



Proto Energy Limited v Kenya Petroleum Oil Workers Union (Civil Application E078 of 2024) [2024] KECA 860 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KECA 860 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E078 OF 2024
PO KIAGE, P NYAMWEYA & PM GACHOKA, JJA
JULY 12, 2024**

BETWEEN

PROTO ENERGY LIMITED APPLICANT

AND

KENYA PETROLEUM OIL WORKERS UNION RESPONDENT

(An application for stay of execution and proceedings and for an injunction pending the hearing and determination of an intended appeal from the Ruling of the Employment and Labour Relations Court at Nairobi (A. Mwaure J.) dated 9th February 2024 in ELRC Cause No. E331 of 2022)

RULING

1. Proto Energy Limited, the applicant herein, has lodged an application dated 19th February 2024 in this Court, in which it seeks the following orders pending the hearing and determination of its intended appeal from the rulings delivered and orders made on 7th July 2023 and 9th February 2024 in Nairobi ELRC Cause No. E331 of 2022 - *Kenya Petroleum Oil Workers Union v Proto Energy Limited*:
 - a. an order of stay of execution or a stay of enforcement of the rulings delivered and orders made on 7th July 2023 and 9th February 2024 including any and all consequential orders emanating therefrom;
 - b. an injunction restraining the Kenya Petroleum Oil Workers Union, the respondent herein, from taking action to pursue its recognition by the applicant and to demand the deduction of union dues relating to the 722 individuals recruited as its members as ordered by the ruling and orders made on 7th July 2023 and 9th February 2024.
 - c. a stay of any further proceedings in Nairobi ELRC Cause No. E331 of 2022- Kenya Petroleum Oil Workers Union v Proto Energy Limited.



2. The main grounds for the application, as detailed therein and in affidavits in support thereof sworn on even date and on 11th March 2024 by Wambui Maina, the applicant's Legal Officer, is that the import and implication of the orders of 9th February 2024 is that the applicant will be required to comply with the ruling of 7th July 2023 and inter alia, deduct union dues of 722 disputed employees, and recognize the respondent for purposes of collective bargaining and enter into a recognition agreement when it had not met the simple majority threshold required by the law.
3. By way of brief background and to provide the context of the application, the respondent filed a suit in the Employment and Labour Relations Court, Nairobi (hereinafter "the ELRC"), wherein it claimed that it had recruited 722 employees of the applicant who were unionisable members, which was over and above the 51% simple majority as required under section 54 (1) of the [Labour Relations Act, 2007](#) for purposes of recognition, and had served the applicant with fully signed check-off forms for the said employees. However, the applicant failed to collectively remit the union dues to the respondent and proceeded to illegally deduct all union dues from some of the respondent's members and to ensure that at any given month, the number of employees deducted dues did not exceed 51%. Further, the applicant refused to execute the model Recognition Agreement and the aforementioned check off forms.
4. The applicant opposed the suit in the ELRC, and contended that the respondent had not reached a simple majority to warrant recognition as a union, and had also not met the legal requirements for the deduction of union dues. The applicant's case inter alia was that there were doubts raised by the inclusion of management employees, employees who were deceased, former employees, and employees whose details were repeated in the check- off forms, and that the alleged number of 722 employees came down to 482 employees after deducting the details of these questionable employees.
5. On 19th May 2022, the respondent subsequently filed an application in the ELRC seeking to compel the applicant to deduct and remit the respondent's union dues for all the 722 members who were the applicant's employees, avail the list of unionisable employees of the respondent, direct the applicant to sign the Recognition Agreement sent on 23rd August 2021 in accordance with section 54 of the [Labour Relation Act](#), and the cost of the application be provided for in favour of the Respondent. The trial Judge (A. N. Mwaure J.) in a ruling delivered on 7th July 2023 found that the respondent had proved its case to warrant the grant of orders sought in the application and granted the following orders:
 1. That this Honourable Court do issue orders to compel the Respondent (Applicant) to deduct and remit to the Claimant (Respondent) union dues for all the 722 members who are the Respondent's (Applicant) employees.
 2. That this Honourable Court do issue orders compelling the Respondent (Applicant) to avail the list of unionisable employees to the Claimant (Respondent)
 3. That this Honourable Court do issue orders directing the Respondent (Applicant) to sign the Recognition Agreement sent on 23rd August 2021 in accordance with section 54 of the [Labour Relations Act, 2007](#).
 4. Costs of the application to be paid by the Respondent.
6. The applicant consequently filed an application dated 20th July 2023 in the ELRC, seeking a review or setting aside of the ruling delivered on 7th July 2023 and any consequential orders. After hearing the parties, the ELRC delivered a ruling dated 9th February 2024 dismissing the said application on the ground that it had not met the threshold for setting aside or reviewing the subject ruling. This ruling precipitated the filing of a Notice of Appeal dated 15th February 2024 against the said decision, and the instant application in this Court.



