United Aryan (EPZ) Limited v Tailors & Textiles Workers Union (Civil Application E178 of 2021) [2023] KECA 1421 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1421 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E178 OF 2021

MA WARSAME, K M'INOTI & JM MATIVO, JJA

NOVEMBER 24, 2023

BETWEEN

UNITED ARYAN (EPZ) LIMITED ..... APPLICANT

AND

TAILORS & TEXTILES WORKERS UNION ..... RESPONDENT

(Being an application for stay of execution pending appeal from the judgment at Employment and Labour Relations Court, Nairobi (Nderi, J) dated 19th May, 2021 in ELRC Cause No. 40 of 2020)

RULING

1. By an application dated 3rd June 2021, the subject of this ruling, United Aryan (EPZ) Limited (the applicant) prays this Court to stay execution of the Judgment delivered on 19th of May 2021 in Nairobi Employment and Labour Relations Court Cause No. 40 of 2020 (Nderi, J) pending the hearing and determination of its appeal. The application is brought under Rule 5(2)(b) of the *Rules* of this Court and Section 3A & 3B of the *Appellate Jurisdiction Act*. The applicant also prays for costs of the application and any other orders the Court may deem fit to grant for the interests of justice. Prayers (1), (2) and (3) of the application are spent.

2. The application is supported by grounds on its body and the supporting affidavit of Amit Bedi (the applicant's Managing Director) sworn on June 2, 2021 together with the annexures thereto. It has been opposed by the respondent vide replying affidavit sworn on 18th June 2021 together with annexures thereto. It was canvassed through rival pleadings, written submissions and legal authorities relied upon by advocates for the respective parties in support of their opposing positions.

3. The background to the application albeit, briefly is that the respondent, a duly registered Trade Union with coverage in the EPZ Zone recruited unionisable employees from the applicant's establishment and sought the implementation of *Legal Notice No. 2 of 2019*, gazetted on January 8, 2019. However,

the parties failed to agree on the implementation, prompting the respondent to institute a suit by way of a statement of claim against the applicant on 27/1/2020 seeking the following orders:

a. A declaration that the respondent's company has violated and/failed to implement *Legal Notice No. 2 of 2019*.

b. That the respondent be ordered to implement the aforesaid *Legal Notice No. 2 of 2019.*

c. The respondent be ordered to pay damages to the claimant union and its members for the violation and/or breach of *Legal Notice No. 2 of 2019*.

d. The respondent be ordered to pay damages for discrimination against the claimant members.

e. The respondents be ordered to pay costs of the instant suit.

f. Any other order that the court may deem fit.

4. The applicant filed a replying affidavit to the suit denying the claim and maintained that the respondent had failed and/or neglected to implement *Legal Notice No. 2 of 2019*, which is a minimum wage order gazetted by the Honourable Cabinet Secretary for Labour.

5. The parties by consent agreed to proceed by way of their pleadings, annexures thereto and written submissions. In the impugned judgment delivered on May 19, 2021, the learned Judge held:

a. The *Regulation of Wages (General) (Amendment) Order*, 2018, came into force on 1st May 2018.

b. All affected employers including the respondent are bound to implement the revised minimum wage for the occupations specified in the schedules therein with effect from May 1, 2018. The respondent is directed to implement the *Wage Order* accordingly.

c. The respondent to pay the costs of the suit.

6. Aggrieved by the verdict, the applicant is desirous of appealing against the said decision and it lodged a notice of appeal dated May 20, 2021 and requested for typed proceedings.

7. It is the applicant's case as we glean it from the grounds in support of the application and the submissions by its learned counsel Mr. Mbeche holding brief for Mr. Obura is that the applicant has an arguable appeal, which has reasonable probability of success. To demonstrate that the intended appeal is arguable, the applicant highlighted 5 grounds upon which it faults the finding by the trial Judge of the superior court. Briefly, the applicant maintained that the learned Judge erred in law and fact in making an award that offends section 28 of the *Interpretation and General Provisions Act* and in failing to appreciate that the issue before him was retrospective application of *Regulations*. Further, the trial judge erred in disregarding a binding precedent and in making a finding, which affects accrued rights. Further, the learned judge erred in basing his judgment on matters that had not been pleaded.

8. The applicant submitted that the question of the retrospective application of subsidiary legislations was determined by the Supreme Court in *Samuel Kamau Macharia & 40 others v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and faulted the trial court for failing to follow the said binding decision in violation of Article 163 (7) of the *Constitution*.

9. On the nugatory aspect, the applicant argued that pursuant to the impugned judgment, the applicants are entitled to large sums of money which the respondent will be unable to refund in the event the intend appeal succeeds. It is also his case that the respondent will not be prejudiced since the applicant is capable of paying the salary arrears should the appeal fail.

10. The respondent's case as we gather it from its response to the application and submissions by Mr. Musebe holding brief for Mrs Guserwa, is that the intended appeal is not arguable. The respondent faulted the applicant for failing to attach a draft memorandum of appeal for consideration by this Court. It argued that the Judge considered all the issues on retrogressive application of the *general wages order*, payment of arrears and development and publication of general wages order. It argued that all the employers in the country have complied with the *general wages order* except the respondent, and therefore setting aside the Judgment will open a pandora's box meaning that all employers will demand refunds of arrears paid to their employees.

