



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 976 OF 2010

MICHAEL KIBOI GATUMIA CLAIMANT

VERSUS

MASTERMIND TOBACCO (K) LIMITED RESPONDENT

RULING

This is an application dated 6th November 2012, by the Respondent herein brought by Notice of motion under Order 42 Rule 6 and Order 51 Rule 1 of the civil procedure Rules 2010 and section 1A and B of the Civil Procedure Act and all other enabling statutes. The application is seeking a stay of execution of judgment herein pending hearing and determination of the intended appeal and supported by the annexed affidavit of Kiogora Mutai. This application is supported by the claimant in their Replying Affidavit of Michael Kiboi Gatumia dated 25th March 2013.

The respondent states that judgment herein was delivered on 16th October 2012 at 9.00am as opposed to the practice and or norm of judgments being read in the morning and that the respondent counsel therefore failed to attend court in the morning thinking that the matter was slated for the afternoon. That the respondent intends to file an appeal against the judgment delivered herein which appeal has high chances of success and there has been no delay in making this application and in the interests of justice the same should be granted.

That when this matter proceeded for hearing and parties directed to file their submissions and the same was fixed for mention to confirm this on 15th February 2012 and that judgment was to be delivered on notice by the court which was received by the respondent on 2nd October 2012 stating that the same was to be delivered on 16th October 2012 and the respondent advocate proceeded to note the matter for the afternoon of the same date as is the practice but that the judgment had been delivered in the morning. That on 17th October 2012, the claimant forwarded a letter to the respondent that judgment had been delivered in their favour and the respondent thus applied for certified copies of the judgment and noted that they did not attend court on 16th to apply for a stay of execution. That the respondent has now filed their notice of intended appeal to the Court of Appeal as the finding on the final dues was unjust and that the court did not consider the terms of the contract between the parties and therefore an appeal has high chances of success.

The respondent further states that the claimant's employment position is uncertain and it would be difficult for them to recover the decretal amount in the event that the Appeal succeeds if this is paid now to the claimant and thus will suffer substantial loss and the failure by the respondent advocate to attend court on 16th October 2012 should not be visited upon the litigant.

The Claimant is opposed to the application by the Replying Affidavit and state that the issues and circumstances of the claim were exhaustively dealt with and the court found merit in the claim and thus the respondent's application lack merit. That before court were enough documents and record and based on both parties submissions awarded employee dues and it would be prejudicial tot eh claimant to be denied fruits of his judgment considering his status.

The claimant further state that an appeal takes long and he will suffer pending the intended appeal being filed and fixed for hearing. That he is currently earning from his annuity from pension scheme with the respondent Staff Retirement Benefit Scheme held by the ICEA and the sums payable are available to him per month for life. That in any event he has a family and relations that would secure any rebate found for and claimed by the responded and he has worked for several years and has had occasion to acquire basic assets like his home and the apprehension that he will not be able to make good any dues from his is unfounded.

I note that the main purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the applicant who wishes to exercising his undoubted right of appeal is safeguarded and the appeal if successful is not rendered ineffective. The order for a cash deposit against the intended appellant is more geared towards ensuring that an appellant takes steps to have their appeal heard and determined without undue delays since he is denied the use of the money but not in any way to deny a successful litigant of the fruits of his litigation and locking up funds to which on the face of the record he is entitled. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving the security.

The claimant admits he is unemployed but has a pension scheme with a monthly income and even though not substantial, the same is available to offset any dues directed by the court within a reasonable time. He should therefore not be denied the fruits of his judgment pending the hearing and determination of the intended appeal.

I however note that what is before Court is a Notice of Appeal and no draft Memorandum of Appeal and to ensure that this is not an effort to frustrate the claimant who already has a judgment of this Court and that the respondent takes steps towards having their appeal filed, heard and determined, this Court will grant a conditional stay. It is right and proper that security be given in a way which is least disadvantageous to the respondent but ensure the claimant is adequately protected.

I therefore direct that 50% of the decretal amount be released to the claimant within 14 days and there be a deposit of 50% of the decretal amount in a joint bank account in the names of both advocates for the parties herein the firms of Kiogora Mutai & Co. Advocates and Ochieng', Onyango Kibet & Ohaga Advocates.

Costs in the motion.

Dated and Delivered at Nairobi this 13th day of June, 2013.

M. Mbaru

Judge Industrial Court

In the presence of:

Court clerk

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