REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 24 of 2013

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION.....CLAIMANT

-VERSUS-
JAMES FINLAY (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd May, 2013)

RULING

The respondent being the applicant filed on 28.03.2013 the Notice of Motion brought under section 12(3)(i) and (viii) of the Industrial Court Act, 2011, Rule 16 of the Industrial Court Proceedings and the inherent powers of the court. The application was supported by the affidavit of Daniel Kirui sworn on 27.03.2013. The claimant opposed the application by filing the replying affidavit of Henry Omasire sworn on 8.04.2013.The application was certified urgent and it came up for inter-partes hearing on 24.04.2013.

During the submissions, counsel for the respondent Mr A. Orao-Obura urged for prayers 3 and 4 in the application namely:

"3. THAT the honourable court be pleased to grant orders of stay of execution of its judgment and orders dated 22nd March 2013 and any subsequent orders thereto pending the lodging, hearing and conclusion of an appeal to be lodged with the Court of Appeal against the judgment of the hourable court in this cause or for such period the honourable court deems fit in the circumstances.

4. The honourable court be pleased to issue any further or other orders it deems justifiable in the present circumstances."

The principles to be satisfied by an applicant in an application for stay of execution pending appeal have been settled and are provided for in Order 42 Rule 6 of the Civil Procedure Rules. The conditions are that substantial loss may result to the applicant unless the order is made; the application has been made without unreasonable delay; and such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

In the present case, it is not disputed that the application was made on time and the court finds that the application has been made without unreasonable delay.

To determine whether the applicant has satisfied the other two conditions, the court will set out a background while bearing in mind that this is not a jurisdiction in review or an appeal in view of the court's judgment.

The orders for which the application seeks to stay and as set out in the judgment were stated as follows:

“In conclusion, judgment is entered for the claimant against the respondent for orders that:

a)the redundancy notice dated 16.01.2013 issued by the respondent is set aside;

b)the respondent shall not close its James Finlays (K) Limited, Chomogonday Central Hospital unless the closure is in accordance with the provisions of the Medical Practitioners and Dentists Act and, the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000;

c) the Deputy Registrar of this court to serve this judgment upon the Medical Practitioners and Dentists Board within seven days from the date of the judgment; and

d) the respondent to pay the costs of the case.”

The reasons for setting aside the redundancy notice were twofold. First, the respondent having determined or agreed upon the content and methodology of providing health care to its staff as envisaged in section 34 of the Employment Act, 2007, that methodology and content was an accrued term and condition of service which the respondent could not vary unilaterally but, could only vary in consultation with the claimants. Thus on this account the court stated:

“For avoidance of doubt, it is the holding of the court that an employer is entitled to determine the content and methodology of discharging section 34 obligation on provision for employees of proper medicines during illness and if possible, medical attendance during serious illness. However, it is also the holding of the court that if the content and methodology of discharging the obligation is in place and operational, the statutory provisions require the employer to consult the employee before varying that content and methodology. In the instant case the respondent discharged the obligation, for a long period of time, through running its central hospital at Chomogonday and the court finds that closure of the hospital, and thereby changes in the methodology, would be unlawful if implemented without proper and genuine consultations between the parties. As submitted for both parties, principles of good industrial practice required proper and genuine consultations between the parties. The court has found that such due process and good industrial practice was not upheld in this case.”[1]

This first ground spread to protect all employees of the respondent including those serving and not serving in the hospital as far as the respondent’s obligations under section 34 of the Act covered all the respondent’s employees.

The second reason for setting aside the notice was that the pretended closure of the hospital had proceeded in contravention of the relevant statutory provisions so that no valid abolition of offices held by the staff serving in the respondent’s central hospital at chomogonday had taken place. This ground specifically applied to protect the staff serving in the hospital ; redundancy could not take place if alleged closure was in breach of the law and if the closure, as it was shown to do, exposed the staff to obvious breach of professional ethics or to incur professional liability. Thus the court stated as follows:

“To answer the issue for determination, the court holds that in closing down a hospital, the owner must address the statutory obligation to notify the Board and to uphold the medical professional ethics over and above taking into account the statutory and agreed employer-employee obligations and rights in view of the closure. In the instant case the court has found that the respondent has not complied with the statutory obligation to notify the Board and to uphold medical professional ethics so that the closure process is not in accordance with the prescribed legal standards. In arriving at that finding, the court nevertheless notes the convoluted and lack of clarity of the relevant statutory provisions that require modernization to effectively deal with the expanded and ever growing sector of private medical institutions. It is the opinion of the court that modernization project should be undertaken by the Board and the concerned stakeholders and on priority basis in view of the difficulties and issues that have emerged in this case.” [2]

Taking that background in mind, the first issue for determination in this application is whether the respondent being the applicant has established that substantial loss may result to the applicant unless the order of stay is made. The second issue for determination is whether the applicant is able to give such security as the court may order for the due performance of the decree or orders flowing from the judgment as may ultimately be binding on the applicant.

