



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 3'A/2013

(Before Hon. Justice Hellen Wasilwa on 26th September, 2013)

JOSEPHINE SERAPHINE WADEGU CLAIMANT

-VERSUS-

KENYA POWER &

LIGHTING COMPANY LTD RESPONDENT

RULING

The application before court is the one dated 5.8.2013. It is brought by the applicant respondents herein under Article 159, 162(2), 164(3) of the Constitution, Section 12(3)(i) and (viii), 7(1) & (2) of the Industrial Court Act 2011 Rule 16 of the Industrial Court Rules, Rule 3(1) & (2) of The High Court (Practice & Procedure Rules) of the Judicature Act Cap 8 Laws of Kenya, and all the enabling provisions of the Law and the inherent powers of the Court. The applicants seek orders for stay of execution and judgment of this court delivered on 30th April 2013 and all consequential orders there to. They also seek orders of stay of execution pending the hearing and determination of an appeal against the ruling of this court delivered on 2.7.2013.

The application is grounded on an annexed affidavit of Sigilai Kirui and on the grounds that:-

1. The respondents are aggrieved by the ruling of this honourable court delivered on 2.7.2013 and have filed an appeal.
2. The claimant has produced an extract of a decree and taxed her bill of costs based on the said judgment delivered on 30.4.2013 and is keen to execute it.
3. That the appeal against the ruling will be rendered nugatory if the application is not granted and respondent will suffer loss and damage of Ksh 175,594/= which claimant is not in a position to refund if the appeal is successful.
4. That the claimant's ability to refund the respondent's Ksh 175,594/= is not known.
5. That orders of stay of execution would not occasion the claimant any irreparable damage or prejudice in the event that the appeal is dismissed as the respondent has means of satisfying the same being a public institution.
6. That the respondents appeal has very high chances of succeeding for reasons that this court's ruling delivered on 2.7.2013 was contrary to the Industrial Court (Procedure Rules) rules 15, 11(7) 22, Article 159(2) of the Constitution, Section 20(1) of the Industrial Court Act 2011.

The claimant respondent opposed this application. She filed her replying affidavit on the same and she avers that she is not aware of any appeal filed against the ruling of the court delivered on 2.7.2013. She further averred that if she executed judgment, the appeal will not be rendered nugatory as the

respondents alleged appeal is not guaranteed success. She also avers that she is able to refund the decretal sum of Ksh 175,594/=. If the appeal succeeds she avers that the request for stay is in bad faith as the advocates for the respondents participated in the taxation of the bill of costs and that this application meant to frustrate her and deny her the fruits of her judgment delivered on 30.4.2013.

I have considered the averments of both parties. The issues for determination are:-

1. Whether the intended appeal would be rendered nugatory should the orders sought not be granted.
2. Whether the intended appeal is arguable and not frivolous.

In deciding the 1st issue, the applicants have argued that the claimant respondent is a woman of straw and will not be able to refund them if the appeal is allowed.

In the case of **Reliance Bank Ltd VS Norlake Investments Ltd [2002] 1 EA 227 (Court of Appeal Kenya)** the learned JJA, Omolo, Bosire and Owuor had this to say in a similar application from stay.

“where a decree for payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory this had to be considered within the circumstances of each particular case ----”

In the circumstances of this case, the respondent claimant avers that is not true that she is a woman of straw and that this has not been established. She contends that the respondent has means of recovering their money if the appeal is allowed. Unless the applicants demonstrate this inability, it would be speculative for this court to rule that indeed the respondent claimant cannot refund the respondents applicants if the appeal succeeds.

In the circumstances, I do not find that the appeal will be rendered nugatory if I do not grant this orders. In any case, this is a monetary decree and will not in any way be affected by the outcome of the appeal.

Secondly is whether the intended appeal is frivolous or otherwise. Of course the applicants must establish that they have an arguable case. The contention of the applicants is that they were not accorded an opportunity to present their case. They argue that pleadings had not closed when they were locked out.

I would not get into detail on this issue as that would be like sitting on appeal on my own ruling. However, the record speaks for itself and the respondents are at liberty to ventilate their case. I believe for the ends of justice and this being a court of law and equity, it would be justifiable to grant the orders of stay pending appeal which hereby grant.

HELLEN WASILWA

JUDGE

26/09/2013

Appearances:-

Claimant/Respondent present in person

CC. Sammy Wamache.

