



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1614 of 2011

EVANS AGULO OVONYOLI.....CLAIMANT/RESPONDENT

VS

H. YOUNG COMPANY LTD..... RESPONDENT/APPLICANT

Claimant in person

M/S Muriu for the Respondent

RULING

The Respondent/Applicant filed a Notice of Stay of Execution pending Appeal against the judgment dated 27/2/2013. The Claimant was awarded Kshs.239.061 plus costs which have not been taxed to date.

The Respondent filed a Notice of Appeal to the Court of Appeal dated 1/3/2013 and has requested for typed proceedings. No specific grounds of Appeal have been outlined in the Application however, the Respondent/Applicant has preferred the following reasons for Stay of Execution;

- (i) That the Respondent considers the appeal to be arguable with a high probability of success;
- (ii) That the Respondent is faced with the inevitable prospect of an attachment and execution for the recovery of the decretal amount;
- (iii) That if the Order for Stay of Execution is not granted the Respondent's Intended Appeal will be rendered nugatory and the applicant will suffer irreparable damage because the Claimant is jobless and not gainfully employed and therefore will be unable to refund the decretal amount if paid to him;
- (iv) The applicant is ready, willing and able to deposit by way of security such sum as this Honourable Court may order to be so deposited in a joint interest earning account to the order of both the Applicant's and the Respondent's Advocates.
- (v) That the application has been made without unreasonable/inordinate delay and same ought to be granted in the interests of equity and justice.

The Application is supported by the affidavit of Gopalkrishhan Balakumar.

The Claimant/Respondent is unrepresented in this matter and indeed appeared in person at the time of the

trial. He has filed what he refers to as “Application to Struck of Stay of Execution Pending Appeal”, and therein has listed several reasons why the Application for Stay of Execution of the Judgment and Decree in his favour should be dismissed with costs as follows;

- (i) That both sides were heard before judgment was delivered and the court upon assessment of evidence adduced found in his favour;
- (ii) That since his employment was unlawfully terminated in July 2011 as a person he has suffered and continued to suffer irreparable harm being the soul bread winner for his family.
- (iii) That no grounds to challenge the judgment of the court have been indicated by the Respondent/Applicant other than a bald statement that the appeal is arguable.
- (iv) That it is in the interest of justice and balance of convenience that this application be dismissed to allow the Claimant to enjoy the fruits of his judgment.
- (v) That he travels from Western Kenya to attend to these proceedings and is incurring a lot of expenses as a result of the dilatory tactics by the Respondent and will continue to suffer a lot of expenses and irreparable loss if these proceedings are not brought to an end.

Grant of Stay of Execution pending Appeal is not a matter of course. It is trite that an Intending Appellant has to demonstrate that he has reasonable prospects of winning the Intended Appeal by showing that same is arguable.

Section 17 of the Industrial Court Act 2011, specifically restricts appeals from the decisions of the Industrial Court to Points of Law. It is therefore not asking too much of the Applicant to at least indicate the legal grounds on which the Intended Appeal will be founded having studied the judgment of the Court. This is the only way the applicant would satisfy the court that the Intended Appeal is arguable and is therefore not frivolous and/or vexatious.

It must be remembered that, in most cases before the Industrial Court as in this one, the balance of power and resources is heavily tilted in favour of the Employer as opposed to an Employee who no longer has any employment and therefore, is barely surviving as a result of what the court has already found to be an unlawful and unfair termination of his employment.

The Applicant did not even bother to attach the judgment of the court to the Application let alone make any specific reference to its contents. It is to be noted that the relationship between the Claimant/Respondent and the Applicant/Respondent stretches far back as 1998 wherein the Claimant worked in various works projects as a heavy vehicle driver. He had been retrenched and rehired severally by the Respondent by virtue of his good work record.

This time round, he had been rehired on 9th February 2011, was forced to relocate from Western Kenya to Mombasa only to be dismissed on 5th July 2011 for what the Court has determined to be unfounded and spurious reasons. He was brought to great inconvenience and financial burden of relocating back without any payment of terminal benefits by the Respondent at all.

In this regard, the court finds that the balance of convenience in this case favours the Claimant/Respondent. The Court is inclined at this point to curtail his further suffering and allow him to enjoy the fruits of his labour.

The Court is not convinced that the decretal amount is so large as to result to irreparable loss to the very able respondent, a multinational construction company. The Claimant has indicated that he resides on his farm in Western Kenya and therefore allegations that the Applicant would not be able to recover the decretal amount should the appeal be successful is not well founded. They have the option of re-hiring the Claimant if they so wished since the court has found on the facts of this case that he committed no misconduct at all and his services ought not to have been terminated.

Even though the Application has been brought without much delay, and that an offer has been made to deposit the decretal amount either with the court or in a joint interest earning account, the court restates that given the circumstances of the Claimant demonstrated in this matter, it would not be in the interest of justice and fair play to delay payment of the decretal sum to him any longer.

Accordingly, the Application for Stay of Execution of the judgment of the court dated 27/2/2013 is dismissed with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 14th day of May, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE- INDUSTRIAL COURT