



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 953 of 2011

PATRICK NJUGUNA KARIUKI.....CLAIMANT

VERSUS

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

(Before Hon. Justice Byram Ongaya on 17th December, 2012)

RULING

On October 26th 2012, the court delivered a judgment in this cause in favour of the claimant. The respondent has filed the notice of motion dated November 8th 2012 seeking orders that there be stay of execution and implementation of the judgment of the court and the decree pending the hearing and determination of the respondent's appeal against the judgment. The application was made under sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Act, Section 3 of the Industrial Court Act and all relevant provisions and rules under the Act. The application was supported by the affidavit of Harry Onyango Odondi sworn on November 8th 2012 together with the annexed documents. The respondent also filed the further supporting affidavit of Harry Onyango Odondi sworn on December 4th 2012 together with the annexed documents. The claimant opposed the application by his replying affidavit sworn on November 20th 2012.

The principles governing stay of execution pending appeal are well settled. First, the applicant must file the application for stay without undue delay and in this case the parties have agreed that the respondent filed the application timely.

Secondly, the applicant must satisfy the court that substantial loss may result to the applicant unless the order is made, the application having been made without unreasonable delay. To satisfy this principle, it has been submitted for the respondent that it will have to undergo difficulties in reengaging the claimant as ordered in the judgment with effect from December 1, 2012 upon the terms prevailing as at the date of dismissal or such better terms as the parties may agree. It has been argued for the respondent at paragraph 7 of the supporting affidavit that unless the orders sought are granted, the respondent will be compelled to terminate the employment of the current Warehouse and Logistics Manager which may trigger another cycle of proceedings against the respondent, and in alternative, the respondent will be required to have a member of staff whom it is obliged to pay yet it has no use for which would be a net loss to the respondent. To support this argument, the respondent has produced the letter dated April 7th 2011 being the contract of employment for one Samuel Jackson Onyancha to the position of a Warehouse and Logistics Senior Department Head with effect from April 18th 2011.

As for the order in the judgment that the respondent pays the claimant a sum of Kshs. 8,863,282.29 plus

interest together with the costs of the case, the respondent has argued that the claimant gave evidence that he was carrying on subsistence farming and he had not been able to secure any other gainful employment. Thus, if the claimant is paid the amount as ordered and the appeal is successful, the respondent will suffer substantial loss because it may not recover the money paid to the claimant.

To oppose the respondent's case, the claimant has stated that he held the position of Logistics and Warehouse Manager which previously was the position of Logistics and Stores Manager on the respondent's production department organogram dated 27th February, 2007 and attached on the claimant's replying affidavit as PNK2. Further, the claimant has attached annexures PNK3 and PNK4 to demonstrate that the warehouse and logistics senior department head is a sectional office that reports to the holder of the office he is supposed to be reengaged into as per the organogram. Indeed, it was submitted for the claimant, that the organogram produced showed such reporting channels.

As for inability to pay, the claimant has produced the title deed for land parcel number Makuyu/Kimorori/Block 1/1599 measuring approximately 9.218 hectares being appendix PNK5 on the replying affidavit to show that he is not a man of straw as alleged and painted by the respondent. The claimant has stated that the respondent, if there is stay of execution, will proceed to fill the office he is to be reinstated into and thereby completely lock him out from ever going back to work. In addition, the claimant has stated that when reengaged, he will work and be paid for the work performed and the respondent cannot in such circumstances suffer any loss. It is the claimant's further case that the respondent cannot conceivably provide security for stay of the court's decision for his reengagement because when the appeal does fail, he would have lost a lot of working time or years down the line. That he is not growing any younger and it cannot be predicted as to the number of productive years that are likely to be lost pending the hearing and determination of the appeal and on account of age, if the appeal is lost, he may never be reengaged to enjoy the fruits of his successful litigation. The claimant has also submitted that the court's finding that he was unfairly terminated is a finding of fact with finality and cannot be appealed against because Section 17 (2) of the Industrial Court Act, 2011 provides that appeals to the Court of Appeal shall be on matters of law only.

The court has considered the evidence and submissions of the parties on the question of substantial loss. The issues for determination are whether the office of logistics and warehouse manager has been abolished, whether the office is vacant, whether the claimant would be unable to refund the decretal sum if the appeal succeeds and whether on a balance of convenience, the respondent has satisfied the principle of substantial loss.

On the issues of whether the office of logistics and warehouse manager has been abolished, and whether the office is vacant, the court finds that the evidence provided at the hearing and the materials presented to support and oppose the application show that the office has neither been abolished nor filled since the claimant was appointed and subsequently removed from holding it. In considering the evidence and the submissions by the parties, the court has been guided by the provisions of the Employment Act, 2007. Sections 76 and 77 of the Act provide as follows: ***"76.(1) This Part shall apply to an employer who employs twenty-five employees or more.***

(2) An employer shall notify the Director of every vacancy occurring in his establishment, business or work place in a prescribed form giving the following details—

(a) the employer's name and full address;

(b) details of the vacant post;

(c) minimum qualification required of the person seeking to be employed;

(d) the place of work, and

(e) the type of work, whether casual, permanent or term contract; and

(f) such other information as the Director may require.

(3) A vacancy shall be deemed to occur on the date-

(a) an employer creates a post to be filled by an employee or decides to engage one.

(b) an employee terminates or has his employment terminated by the employer and the employer abolishes the post.

