



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.953 OF 2011

PATRICK NJUGUNA KARIUKI.....CLAIMANT

VS

DEL MONTE (K) LIMITED.....RESPONDENT

Mr. Maluti for the Respondent/Applicant

Mr. Mutua for the Claimant/Respondent

RULING

By Notice of motion dated 7th January 2013 and filed on 9th January 2013, the Applicant/Respondent sought an order for stay of release of the judgment sum deposited in court on 14th November, 2012 and stay of implementation of the Award and an order made by this court on 26th October, 2012 pending the hearing and determination by the Court of Appeal of the said Award and orders pending appeal, namely Civil Application No. Nai. 41 of 2013 (UR41/2013), Delmonte Kenya Ltd -Vs- Patrick Njuguna Kariuki.

The Application is grounded on the Supporting Affidavit of Mr. Malt Lloyd, the Production Director of the Respondent/Applicant.

These grounds may be summarized as follows;

That pursuant to an Award of Honorable Mr. Justice Ongaya granting the Respondent/Claimant Kshs.8,863,282.29, and that he be re-engaged commencing the 1st December 2012, the Respondent/Applicant deposited the said sum with the Court on 9th November, 2012 as a pre-condition for interim orders for Stay of Execution. That on 18th November, 2012, the Respondent/Applicant filed a Notice of Appeal and on 17th December, 2012, the Court dismissed the Application seeking stay of execution pending the hearing and determination of Appeal.

That on 21st December 2012, the Respondent/Applicant presented to the Court of Appeal under a certificate of urgency an application seeking a stay of execution of the said Award and Orders pending the hearing and determination of the Intended Appeal.

As at the time this Application was brought, the said Application before the Court of Appeal was yet to be certified as urgent and required the same to be sent to the President of the Court of Appeal for him to empanel a three Judge Bench to hear the matter as well as fix a hearing date.

The Court has noted the preliminary issues raised by the Claimant/Respondent in its written submissions

dated 8th March, 2013 and filed on 11th March 2013, including but not limited to the manner in which this Application has been prosecuted by the Respondent/Applicant.

The Court in particular notes that the Application for stay of execution is sought pending the hearing of an application in the Court of Appeal for stay of execution. The Claimant/Respondent submits that the Court has no jurisdiction to entertain such an Application and in particular the Industrial Court Act, 2011 does not empower the Court to make such an order.

Furthermore, the Applicant had sought stay of execution of the Award of the Court before the trial judge and by a ruling dated 17th December 2013, the application was dismissed.

It is the Claimant's submission that the Applicant has exhausted its right for a stay, the matter having been heard and determined. All the issues raised in this regard, including whether there exists an arguable and meritorious Appeal against the decision of the trial Court delivered on 26th October, 2012; Whether the Appeal will be rendered nugatory; and whether balance of convenience favors the grant of stay of execution pending appeal were raised and determined in the previous Application.

That the Application is an abuse of the Court process and same be dismissed with costs.

The issues for determination are as follows;

- Whether the Court may review the ruling of the trial judge on the matter of stay of execution delivered on 17th December, 2013.
- Whether the court has jurisdiction to hear this Application when there is a similar application pending in the Court of Appeal.

Issue 1

It is clear that all the issues being canvassed in this matter were considered and determined by Hon. Justice Byram Ongaya and a ruling made on the same on 17th December, 2012.

This application is not couched as one for review in terms of Rule 32 of the Industrial Court (procedure) Rules 2010. It is a fresh application on the same facts seeking similar relief to that which was denied by the trial judge in his ruling aforesaid.

This Court may only sit on review of its own decision on very limited grounds outlined under Rule 32(1) to wit; 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 decision was made; or on account of some mistake or error apparent on the face of the record; or on account of the ruling being in breach of a written law; or for any other sufficient reasons discernable from the Application itself.

Nothing in this application has alluded to any such failures in the ruling of the trial judge nor has there been any indication that any review of the same is desired.

It is trite that this Court cannot sit on appeal of its own decision. Accordingly the Court lacks jurisdiction to allow the Applicant to have a second bite on the cherry. On this point alone, this application must fail in its entirety.

Issue II

The Court is however inclined to also deal with the issue whether it has jurisdiction to entertain an application for stay of execution of its award when a similar application is pending before the Court of Appeal as is clearly shown by annexure PNK1 to the Replying Affidavit.

As soon as the applicant filed the said application before the Court of Appeal, the jurisdiction of the trial Court was in my view immediately pre-empted. This Court cannot deal with the matter any longer and it must therefore fold its hands and await the outcome of the Court of Appeal on the matter. Furthermore it is clear that no Appeal has been lodged yet and I agree with the submissions by the Claimant that this Court lacks jurisdiction to grant an order for stay pending an application in the Court of Appeal. The Industrial Court Act 2011 and the Rules of the Court cited herein before make no such provision.

I need not canvass the issues raised with regard to the inherent Jurisdiction of the Court. There are sufficient express provisions governing issuance of stay orders pending Appeals to the Court of Appeal which were fully canvassed by the trial judge in the ruling delivered on the subject on 17th December, 2012.

Accordingly the application dated 7th January, 2013 is dismissed with costs.

It is so ordered.

Dated and Delivered at Nairobi this 8th day of July, 2013.

Mathews N. Nduma.

PRINCIPAL JUDGE - INDUSTRIAL COURT.