



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 5 OF 2012

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION .....CLAIMANT

VERSUS

LARFAGE ECO SYSTEM .....RESPONDENT

**RULING**

The applicant has brought a Notice of Motion dated 8/7/2013 seeking stay of execution of the judgment of this court delivered on 7/6/2013 pending hearing and determination of the intended appeal to the Court of Appeal. The Motion is supported by the affidavit dated 8/7/2013 sworn by Betty Kanyagia, the Company Secretary for the applicant. The claimant has opposed the Motion through the replying affidavit sworn on 16/7/2013 by Francis Atwoli the Secretary General of the claimant.

The grounds upon which the Motion is brought were that:

- a. **the intended appeal raises serious issues and has high probability of success.**
- b. **The appeal if successful would be rendered nugatory if the stay is not ordered.**
- c. **Substantial and or irreparable loss may be occasioned to the applicant if stay is not granted and the claimant allowed to execute.**
- d. **Execution could hamper the operations of the respondent which is already in loss making and will have unintended consequences on the claimant and the applicant and may ground operations and halt her status as a going concern.**
- e. **The applicant is prepared to abide by such reasonable terms of security as th court may direct.**

In support of the aforesaid grounds, madam Betty Kanyagia, depones that the applicant lodged a Notice of Appeal on 21/6/2013 and simultaneously requested for typed proceedings and judgment to facilitate filing of an appeal. That subsequently the claimant wrote to the applicant on 28/6/2013 forwarding copies of new CBA in an attempt to execute the impugned judgment and as such the applicant was apprehensive that unless stay was ordered, her appeal will be rendered nugatory and occasion on her irreparable loss.

She further deponed that the applicant has a meritorious and arguable appeal with high probability of success as there were errors of law in the judgment as outlined in the draft memorandum of appeal annexed to the affidavit. In her view, the grant of stay was in the best interest of justice. She ended by indicating the applicants willingness to abide by reasonable terms of security.

The replying affidavit on the otherhand contends that the intended appeal does not disclose possibility of success considering the grounds cited. That the Motion has no merit and it was only intended to delay execution of judgment and may result in great injustice considering that the grievants have gone without a salary increase for 4 years. The application was disposed of by way written submission.

I have carefully perused the Notice of Motion, the supporting affidavit and the reply by the claimant. I have also carefully read through and considered the written submissions and the judicial precedents cited. The issues for determination are:

- a. **whether the court has got jurisdiction to entertain the Motion before it.**
- b. **Whether the applicant has satisfied the requirements for granting the order sought.**
- c. **Whether the order of stay ought to issue.**

In answer to the first issue, the court notes that the Motion is based on Section 20(1) and 29(1) of the Industrial Court Act (ICA) and Section [sic] 48 of the constitution of Kenya. All the above quoted provisions are not specific procedural rules. In my view rule 31(2) of the Industrial Court (Procedure) rules 2010 [ICPR] provides the procedure to be followed in matters such as the one before me. It says,

***“Rules on execution of an order and a decree applicable in the High Court shall be applicable to an order and decree of the Court”.***

Consequently, I find that the relevant law to guide the court in this Motion is Order 42 of the Civil Procedure Rules.

Rule 6(1) of the said Order provides that the court appealed from may for sufficient cause order stay of execution of the impugned order or decree. To that extend the court finds that it has the jurisdiction to entertain the Motion before it because it concerns an application for stay pending an appeal challenging a decision of the court.

As regards the second issue, sub rule 2 of the said rule 6 of Order 42 of the Civil Procedure Rules outlines the requirement for granting stay pending appeal.

- a. **the court is satisfied that substantial loss may result to the applicant unless that order is made and the application has been made without unreasonable delays, and**
- b. **such security as the court orders for due performance of the decree or order has been given by the applicant.**

It follows therefore that at this stage, the court should not concern itself with the merits and the chances of success of the appeal as a condition before making a stay. Any attempt to do so would be setting an appeal over its won decision. The court should only therefore deal with the likely amount of loss to be suffered if any, the time within which the application was made after the making of the impugned decision and finally the security to guarantee performance if the appeal fails.

The question to answer is whether the applicant has tendered any evidence to prove the alleged substantial loss if stay is not granted. The answer is supposed to be provided by the supporting affidavit to the Motion. Paragraph 6 states

***‘that the respondent is now apprehensive that the claimant will proceed with execution before the hearing and determination of the appeal and consequently occasion irreparable loss to the respondent hence the need to stay execution pending the hearing and determination of the appeal’.***

There is no other paragraph dealing with the issue of substantial loss in the supporting affidavit. There is also no exhibit annexed to demonstrate the magnitude of the money payable if stay is denied. There is no evidence to show that any pay in execution of the decision will be unjustified.

Other than submissions from the bar that the respondent risks insolvency, no tangible evidence for

example current financial statements have been shown to the court to demonstrate that the applicant is in a pathetic financial position.

In my view weighing the submissions by the counsel which are outside his client's affidavit against the interest of the desperate employees who were denied their compensation at the right time when they made income to the applicant the balance tilts in favour of the claimant. Holding in favour of the applicant is like justifying the financial irresponsibility or misapplication of income by the applicant to deny the grievants their due compensation. The question in my mind is why did the respondent delay the salary review at the right time only to scream loudly at this time that she is a sinking ship.

The court is not satisfied by the evidence adduced in support of the Motion that the applicant will suffer substantial loss if stay is denied. In any case the grievants are employees of the applicant and they have their employment benefits accruing and which can be used to repay the applicants if she succeeds in her appeal.

I have no quarrel with the delay in bringing the Motion because it was brought before the expiry of the 30 days given by the court for amicable signing of the new CBA. In view of my decision on the issue of substantial loss above, I see no need of going to the issue of security as a condition for stay. Consequently the answer to the third issue for determination is that the application is dismissed with costs.

**Signed, dated and delivered this 30th August 2013**

**ONESMUS MAKAU**

**JUDGE**