It was submitted for the applicant that if there is no order for stay of execution, the applicant will not proceed with the redundancy process, the applicant will have to pay the employees' salaries and allowances while at the same time will have to meet its obligations under the collaboration contract with the Unilever Kenya Limited to provide medical services to the respondent's staff. To terminate the collaboration contract, it was submitted that the respondent would have to serve a six months contractual notice during which it would be suffering double payments and which the respondent will not be able to recover if the appeal is successful. Further, the applicant cannot operate the hospital as compelled by the orders in the judgment because doing so would be running the hospital without a licence as it would be liable to be prosecuted under sections 164 and 167 of the Public Health Act, Chapter 247 of the Laws of Kenya. To operate the hospital, it was submitted that the respondent will have to re-assemble the equipment and employ new staff because the medical staff previously serving at the hospital had already been redeployed to the respondent's dispensaries to enhance delivery of primary health care to the employees. It was also submitted that the redundancy notice was in compliance with the statutory provisions and it was due to lapse on 28.02.2013 (had actually lapsed) and it amounted to servitude for the respondent not to be allowed to proceed with the redundancy.

The respondent referred to several cases including **Rosengrens Ltd –Versus- Safe Deposit Centres Ltd** where it was stated:

"….We are faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending the appeal. It is not our function to disadvantage the defendants whilst giving no legitimate advantage to the plaintiffs. I say 'no legitimate advantage' because what the plaintiffs want to do is disadvantage the defendants so that the defendants may perhaps be minded to settle or perhaps be minded to concentrate their minds more on the plaintiffs' claim: I know not precisely. But the avowed intention of the plaintiffs is to make life difficult for the defendants pending the appeal. I do not myself regard that as a proper attitude; or, if it is a proper attitude to put before the court, it certainly would not be proper for the court to lend itself to it. It is our duty to hold the ring even-handedly without prejudging the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. If it would be easier for the defendants or if for any reason they prefer to provide security by a bank guarantee rather than by cash, I can see absolutely no reason in principle why they should not do so."[3]

The respondent also referred to **Sammy Muhia and Two Others –Versus- Kenya Power & Lighting Company Ltd** where the court stated:

"….Servitude is the condition of being a servant or slave to another (see Black's Law Dictionary 8th Edition). Being an involuntary condition, this includes the condition of one forced to labour- for pay or not for another by coercion or imprisonment. If the constitution protects the plaintiffs' against such condition then the enforcement of such right which to me is automatic must ensure that equally the rights of the defendant are not prejudiced."[4]

Further stating:

"It is my view in this application that to grant the said orders in the circumstances of this case would amount to holding the Defendant in 'servitude' to the extent that it will be compelled to retain the personal services of the Plaintiffs, provide them with a work and duties, pay them salaries and other allowances, allow them entry into its premises, give access to information and documents etc. the injunction will force the Plaintiffs and the Defendant together against the Defendant's will. This would be legal coercion and bondage."[5]

Counsel for the respondent further referred to the Court of Appeal judgment in **Kenya Revenue Authority –Versus- Menginya Salim Murgani** where the court stated:

"….It is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a yoke of slavery or a contract of servitude. This is the reason why either party is allowed to terminate the contract by giving the stipulated notice or a reasonable notice if not specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. This applies whether or not the contract is permanent or pensionable and this right vest in both the employee and the employer."[6]

Finally, counsel for the respondent referred to the Court of Appeal decision in **Eric V.J. Makokha and Four Otherss –Versus- Lawrence Sagini and Two Others** where the court stated:

"….It is well established that they cannot be forced to resume their office by equitable remedy of specific performance. So, the only remedy the University can pursue against them would be a claim for damages for breach of contract. Equitable remedies are said to be mutual. If that is so, if the University itself commits a breach of contract against them, the mutuality rule would dictate that they, for their part, can only seek damages against the University for breach of contract. If the University can properly compel them to return to its service by the equitable remedy of specific performance, then, and then only, can they claim as a remedy against the university the coercive equitable remedy of specific performance. To compel performance of a contract of personal service in this way, will turn a contract of service into a status of servitude."

