



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1918 of 2011

NJERU KANYAMBA (immediate former secretary

general of the 1st respondent).....CLAIMANT/APPLICANT

VERSUS

KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS.....1ST RESPONDENT

AKELO MISORI.....2ND RESPONDENT

OMBOKO MILEMBA3RD RESPONDENT

WICKS MWETHI NJENGA4TH RESPONDENT

TEACHERS SERVICE COMMISSION.....GARNISHEE

RULING

The Applicant/Claimant seeks the court to vary its ruling dated 6th December, 2012 directing the Garnishee to release a sum of Kshs.607,200 to the Applicant immediately and the balance including interest at 14% from July 2006 be deposited in an interest earning joint account in the names of the Applicant and the 1st Respondent until the pending appeal is heard and determined.

The Applicant basis the Application on grounds that on 18th December, 2012, the respondents abandoned the Intended Appeal and moved back to the trial court to seek to set aside the *exparte* order issued on 11th October, 2012.

That the trial court upon hearing the application *interpartes* on 12th February 2013 dismissed the same with costs thus upholding the judgment and concluding the matter before it.

That at the time this application was filed, no appeal was pending before the Court of Appeal hence the court should direct the decretal amount be paid in full.

That the Garnishee complied with the first part of the order to deposit Kshs.607,200 to the Claimant’s account on 6th December, 2012 and therefore the balance todate should be released.

The Applicant attached a ruling of the Court of Appeal in Civil Application No.NA 259 of 2012 dated 11th October, 2012 wherein the court in refusing to grant orders for Stay of Execution pending appeal stated on page 5 at paragraph 11 and 12 as follows;

“Having considered the applicant’s draft memorandum of appeal in the light of the above guidelines, we are of the view that the applicant’s Intended Appeal is not arguable. Lest we pre-empt its hearing we say no more.

The applicant having punged its contempt, maybe it should go back to the trial court and seek to set aside the ex-parte judgment so that the matter can be heard interpartes and determined on the merits”.

The above came to pass and the trial court declined to hear the matter afresh.

As at the time this application was filed, no appeal was pending before the Court of Appeal, the Respondent/Appellant having elected to pursue a review application before the trial court which application was dismissed on 12th February, 2012 as earlier said.

Rule 32(1) of the Industrial Court (procedure) Rules, 2010 reads;

“(1) A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling –

(a) if there is a discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;-----

(e) for any other sufficient reasons”.

It is common cause that the parties were unable to open a joint account because the banks approached declined to open a joint account between an individual and a corporate. The Respondent had admittedly opened an account including the Applicant as one of the several signatories. The Applicant declined to co-operate as this was contrary to the court order to open a joint-account.

Furthermore, the move by the Respondent to move back to the trial court to seek for a review of the judgment of the court in itself amounted to an abandonment of the Intended Appeal and any move to reinstate the appeal upon dismissal of the review application by the trial judge was an abuse of the court process.

Upon considering the circumstances of this matter, it is without a doubt that the court of Appeal discredited the Intended Appeal and advised the Respondent/Appellant to seek relief from the trial court by way of review of proceedings which it proceeded to do.

This move compromised the purpose of my order dated 6th December, 2012, directing deposit of the balance of the decretal sum including 14% interest to the date of payment *“until the pending Appeal is heard and determined”*.

The court, therefore has no hesitation in setting aside the said order of 6th December, 2012 and direct that the balance of the decretal amount with interest be paid forthwith by the Garnishee to the Applicant/Claimant including 14% accrued till the date of such payment.

The Respondent to pay the costs of this application.

It is so ordered.

Dated and Delivered in Nairobi this 9th day of May, 2013.

Mathews N. Nduma
PRINCIPAL JUDGE – INDUSTRIAL COURT