



THE REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 802 OF 2011
KENYA UNION OF COMMERCIAL
FOOD AND ALLIED WORKERSCLAIMANT
VERSUS
NATIONAL WATER CONSERVATION
AND PIPELINE CORPORATION.....RESPONDENT
RULING

This is a Notice of Motion brought under Rule 16(1) (2) and Rule 27 of the Industrial Court (Procedure) Rules and dated 28th January 2013 as made by the respondent seeking temporary stay of the judgment and orders issued by this court on 28th September 2012 and further a stay of execution of the decree pending the hearing of the appeal lodged in the Court of Appeal. The claimant Union filed their Replying Affidavit sworn by Dickens Atela, the Assistant Secretary General and dated 20th May 2013.

The application is based on the grounds that this court delivered an ex-parte judgment on 28th September 2012 and the respondent being aggrieved by this judgement has filed an appeal to the Court of Appeal against the whole of this ex-parte judgement. That this appeal has good chances of success and if execution herein is done there will be substantial loss to the respondent.

This application is supported by the annexed affidavit of Justus A. Wabuyabo, the General Manager in charge of Legal Affairs at the respondent on the basis that when the ex-parte judgement herein was delivered on 28th September 2012, the advocates on record then made an application dated 26th October 2012 seeking to set it aside, which application was dismissed on 19th December 2012. The respondent instructed new advocates to lodge an appeal against the ex-parte judgement. That there is a good appeal with high chances of success and the respondent stands to suffer substantial loss if the said ex-parte judgment is effected as this means the reinstatement of the claimant to the position that has already been taken up by another employee. That there may be a fundamental errors and legal excesses made by the Court which errors are likely to influence the Court of Appeal in the respondent's favour and if the court grants the orders sought they are prepared to abide by any terms that the court will direct.

In the reply, the claimant state that the hearing of the matter proceeded on 30th August after the date had been taken by consent, following which the court delivered its judgment and on good grounds, made the orders reinstating the claimant to her position with the respondent, a public entity. The claimant was also to be paid all her benefits. That on 26th October 2012, the respondent applied to set aside the judgement herein, and on good ground, the same was rejected in a well reasoned ruling dated 19th December 2012.

The orders being sought herein relate to the judgment dated 28th September 2012. This application was filed on 31st January 2013, four months after the event. Even where the court took vacation from 21st December 2012 to 14th January 2013, there are still 3 unaccounted for months within which time this application should have been presented.

As much as the mistakes of an advocate should not be visited upon their clients, advocates attend court upon instructions from their clients. I take it then, when the respondent's advocates on record filed the application dated 26th October 2012, seeking to vary and to set aside the judgement of this court dated 28th September 2012, the respondent herein on whose behalf this application was made had instructed their advocates. That application was dismissed on 19th December 2012 and there is no record of an appeal against this ruling.

The orders of this court on 28th September 2012 were specific, unambiguous and directed that;

- a. ***The claimant Lydia Kakenya Korir be reinstated to her job or an equally suitable job with the respondent, with all her back salary, allowances, benefits, and any other legal dues within 30 days from the date of this judgment.***
- b.

No efforts have been shown by the respondent that they have complied with these orders or engaged with the claimant in a meaningful way to ensure that she is deployed in a suitable position. The application dated 26th October 2012 noted this much, but the respondent opted to ignore the court directions and now submits this current application. This is a travesty of justice.

I note the respondents submissions that the claimants position with the respondent has already been taken up and that her presence at the respondent will strain relationships. Far from it, the order of the court had noted this scenario by directing that there be reinstatement to her job or an equally suitable job. This is a public body, not private property that can be folded and placed in an individual pocket to direct as their wish and even if it was a private business, we now have the Employment Act that create the remedy of reinstatement upon the court finding this is the best remedy available to a party before the Court. In this case, the respondent is not a private company but a public body that serves the public good and the officer's bestowed with the high duty and responsibility of managing the public affairs of the Kenyan people and ought to be guided by due diligence and rule of law.

The Notice of Appeal dated 22nd January 2013 is filed way past the delivery of the judgment herein. I will not go into the merits or demerits of the draft memorandum of appeal. That is not what this court has been asked to do. The appeal as lodged at the Court of Appeal noted in the application is not attached.

To grant the orders sought herein will be a travesty of justice. Lydia Kakenya Korir should have been reinstated to her position or to an equally suitable position with payment of all her dues and benefits within 30 days from 28th September 2012. This should be done within the next 7 days and benefits due within the intervening period to date be inclusive. This is what is justice and within the powers of this court to direct.

I will therefore dismiss the application dated 28th January 2013 and direct the respondent to reinstate Lydia Kakenya Korir within the next 7 days as directed on 28th September 2012 with benefits due to date being inclusive. Costs will be awarded to the claimant.

Delivered in open court, this 30th day of July 2013.

M. Mbaru

Judge

In the presence of

Jacob Kipkirui: Court Clerk