



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 356 OF 2010

JULIUS GATETE IHOMBACLAIMANT

-VERSUS-

WELLS FARGO LIMITEDRESPONDENT

Mrs. Mutisya for Respondent/applicant.

Mr. Gathii Irungu for Claimant/Respondent

RULING

The Respondent/Applicant filed a notice of motion dated 18th September, 2013 on a Certificate of Urgency seeking a stay of execution of the portion of award of this court delivered on 6th September, 2013, awarding the Claimant gratuity pending the hearing and determination of the application *inter partes*.

The application was heard *ex parte* in the first instance by Hon. Justice Makau on 19th September, 2013 but no interim relief was granted pending *inter partes* hearing.

The court is now seized with the matter and is considering prayer three (3) in the Notice of Motion seeking the honourable court to grant a stay of execution of the award of the court dated 6th September, 2013, pending the hearing and determination of the intended appeal by the Respondent/Applicant against part of the said award.

The application is based on the grounds in the Notice of Motion as follows;

1. *That the Applicant has lodged a Notice of Appeal and the Applicant will suffer considerable loss if a stay of execution is not granted.*
2. *That the Applicant is apprehensive that the Claimant/Respondent will move to execute the entire award delivered on 6th September, 2013 an action that would occasion great injustice to the Applicant.*
3. *That the intended Appeal will be rendered nugatory if the execution takes place prior to the determination of Appeal.*
4. *That the Claimant/Respondent has no known assets and there is an imminent risk that the*

Applicant will not recover the sum of Kshs.560,000/= awarded for gratuity together with interest in the event that its intended appeal is successful.

5. *That the Applicant is ready and willing to comply with any reasonable conditions as this honourable court may order for due performance of the award pending the hearing and determination of the intended appeal.*

The application is further supported by an affidavit of **Mr. Stephen Kangethe**, the Human Resources Manager of the Respondent.

The Notice of Appeal dated 19th September, 2013 and filed on the same date is annexed to the application. Also attached to the application is a Draft Memorandum of Appeal with seven (7) grounds of appeal.

The application was responded to by a replying affidavit of **Mr. Julius Ihomba Gatete**, the Claimant/Respondent herein.

The Applicant states that the application is frivolous, vexatious and scandalous as the intended appeal has no merits at all.

That the application is merely intended to delay the matter further in order to deny the Claimant the fruits of his judgment.

That the Applicant has not demonstrated how he stands to suffer injustice by Respondent realising the fruits of his award.

That the award is monetary in nature and the execution thereof cannot render the intended appeal nugatory.

That the Applicant has not in any event demonstrated that, it would be unable to recover the money in the event the appeal is successful which is highly unlikely.

The Claimant states that he is a person of means and the law does not require him to declare his assets before he is allowed to execute or recover the awarded sum from the Applicant.

That the application has no substance, is incompetent and should not be sustained.

That the Applicant has not demonstrated he has a good appeal and or grounds of appeal against the decision of the court to warrant stay of execution.

That in the alternative and without prejudice to the foregoing, the Claimant prays that in the event the application is allowed the Applicant be ordered to deposit the entire amount in court or in an interest earning account in the name of advocates on record before being allowed stay of execution.

Issue for determination.

The Court of Appeal at Nairobi in the case of **Butt v. Rent Restriction Tribunal** (Madan, Miller and Porter, JJ.A) while considering an appeal from the High Court refusing a stay of execution pending appeal held;

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered

nugatory should that appeal court reverse the judges' discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements.”

In this case, only part of the award is disputed. The award of Kshs.91,258/= in respect of notice pay and arrear salary is not contested by the Applicant. Only the award of Kshs.560,000/= in respect of the award of gratuity is contested. Indeed the Claimant has already received payment of Kshs.123,000/= in part settlement of the award.

The Claimant/Respondent has stated in his replying affidavit that he is a man of means and would have no problem to pay Kshs.560,000/= in the event the appeal was successful.

That the court should therefore allow him to enjoy the fruits of the judgment which constitute well-earned terminal benefits (gratuity) from the services he had faithfully rendered to the Respondent/Applicant.

The only issue in dispute, which is the subject of appeal is whether the Claimant belonged to the management cadre and therefore not entitled to service gratuity in terms of the **Regulation of Wages (Protective Security Services) Order 1988** as amended in 2003 or belongs to the security guards cadre who are unionisable and therefore entitled to the service gratuity.

A discourse of facts led the court to determine that the Claimant was employed as a security guard and not a manager and therefore was entitled to service gratuity like his colleagues whose services had been terminated and were paid service gratuity.

It is not for this court to consider the merits or demerits of an appeal but the court cannot overlook the provisions of the Industrial Court Act, 2011, and in particular **Section 17 (2)** which provides;

“(2) An appeal from a judgment, award, decision, decree or order of the court shall lie only on matters of law.”

Furthermore, the evidence by the Claimant that he is a man of means and therefore would not be unable to pay the disputed sum of Kshs.560,000/= in the event the appeal was successful was not responded to at all by the Respondent/Applicant.

These are the circumstances of this case, this court has taken into consideration in refusing the Respondent/Applicant an order for stay of execution with costs to the Claimant.

Dated and delivered at Nairobi this 29th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE