Kenya Hospitals Association t/a Nairobi Hospital v Kenya Medical Practitioners, Pharmacists and Dentists Union & another (Civil Appeal (Application) E505 of 2024) [2025] KECA 1133 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1133 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E505 OF 2024

J MOHAMMED, FA OCHIENG & AO MUCHELULE, JJA

JUNE 20, 2025

BETWEEN

KENYA HOSPITALS ASSOCIATION T/A THE NAIROBI HOSPITAL ..... APPLICANT

AND

KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION ..... 1ST RESPONDENT

MINISTRY OF LABOUR & SOCIAL PROTECTION ..... 2ND RESPONDENT

(Being an application for an order of stay of execution against the judgment and decree of the Employment and Labour Relations Court at Nairobi (N. Nderi, J.) dated 27th June 2024inELRC Cause No. E860 of 2022)

RULING

1. This is a motion dated 3rd October 2024 pursuant to Article 50 of the *Constitution*, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of the *Court of Appeal Rules, 2022* filed by the applicant, Kenya Hospitals Association T/A The Nairobi Hospital, against the 1st respondent, Kenya Medical Practitioners, Pharmacists and Dentists Union, and the 2nd respondent, Ministry of Labour and Social Protection. It sought:-

> " 3) A declaration and/or finding that the appellant's action of failing to recognize the respondent was wrongful and illegal and amounted to unfair labour practice contrary to Article 41 of the *Constitution*;
>
> 4. An order as to costs of this suit; and

5. That Honourable Court do make any such further order it deems fit to grant."

2. The background of this dispute is that in the Employment and Labour Relations Court (ELRC) at Nairobi, the 1st respondent sued the applicant seeking a declaration and/or finding that it (the 1st respondent) represents the simple majority of unionisable employees at the applicant's hospital; an order that the parties do negotiate and execute a recognition agreement within 30 days of granting of prayer (1); a declaration and/or finding that the applicant's action of failing to recognize the respondent was wrongful and illegal and amounted to unfair labour practice contrary to Article 41 of the *Constitution*; and an order for costs.

3. The 1st respondent claimed that it was a registered trade union that represented a simple majority of the unionisable employees of the applicant. That, despite this, the applicant had refused to recognize the union for purposes of collective bargaining, alleging that the number of staff that the 1st respondent represented was approximately 14% of the total unionisable employees. The 1st respondent went on to state that the applicant was thus in breach of section 54(1), (6), (7) and (8) of the *Labour Relations Act*, 2007.

4. The dispute was referred to the 2nd respondent for conciliation vide letter dated 7th July 2022 but it was alleged that the 2nd respondent had failed to discharge its mandate under Part VIII of the *Act*, hence the suit.

5. On the basis that the applicant had been served with summons to enter appearance but had failed to enter appearance or file a defence, the matter went for formal proof. This led to the judgment delivered on 24th August 2023 in which the ELRC found that the 1st respondent represented a simple majority of the unionisable employees of the applicant; and issued an order directing the applicant to execute the draft recognition agreement presented to it within 30 days of the judgment. Costs were to be borne by the applicant.

6. Vide a motion dated 9th November 2023, the applicant applied to set aside the judgment and decree, seeking to be allowed to defend the claim. Its case was that service had been done to its company secretary/legal department which was the office that did not ordinarily receive court documents; that it was the chief execution officer who normally received court documents; and that, in this case, the chief executive officer became aware of the case after judgment had been entered. The applicant indicated that it had a good defence, and that, in fact, it had come by new evidence that showed that 20 members had exited the Union thereby reducing the alleged majority. The applicant in the alternative sought the review of the judgment of the court under Rule 33 of the *Employment and Labour Relations Court (Procedure Rules, 2016)* saying that there was an apparent error on the face of the record in that the court left out the requirement to "negotiate" in the final orders.

7. In the meantime, the 1st respondent had filed a motion to have the applicant committed to civil jail for being in contempt of the orders in the judgment. The 1st respondent had not acted to satisfy the decree.

8. The learned Judge (M.N. Nduma, J.) considered the application. He found that the applicant had been properly served but had not presented a credible reason why it had not filed a defence to the claim. He considered the intended defence which was that 20% of the recruited employees had since left the employment of the applicant and so they could not count to support the finding that the 1st respondent had recruited 85 employees who constituted more than a simple majority of the unionisable employees of the applicant. It was noted that this was not arguable defence, because the simple majority of an employer to recognize a union is considered at the time of the recruitment of members and the check

off forms presented to the employer by the union, and not later; that exit of some employees after the fact was not material to the issue of acquiring a simple majority by the union.

9. Ultimately, the court dismissed the applicant's application but varied order "13(b)" of the final orders in the judgment to include "negotiation" so that it read -

> " 13(b) The 1st respondent is directed to negotiate and execute a recognition agreement within thirty days of this judgment."

It was found that the contempt application had been spent. Each party was asked to pay its costs.

10. This ruling of 27th June 2024 is what was followed by a notice of appeal dated 1st July 2024 and the instant application which sought that –

> " 3. Pending the hearing and determination of the intended appeal there be a stay of execution and or a stay of the enforcement of the judgment of 24th August 2025 as partly reviewed by the ruling delivered and orders made on 27th June 2024 ... including any and all consequential orders emanating therefrom."