11. In addition, the respondent argued that the orders sought if granted will prejudice the union's members. This is because the orders are intended to deny its members enjoying the fruits of their Judgment after 3 years of litigation against the applicant who is actually inciting employees to leave the respondent union yet they continue to enjoy the negotiated collective bargaining agreement. The respondent maintained that the applicant cannot suffer any damage or loss by paying the employees the arrears of their lawful salary adjustments which is their statutory duty under *Employment Act*.

12. On whether the intended appeal would be rendered nugatory, the respondent maintained that the issues raised in the instant application are not of national importance as claimed because there is nothing wrong with a retrospective application of a statute or any amendment thereto. The respondent relied on *Kenya Medical Laboratory Technicians & Technologists & 7 others v Attorney General & others* [2020] eKLR where an application for stay of execution was dismissed for failing to demonstrate that the intended appeal would be rendered nugatory.

13. Our invitation to intervene on behalf of the applicant has been invoked under Rule 5 (2) (b) of the *Court of Appeal Rules*. The principles governing granting stay of execution, injunction or stay of proceedings under Rule 5(2) (b) of this *Court's Rules* are well settled. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 other*s [2013] eKLR). An applicant seeking relief premised on the above rule is obligated to demonstrate that the appeal or the intended appeal is arguable and, that the appeal will be rendered nugatory if the stay is refused should the appeal ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.

14. We are also guided by the decision in *Eric Makokha & 4 others v Lawrence Sagini & 2 others* [1994] eKLR CA where this Court in an application under Rule 5 (2) (b) stated:

> "An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the court. So, its grant must be made on principles established by equity..."

15. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court on appeal. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this Court described an arguable appeal in the following terms:

> " vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
>
> viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

16. It is the respondent' case that failure by the applicant to annex a draft memorandum of appeal renders the appeal not arguable. The said line of argument was addressed by this Court in *Somak Travels*

Ltd v Gladys Aganyo [2016] eKLR and *Abercombie & Kent Limited v John Wanjau Main*a [2020] eKLR whereby this took the view that while it is desirable for an applicant to annex a draft proposed memorandum of appeal to its application, the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. We agree this sound statement of the law and add that our reading of the grounds enumerated on the face of the application, the supporting affidavit and the submissions tendered leaves us with no doubt that the applicant has set out the key grounds it desires to mount in its appeal. Therefore, the argument founded on the omission to annex the draft memorandum of appeal is rejected.

17. In satisfaction of the first prerequisite, the applicant has raised 5 grounds. One of the grounds is that the Learned Judge erred in law and in fact in failing to follow a binding Supreme Court decision in *Samuel Kamau Macharia & 40 others v Kenya Commercial Bank Limited & 2 others* (*supra*) in violation of Article 163(7) of the *Constitution*.

18. We have examined the grounds cited. Among the grounds cited are the alleged retrospective application of the order and the manner in which it was developed and published. It has also been contended that the impugned award offends section 28 of the *Interpretation and General Provisions Act* and that the learned judge based his findings on issues which were not pleaded. Lastly, the trial court has been faulted for making a decision that affects the applicant's accrued rights. In our view, the said grounds are arguable. We are aware that even one arguable ground is sufficient to satisfy the test. Further, an arguable ground is not necessarily a ground that will succeed. We are satisfied the first limb under Rule 5(2)(b) has been satisfied.

19. Turning to the second prerequisite, whether the appeal, if successful, will be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this Court stated that:

> " ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
>
> x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

20. In determining whether an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be determined considering its peculiar facts and circumstances.

21. The applicant has argued that the amount payable to the respondent's members in arrears pursuant to the judgment is colossal and the respondent may not be in a position to refund the said sums in the event the intended appeal succeeds. On the part of the Respondent, it has been submitted that the applicant can recover its money in the event the intended appeal succeeds.

22. We are required to balance the interests of both parties. On the one hand, the respondent has a judgment in its favour and it is entitled to the fruits of the judgment. On the other hand, the applicant is apprehensive that the respondent may not be in a position to refund the entire amount if the same is paid out should the appeal succeed.

23. Whether an appeal will be rendered nugatory if a stay is not granted depends on if:

    (a) what is sought to be stayed is reversible; and

(b) any damage to the aggrieved party can be reasonably compensated by damages. (See *Public Service Commission & 72 others v Okiya Omtatah & 4 Others* [2021] eKLR).

24. Our analysis of the material presented to us leaves us with no doubt that the applicant has not provided evidence before the court to show that the respondent is impecunious or that its current financial position is such that it would be unable to repay the amounts in question. The applicant has failed to meet the legal requirement of demonstrating that the respondent lacks the means/capacity to repay the debt if their appeal is successful. It is not enough to make the allegation and stop there or to claim that the amount in question is colossal.

25. In conclusion, we find that the applicant has not satisfied the second pre-requisite. Accordingly, we dismiss the application dated June 3, 2021 with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR