



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 467 of 2010

BENTACK KILUNDO.....CLAIMANT

VERSUS

SCHENKER LIMITED.....RESPONDENT

RULING

Mr. Ogembo for the Applicant

Mr. Nyabena for the Respondent/ Claimant

The facts giving rise to this application may be briefly summarised as follows:-

The Respondent was employed by the Applicant on 2nd December, 1985 until his services were summarily terminated on 26th February 2010. He filed a case for wrongful termination before the Industrial Court on 27th April, 2010 and on 13th July, 2012 the Court found in his favour and awarded him terminal dues as follows:-

- (a) Three months' salary in Lieu of Notice
- (b) Annual leave days
- (c) Gratuity
- (b) Six (6) months' salary compensation for loss of employment
- (e) Issue a Certificate of Service

The Industrial Court on 30th August, 2012 issued a Decree for a total sum of Kshs.2,890,292/= in favour of the Claimant/Respondent and on 25th September, 2012 Jumbolink Auctioneers proclaimed the Applicant's entire tools of trade which proclamation was to take effect for a period of 7 days from that date.

On 26th September, 2012 a Notice of Motion under Certificate of Urgency was filed seeking orders for stay of execution of the Decree and the Court having declared the matter urgent issued interim orders which are still subsisting.

The Applicant states that the intended appeal has good chances of success on grounds outlined in the Supporting Affidavit to wit:-

- (a) The Honourable Judge erred in law in finding that there was no evidence or basis for dismissing the Claimant and proceeded to irregularly award the Claimant 6 months' salary in Lieu of Notice.
- (b) The Honourable Judge erred in awarding the Claimant salary in Lieu of Notice inspite that the contract of service provided for 1 month notice.
- (c) The Honourable Judge erred in fact and law by awarding the Claimant unpaid leave without any evidence placed before it; and
- (d) The Honourable Judge erred in law in awarding the Respondent payment of gratuity though there was no provision for it in his Contract of Service.

In terms of Section 17(1) of the Industrial Court Act, 2011 appeals from the decisions of the Industrial Court lie to the Court of appeal in accordance with Article 164(3) of the Constitution. Such appeals only lie on matters of law in terms of Section 17(2) of the Industrial Court Act, 2011.

In its Replying Affidavit, the Respondent opposes the grant of stay of execution of the Judgment of the Court on grounds that:-

The Applicant only moved this Court after the proclamation of its goods on 25th September 2012, more than 21 days from the date the Respondent claims it knew about the judgment and decree in this matter.

That since an application for extension of time to file a notice of appeal in the Court of Appeal has been filed, the Application for stay of execution should have been filed there.

That the intended appeal has no merit as it is based on issues of fact hence may not be entertained by the Court of Appeal. Furthermore, the judgment of the Court sounds in money and therefore capable of being refunded should the Respondent succeed in its intended appeal to the Court of Appeal. That the Respondent is a Multinational which is well funded unlike the Applicant who is in dire need of funds and therefore the balance of convenience is in favour of disallowing the Application for stay of execution.

The Court has duly considered the papers filed on record by both parties and the submissions by counsel for the parties and the following issues require determination:-

- (i) whether an application for stay of execution of a Decree of the Court is tenable where no notice of appeal has been filed.
- (ii) if issue (i) is determined in the affirmative whether the Application for the stay of execution has merits.
- (iii) if issue (ii) is ruled in the Affirmative what conditions should attach to the grant of the application for stay of execution.

(1) Whether an application for stay of execution of a Decree of the court is tenable where no notice of appeal has been filed.

It is common cause that the Applicant has neither filed a notice of appeal nor the appeal itself to the Court of Appeal. However an Application under Section 3A of the Appellate Jurisdiction Act Cap. 9 of the Laws of Kenya and Rules 4 and 42 of the Court of Appeal Rules 2010 was filed by the Applicant on 13/9/2012 seeking extension of time to file notice of appeal on grounds that the Industrial Court did not notify them of the date of the judgment and that they only became aware of it after 14 days' period had expired.

Rule 75 of the Court of Appeal Rules, 2010 provides that:-

“(1) Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in

duplicate with the registrar of the superior court (read Industrial Court).

(2) Every such notice shall subject to rules 84 and 97, be so lodged within fourteen days of the date of decision against which it is desired to appeal.

(3) When an appeal lies only with leave, or on a certificate that a point of law of General Public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal”.

No notice of appeal had been filed as of the date of hearing this matter as noted earlier.

The Authorities I have perused deal with the considerations by the Court in granting a stay of execution pending appeal after a notice has been filed. The issues whether the intended appeal is arguable with high probability of success, whether failure to grant a stay would render the intended appeal nugatory and whether the balance of convenience favours the grant of the stay or not are moot points where no notice of appeal has been lodged.

Indeed, Section 7 of the Appellate Jurisdiction Act Cap. 9 of the Laws of Kenya permits the Court *Aquo*, in this case the Industrial Court, to extend the time for giving notice of intention to appeal from a judgment of the Industrial Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that the time for giving such notice or making such appeal may have already expired. The Applicant has therefore no excuse for not filing a notice of appeal notwithstanding that it became aware of the Judgment after 14 days had expired.

Accordingly the Application is misconceived and the same is dismissed with no order as to costs.

Ordered accordingly.

DATED and DELIVERED in Nairobi this 6th day of December, 2012.

Mathews N. Nduma

PRINCIPAL JUDGE