11. The application was based on grounds and supporting affidavit. The applicant's case was that the learned Judge ought to have set aside the exparte judgment and allowed for the filing of a defence which was based on arguable grounds. According to the applicant, the threshold for recognition had not been met; that the trial Judge ought to have set aside the judgment and subjected the issue whether or not the threshold had been met to the calling of evidence. As to whether the intended appeal had arguable grounds, the applicant pointed to the draft memorandum of appeal. The question whether the threshold had been met was an arguable point, it was stated. Then the question whether the 1st respondent had exhausted the conciliation process under the Act before coming to court. Lastly, there was the question whether the court properly exercised its discretion in dismissing the application.

12. On the nugatory aspect, it was stated that the 1st respondent had since filed an application for contempt which was due for hearing. That, to purge the contempt, the applicant will be forced to enter into a collective recognition agreement which step will be irreversible and prejudicial.

13. A replying affidavit was filed to oppose the application.

14. Learned counsel, Ms. Irene Kashindi submitted that the learned Judge was wrong to dismiss the application to set aside as the applicant had demonstrated that the failure to enter an appearance was not inadvertent and excusable. Secondly, that there was a reasonable defence as a hearing would have shown the discrepancies in the check-off list produced by the 1st respondent. As indicated in the foregoing, it was contended that the applicant had an arguable intended appeal and that, if stay is not granted, the appeal will be rendered nugatory.

15. Learned counsel Mr. Washika for the 1st respondent opposed the application. According to him, it was evident that the threshold for recognition had been met, and therefore there was no arguable appeal. Secondly, that the learned Judge had properly exercised his discretion in refusing the application to set aside as the claim and memorandum to enter appearance had been served but had not been responded to, or the defence filed. On the nugatory aspect, learned counsel referred to section 54(5) of the *Labour Relations Act*, and submitted that the recognition agreement can be set aside or revoked. This fact was acknowledged by learned counsel for the applicant in her submissions.

16. We have considered the application, the response and the rival submissions. We have to decide whether, on the material before us, the applicant has made a case to warrant the granting of the order of stay.

17. In dealing with a 5(2)(b) application, we are exercising original and discretionary jurisdiction whose power is wide and unfettered. Each case has to be decided on its merits, but the running theme is that the applicant has to satisfy the Court that it has an arguable appeal, and not a frivolous appeal, and, secondly, that if stay is not granted, the ultimate appeal, if it were to succeed, will be rendered nugatory (see *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR).

18. An arguable appeal is not one that is likely to succeed. It is enough that it raises a serious question of law or a reasonable argument that is deserving of consideration by the Court (*Dennis Mogambi Mang'are v Attorney General & 3 others*, Civil Application No. NAI 265 of 2011).

19. When considering whether or not the intended appeal may be rendered nugatory owing to the refusal to grant stay, this Court is required to look at the facts of each case, the conflicting claims of each party and whether the hardship that the applicant will suffer, if stay is not granted, will be out of proportion to any suffering that the respondent will suffer while waiting for the hearing and determination of the intended appeal. (See *Reliance Bank Ltd v Norgake Investment Ltd* [2002] EA 227).

20. We have no hesitation in finding that whether or not the learned Judge exercised his jurisdiction properly when he declined to set aside the exparte judgment is an arguable point worth the consideration by this Court on appeal. The other issue would be whether the appellant's proposed defence raised triable issues that the learned Judge should have been persuaded to re-open the case to be heard and determined on merits. We are alive to the principle that, it is sufficient if a single bonafide arguable point of appeal is raised (See *Damji Pragji Mandavia v Sara Lee Household & Rudy Care (K) Ltd*, Civil Application No. NAI 345 of 2004).

21. As to whether the intended appeal will be rendered nugatory if stay is not granted, and the appeal ultimately succeeds, we do not think that the applicant successfully demonstrated this.

    This is because, if a recognition agreement is successfully negotiated and signed by the parties, the same can be terminated or revoked on application by either side. Section 54 of the *Labour Relation Act* provides as follows:-

    54.

    (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

    2. A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

    3. An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

    4. The Minister may, after consultation with the Board, publish a model recognition agreement.

    5. An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement."

The applicant can apply to the National Labour Board at any time to revoke the recognition should it demonstrate relevant matters, including that the 1st respondent does not meet the simple majority threshold. On the other hand, should stay be granted, and the appeal ultimately fails, the members of the 1st respondent would have been denied the right to collectively bargain.

22. This means that, the applicant has met one of the requirements, whilst falling short of meeting the second one.

23. But the substantial reason why we cannot allow the application for stay is because, stay under Rule 5(2)(b) is intended to prevent the execution of a positive order that could cause irreparable harm. In the instant case, however, the applicant's application seeking to set aside the exparte judgment was dismissed with each side being ordered to pay its costs. Stay is not applicable to a dismissal order that simply leaves the parties in their original position. In *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 Others* [2021] KECA 363 (KLR), this Court stated as follows:-

> " The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed."

24. The exparte judgment had asked the applicant to execute a recognition agreement within 30 days. The ruling varied that, so that the applicant was now required to negotiate and execute a recognition agreement within 30 days. What was sought to be stayed was, however, not the judgment but the ruling refusing to set aside the exparte judgment. But even if the applicant was seeking to stay the negotiation and execution of the recognition agreement, we have observed in the foregoing that such recognition was terminable or revocable at the instance of either party, and therefore the intended appeal would not be rendered nugatory.

25. In conclusion, we find no merit in the application. We order its dismissal with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

JAMILA MOHAMMED

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

.....

A.O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED DEPUTY REGISTRAR