Counsel for the respondent urged the court to make other orders such as vacating the order in the judgment setting aside the redundancy notice. The orders could, he submitted, be stayed for a determinable period of time to allow the respondent to apply to the court of appeal for stay orders pending the filing, hearing and determination of the appeal against the judgment. As to whether the orders of stay were available, counsel answered that the orders in the judgment were executable. He explained that the order setting aside the redundancy notice meant that the notice could not be relied upon to proceed with the redundancy and the order that the respondent shall not close the hospital except in accordance with the relevant statutory provisions meant that the respondent had to keep the hospital doors open and running.

It was submitted for the respondent that if the orders of stay are granted then the respondent would deposit the redundancy benefits for the affected staff in court.

The claimant's counsel submitted that there would be substantial loss if the orders are not stayed was not the true position in this matter because the respondent was only liable to pay Unilever Kenya Limited under the collaboration contract only on the basis of the patients that would be send to Unilever Central Hospital. If there were no sick employees no money would be paid and the collaboration contract did not provide for a retainer charge. Further the respondent would only incur liability if it terminated without giving the six months notice and nothing stopped the respondent from giving such notice.

It was submitted for the claimant that the respondent had not made any effort to obtain renewal of the license to operate the hospital and any prosecution as submitted for the respondent would be self inflicted and not attributable to the court orders in the judgment. The respondent could easily obtain the license by paying a late application fee. That further the letter marked DK2 on the supporting affidavit dated 1.02.2013 addressed to the Board as the regulator indicating the intension to close is a mere calculation to mislead the court as it came after the respondent's purported closure of the hospital and was never produced at the hearing as no reason has been provided for the obvious failure. The claimant also submitted that the redeployment of medical staff saved from redundancy from the dispensaries back to the Chomogonday Hospital would not lead to down grading of available primary health care services because the respondent, as per evidence on record, had already attained optimal primary health care services long before the redeployment of the nurses to the dispensaries. Thus, there would be no need to employ new nurses.

As relates to the equipment, it was submitted for the claimant, these were intact and available to use

particularly in view of the court orders that the status quo had to be maintained at all material time. The claimant also submitted that the respondent could not allege servitude by failing to comply with the law on licensing and the orders of the court. It was further submitted that scales of justice under Article 159(1) of the Constitution must serve both parties. Thus, if stay orders were allowed, hospital closed, workers go home and the appeal was not to succeed, the employees will go home, suffer loss of income and not have an avenue to get recalled. To counter the argument, the respondent as applicant stated that it would never recover money paid to the staff if appeal succeeded but that the employees could easily access pay back if appeal were to be unsuccessful.

The claimant submitted that the respondent had not established substantial reasons for stay of execution and it was not enough to cite financial burden or that a notice of appeal had been filed. For that position the court was referred to the High Court decision in **Ferdinard Mwango T/A Beach Air Tours & Safaris –Versus- Tourism Promotion Services Limited T/A Serena Hotels.**[7]

The court has considered the submissions made for the parties and makes the following findings:

1.The court upholds the existence of mutuality of rights and obligations in a contract of employment. However, the court holds that servitude does not accrue where a party to the employment contract having acted in breach of the agreed or statutorily protected rights or obligations is held to purge the breach. In the present case the respondent, according to the findings of the court in the judgment, proceeded to attempt variation of the prevailing content and methodology of the discharge of its obligations under section 34 of the Employment Act, 2007 without consulting the employees as prescribed in section 10 (5) of the Act. The variation, again in the findings of the court, entailed closure of a hospital without involving the statutory regulator and exposing the professional medical staff to professional liability. The court accordingly found the closure and the redundancy proceedings by the respondent legally irregular. Thus the orders made by the court in the judgment. Nowhere did the court order the respondent not to proceed with the redundancy and hospital closure process. Instead the court found and ordered that the respondent could not so proceed except by way of purging the identified irregularities; first consulting and agreeing with staff to vary the method and content of discharging the section 34 obligation as such content and method was a term of contract, and secondly involving the regulator and addressing the medical professional issues as likely to affect the medical professional staff in the closure of the hospital. Accordingly, the court finds that the orders as made did not encourage or by themselves or in their effect amount to servitude as envisaged in the cited authorities.

