rika

Judge_____