



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

CAUSE 935 OF 2010

JAMES KIPKONGA KANDAGOR.....CLAIMANT

VERSUS

MOI TEACHING REFERRAL HOSPITAL.....RESPONDENT

RULING OF THE COURT

The application before Court is made by Notice of motion dated 10th August 2012 is filed under **rule 31(2) of the Industrial Court (Procedure) Rules, Order 42 Rule 6 of the Civil Procedure Rules, and sections 3 and 12 (3) (i) and (4) of the Industrial Court Act and all other enabling provisions of the law and seeks the following orders:-**

- a) There be stay of execution of the judgment award and decree herein pending the hearing and determination of the application***
- b) There be stay of execution of judgment and decree herein pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. 159 of 2012***
- c) Costs of this application be provided for***

The application is based on the annexed affidavit of Dr. Joseph Kibosia and the grounds that the respondent herein being aggrieved by the judgment and decree herein has lodged an appeal being **Civil Appeal No. 159 of 2012 at the Court of Appeal in Nairobi**. That the claimant herein being a man of straw may not be able to refund the decretal sum if this is paid to him in the event the appeal as filed is successful and thus render it nugatory where the respondent herein will suffer substantial loss. That the respondent herein will suffer irreparable loss and damage unless the prayers herein are granted.

The application is opposed vide replying affidavit of James Kipkonga Kandagor dated 18th September 2012. That the application as filed does not meet the requirements of Order 42 of the Civil procedure Rules that there are no factual basis that the claimant is a man of straw and cannot be able to refund the decretal sum in the event the appeal succeeds and should be allowed to enjoy the fruits of the judgment of this Court.

The application was heard by this Court on 18th October 2010 when Ms Songole, learned counsel for the applicant submitted that the appeal has been filed being **Civil Appeal No. 159 of 2012 in Nairobi**, which appeal has high chances of success. That if execution is not stayed and the decree herein allowed to proceed the appeal will be rendered nugatory. That the respondent is a man of straw based on his own pleading and may not be able to repay the decretal sum if this is advanced to him before the appeal is

heard and determined. That the respondent herein is willing to deposit the decretal sum in joint account of the advocates for both parties as security for costs pending the hearing and determination of the appeal already filed.

Mr. Manani, learned counsel for the claimant herein submitted that what was in issue was the stay will deny the claimant the enjoyment of the judgment of this court, he is capable to defray the decretal sum and hence stay should not be granted. That in the event stay is granted, the claimant would wish to have half the decretal sum and the balance be deposited in a joint account of both advocates for the parties.

In an application of this nature two principles should be satisfied, namely that the appeal is arguable and that if the appeal is successful, its result will be rendered nugatory if the order of stay is not granted – see ***Trust Bank Limited & Anor v. Investech Bank Limited & 3 Others – Civil Application No. Nai. 258 of 1999 (UR)***. The copy of the memorandum of appeal annexed to this application, already filed includes grounds which raise substantial points of law and this Court is, despite submissions from Mr. Manani for the claimant herein that the claimant should be allowed to enjoy the fruits of his judgment persuaded to allow the stay of execution pending the hearing of the appeal.

Court therefore agrees with Ms Songole’s arguments that indeed there is an arguable appeal on record, the respondent herein acted swiftly in submitting the appeal and filing this application under Certificate of Urgency for stay and in the interests of this Court facilitation of a just and expeditious process and proportionate resolution of disputes will allow the application. Court will further order that the decretal sum be deposited in a joint bank account in the names of M/s Kalya & Co. Advocates and Manani Lilan & Co. Advocates. Costs in the motion.

Dated and Delivered at Nairobi this 23rd day of October, 2012.

M. Mbaru

Judge Industrial Court

In the presence of:
Court clerk

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