2.The parties delved at length submitting on the issue of substantial loss and security as set out in this ruling. They focused on the financial implications and their respective plight in view of the orders made in the judgment. They were entitled to submit as they did. Nevertheless, the court has taken the submissions into account but is of the opinion that the court findings and orders were to the effect that the respondent was to proceed in accordance with the law as per the findings of the court and as better elaborated in this ruling. They were findings in the nature of the declaration that the law had not been complied with and there was need for compliance. It is the considered opinion of the court that where the court order subject of an application for stay pending appeal is declaratory that the law be complied with as it is the case in this matter, granting orders of stay pending an intended appeal would undermine the rule of law and the due process of justice. Making an order to stay such a declaratory or definitive order would, in the opinion of the court occasion serious breach and encouragement for disregard of the law. What would be the security in lieu of an order in protection and promotion of compliance with the law and due process? Most likely none would be conceivable or sufficient. There would result grave disrepute in our system of administration of justice as well as law and therefore a serious substantial loss not only to the parties before the court but also injurious to the necessary confidence in the justice system. Such being the circumstance in this case, the grant of the orders for stay of execution would, in the considered opinion of the court, be declined.

3.The order in the judgment is that the redundancy notice dated 16.01.2013 and issued by the respondent is set aside. That notice was to effectively serve its purpose and lapse by end of February, 2013. The judgment in this case was delivered on 22.03.2013. It is the considered view of the court that the order was declaratory and the notice having been set aside, long after it had lapsed, there was nothing of it left

as to constitute the subject of the stay order as prayed for. A stay order relates to postponement or halting of a proceeding, a judgment, an order or a decree. It suspends all or part of a judicial proceeding, a judgment, an order or a decree.[8] In this case the redundancy notice that the court set aside long lapsed even before making the order in the judgment. The notice is dead and it has no life left that can be rescued by grant of an order of stay of execution pending the intended appeal. The court does not act in vanity and the court must keep fidelity to the law by making an order with vitality. In the circumstances of this case, the order of stay as prayed for would not be vigor as to serve any practical purpose. Accordingly, it is the finding of the court that the order of stay with respect to the order setting aside the redundancy notice would not be tenable as prayed for in the application.

4.Finally, the court was urged to make any further or other orders as shall be just in the circumstances of this case. It is not in the authority of this court to stop the respondent from exercising its powers to undertake redundancy as provided in section 40 of the Employment Act, 2007 or to close the hospital in accordance with the relevant statutory provisions. In the same vein, this court must protect the law towards the realization of justice for both parties. In complying and acting in accordance with the law, the respondent will have to consult and involve the claimant and the relevant statutory regulators as shall be necessary. Pending the hearing and determination of the intended appeal, the court finds that nothing would stop the respondent from exercising its statutory authority or powers as an employer and as an owner of a medical institution.

In conclusion, the court makes the following orders:

a) Pending the lodging, hearing and determination of appeal by the respondent against the judgment in this cause, the respondent is entitled to close its central hospital at chomogonday and to undertake the redundancy of the affected 53 employees in accordance and compliance with the relevant provisions of the Employment Act, 2007, the Medical Practitioners and Dentists Act and, the judgment in this matter.

b) The costs of this application shall abide the outcome of the intended appeal.

Signed, dated and **delivered** in courtat **Nakuru** this **Friday, 3rd May, 2013.**

BYRAM ONGAYA

JUDGE

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[1] See pages 25-26 of the court's record of the judgment.

[2] See pages 33-34 of the court's record of the judgment.

[3] Per Sir John Donaldson MR (1984) 3 All ER at 200.

[4]Per High Court decision by Honorable Justice M.K. Ibrahim(No.2) (2004) Eklr at page 20

[5] Per High Court decision by Honorable Justice M.K. Ibrahim(No.2) (2004) Eklr at page 22

[6] (2010) eKLR at page 4.

[7] Judgment by Honourable P.V. Wendo (2007) eKLR

[8] See meaning of stay and stay order in Black's Law Dictionary, 9th Edition.