7. The applicant has deposed in the instant application that it has an arguable appeal for the reason that the ELRC failed to consider and make findings on glaring discrepancies in the check off forms containing the 722 individuals said to be the respondent's members, which constituted a clear and evident error apparent on the face of the record. Further, that this was not an issue of merit as found by the trial Judge, and this oversight amounted to sufficient grounds to warrant the review of its ruling of 7th July 2023. Lastly, the orders of 7th July 2023 were in the nature of final mandatory orders which should only be issued in exceptional circumstances after hearing the parties on merit. These are the main issues raised in the applicant's draft Memorandum of Appeal which listed nine grounds of appeal. The applicant was also opposed to providing security for the union dues and averred that the figure of 482 employees had significantly reduced and the number was 33 at the time of filing the application for review, and stood at 28 as at February 2024 due to the exit of employees over time, thus it was not possible to deduct dues for individuals who were not employees.
8. The respondent opposed the application in a replying affidavit sworn on 8th March 2024 by George Okoth Omollo, its General Secretary. He averred that the grounds cited in the draft memorandum of appeal were not arguable as most of them touched on the merits of the ruling delivered on 7th July 2023 and not the review ruling delivered on 9th February 2024 which was subject of the intended appeal before this Court. Further, the applicant filed an appeal couched as a review application before the ELRC which substantively questioned the merits of the ruling delivered on 7th July 2023. The respondent contended that a blanket injunction or stay stopping remittance and deduction of union dues will prejudice its activities as it depended on the funds for its daily operations; the union dues were deducted and remitted on a monthly basis from salaries of union members hence the same would not be recoverable if the stay orders were granted; and the applicant stood to suffer no prejudice since the deductions were made from the employees' salaries and not its funds.
9. In addition, that there were no ongoing proceedings in the suit in the ELRC namely ELRCC/E331/2022- *Kenya Petroleum Oil Workers Union v Proto Energy* which was marked as closed on 9th February 2023 upon delivery of the review ruling, though the taxation of costs had not commenced. Therefore, in case this Court is persuaded to grant the stay orders, the applicant should provide security in the sum of the union dues equivalent of the 482 members not disputed for all the months before the intended appeal is heard and determined as a condition for stay, and the same is deposited in an interest earning account.
10. We heard the application on the Court's virtual platform on 13th March 2024. Learned counsel Ms Irene Kashindi and Ms. Akumu, appeared for the applicant, while learned counsel Mr. K'Ogangah holding brief for learned counsel Mr. Onyony appeared for the respondent. The learned counsel present highlighted their respective written submissions dated 11th March 2024 and 12th March 2024, in which they set out the principles that are applicable in an application for stay of execution or proceedings, and for an injunction pending an appeal under rule 5(2)(b) of the *Court of Appeal Rules* 2022.
11. These principles are well settled. Firstly, an applicant has to show that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, and in the various judicial authorities cited by the learned counsel, namely *Githunguri v Jimba Credit Corporation Ltd (No. 2)* [1988] eKLR, *Butt v Rent Restriction Tribunal* [1979] eKLR and *Trust Bank Limited & Another v Investech Bank Ltd & 3 Others* [2000] eKLR. The applicant's counsel, in addition cited the decision of this Court in *Cabinet Secretary Ministry of Health v Aura & 13 Others (Civil Applications E583 of*



2023) [2024] KECA 2 (KLR) (19 January 2024) (Ruling) for the position that public interest is an additional consideration in granting stay.