77. When a post, which has been notified to the Director as vacant, has been filled or has been abolished before being filled, the employer shall notify the employment service office of this in writing within two weeks of the filing of the post or of its abolition, as the case may be.”

In view of the provisions quoted above, the court finds that a vacancy occurred when the claimant was terminated from employment and the filling or abolition of the office required notification to the Director by the respondent as envisaged in the provisions. The court is of the opinion that the notification by the affected employers to the Director has the consequence of enabling the Government in the wider sense as including the Judiciary, the Executive and the Legislature to take charge and perform their respective functions in matters of employment. Thus, matters of creation of office, abolition of office, appointment and termination of employment are all functions that the law requires the employer to notify the Director as provided for failing which, the employer's exercise of those functions would be brought to question. In the opinion of the court, failure to prove the notification will lend the court to a finding that the employer has not exercised the entitlement with respect to any of the functions for otherwise, the exercise would be arbitrary and outside the express statutory regulation.

In the instant case, the court finds that the respondent has not produced any evidence to show that the office of warehouse and logistics manager in its establishment was abolished as no notification of such abolition has been shown to have been conveyed to the Director. In addition, the evidence before the court does not show that the respondent employed an officer to that office. The evidence before the court shows that the respondent employed one Samuel Jackson Onyancha to the position of a Warehouse and Logistics Senior Department Head with effect from April 18th 2011. The court finds that the position of Warehouse and Logistics Senior Department Head is obviously different from that of Warehouse and Logistics Manager. In the circumstances, it is the court's finding that the position to which the claimant was reengaged into with effect from 1st December 2012 by operation of the court order in the judgment was vacant at all material times.

The court has noted the deposit in court of the decretal amount. The court has also noted the claimant's argument that he owns substantial amount of land and he is ready and willing to work as reengaged by the court. It is the court's finding that once the claimant is reengaged and as long as he is able and willing to engage in productive work, it is fishing in the air to allege that he is a man of straw.

As for the money, the claimant will earn from the pay of his productive work. As for stay of the order of reengagement, the court finds that the stay if granted, would occasion substantial loss to the claimant in view of the claimant's right to work and engage in productive work especially in circumstances whereby the court has already found that he is entitled to the reengagement. An employer does not suffer any substantial loss in reengaging an employee because he is always entitled to terminate the relationship in accordance with the law and the contract between the parties. Such substantial loss in event of reengagement cannot arise for the further reason that the employer will enjoy the productivity of the employee consequential to the reengagement; unless the employer establishes and proves that consequential to the reengagement, the employee is not willing and able to be productive. Thus, on a balance of convenience, the court finds that the respondent has failed to establish the substantial loss it may suffer if the order of stay of execution pending appeal is not made by the court.

Thirdly, in an application for stay of execution pending appeal, Order 42 (6) (2) (b) of the Civil Procedure Rules prescribes the furnishing by the applicant of such security as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant. The court has

considered the requirement especially with regard to the order of reengagement. The question is: What kind of security would be sufficient to cover the inherent human right to work? A further question related to inability to incarcerate running of time or storage of time is: What security would sufficiently cover for an employee's lost time to work? The court is of the opinion that every moment of time that an employee works inherently generates satisfaction and the employee's self esteem which is a necessary component to the employee's human dignity beyond the mere pay for the employee's work. Thus, it is the court's holding that computation of the likely or actual pay in view of stay of an order of reengagement and the willingness of the employer to deposit the same as security would fall short as sufficient security for the human dignity of an employee to work. It is the court's further consideration that it would be arbitrary and an imbalance of convenience to compute such payment and to require an employer to furnish the same as security. The court is alert to the likely intervening circumstances following a reengagement such as the right of the employer to terminate employment lawfully, the right of the employee to terminate employment lawfully, frustration of the contract of service and such other circumstances. The court does not enjoy precision of a prophet to foresee such intervening circumstances and thereby make a finding on sufficient security in lieu of implementation of an order of reengagement. Accordingly, the court finds that with or without the assistance of the parties, and in this case without the assistance, it is conceivably very difficult, indeed impossible, for the court to order security for stay of implementation of an order of reengagement.

Fourthly, during the submissions, the respective Counsel for the parties spent considerable time on the question whether an appeal existed. For the respondent, it was submitted that the notice of appeal had been filed and thus, there was an appeal. For the claimant, it was submitted that the notice of appeal had not been served within the prescribed time and no steps had been taken by the respondent to regularise that fundamental irregularity. The court has considered the submissions and finds that such behaviour on the part of the respondent would be indicative of bad faith on the part of the respondent in seeking an order of stay of execution pending appeal whose consequences, if the order is granted, would impede the natural flow of justice by suspending the claimant's enjoyment of his successful litigation as per the court findings and decisions. In the opinion of the court, an applicant for stay of execution pending appeal must demonstrate to the court that the intended appeal is genuinely being pursued. Hence, such an applicant should act with due diligence in complying with the rules and steps in filing the appeal and prompt action in accordance with the rules to correct any irregularities that may occur in the process and failing which, lack of dexterity in that regard will lead to conclusions of bad faith and therefore denial of the order of stay pending appeal. In the instant case, the respondent has not offered any explanation for the delayed service of the notice of appeal or steps being taken to regularise the delay, both of which in the opinion of the court are impetus to denial of the order of stay of execution pending appeal.

In conclusion, the respondent's application by way of the notice of motion filed on November 9th 2012 is dismissed with costs.

Signed, dated and delivered in court at Nairobi, this 17th December 2012.

BYRAM ONGAYA
JUDGE