12. It is necessary to clarify at the outset that the exercise of this Court's jurisdiction under Rule 5(2)(b) of the Court of Appeal's Rules of 2022 is predicated on a notice of appeal having been filed against the decision or action sought to be stayed. The ruling and orders sought to be stayed in the instant application were those made on 7th July 2023 and 9th February 2024. It is in this regard notable that after the ELRC delivered the ruling dated 7th July 2023, the applicant filed a Notice of Appeal dated 14th July 2023. However, after filing the application dated 20th July 2023 for review of the said ruling, the applicant subsequently filed a Notice of Withdrawal of the said Notice of Appeal, dated 24th August 2023. The prayers therefore seeking stay of execution and an injunction against the orders made on 7th July 2023 are incompetently before us, and we will therefore only proceed to consider the prayers before us as regards the ruling of 9th February 2024.
13. On whether the intended appeal against the ruling of 9th February 2024 is arguable, the learned counsel for the applicant reiterated that the trial court failed to consider and make findings on glaring discrepancies in the check off forms which was crucial evidence, and also erred in concluding that the applicant pursued both a review and an appeal failing to consider that the Applicant did not submit a substantive appeal and submitted that the filing of a Notice of Appeal, without a substantive appeal did not take away the Court's jurisdiction to hear an application for review. The Applicant urges that the intended Appeal was arguable with a high chance of success as it rested on the nine (9) substantial grounds set out in the draft memorandum of appeal.
14. Learned counsel for the respondent on his part submitted that the grounds cited in the draft memorandum of appeal were not arguable as most of them touched on the merits of the ruling delivered on 7th July 2023 and not the review ruling delivered on 9th February 2024, which was the subject of the intended appeal. Additionally, the ELRC was right in dismissing the review application as the same was an appeal couched as a review application inviting the trial court to re-analyze the facts, the evidence adduced, submission, and make a different finding.
15. We are alive to the position that an arguable appeal is one that need not succeed but one that warrants this Court's interrogation, one which is not frivolous as was held in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [*supra*]. It was also held in the case of Nicholas Muriuki Kangangi v Attorney General [2011] eKLR that an arguable appeal is one which raises at least one arguable point. In our view, the applicant has demonstrated from the grounds set out in the draft Memorandum of Appeal an arguable point as to whether the ELRC took into account the proper and relevant factors in dismissing its application for review, and its intended appeal is therefore not frivolous.
16. As to whether the intended appeal will be rendered nugatory, the applicant's counsel submitted that it was crucial to maintain the substratum of the appeal to prevent it from being rendered nugatory if successful, and that compliance of the orders of the ELRC will be extremely difficult if not impossible, as it was being compelled to pay dues for 722 members of the respondent whereas many of the individuals had left employment from the time the suit was filed in 2022 and the number now stood at 28. It would not be in consonance with the law that governs the threshold for recognition of trade unions for collective bargaining. It was their position that some of the employees said to be recruited as members of the respondent were in the applicant's management and were not eligible to join the union, and retaining them as members will engender industrial disharmony. Lastly, that it was not in the public interest and in the interest of advancing the proper administration of justice that if the applicant is compelled to comply with orders that were not capable of performance and not in consonance with the applicable law on recognition of trade unions.



17. The averments made by the respondent as to its activities being prejudiced by the orders sought, and that the applicant will not be prejudiced if the deduction and remittance of union dues of the respondent's members continued to be made, were reiterated by its counsel. In addition, that the Recognition Agreement can be revoked under section 54 (5) of the *Labour Relations Act* once a union loses a simple majority of representation and hence recognition is reversible. Lastly, that the orders given by the trial Court in the ruling delivered on 9th February 2024 were negative orders and there was nothing to stay in the said ruling.
18. It is notable that the ruling of 9th February 2024 dismissed the applicant's application for review, and there were, therefore, no positive orders capable of stay. In addition, in relation to the prayer for an injunction restraining the respondent from demanding the deduction of union dues and taking action to pursue its recognition by the applicant, it is our considered view that any remittances made by the applicant to the respondent are refundable, and any recognition given to it is also reversible under the applicable law. The applicant's appeal will in this respect not be rendered nugatory in the event that it is successful. It was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [supra] in this respect that whether an appeal will be rendered nugatory is dependent on whether or not what is sought to be stayed is reversible and, if not, whether damages will reasonably compensate the aggrieved party.
19. The applicant has in the circumstances failed to satisfy the second limb for grant of stay orders or an injunction, and its application dated 19th February 2024 is accordingly dismissed with costs to the respondent.
20. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024

P. O. KIAGE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

MWANIKI GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

