Ministry of Education & 3 others v Kenya Union of Domestic, Hotels Educational Institutions and Hospital Workers (KUDHEIHA) & another (Civil Application E418 of 2021) [2022] KECA 717 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 717 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E418 OF 2021

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JULY 22, 2022

BETWEEN

MINISTRY OF EDUCATION ..... 1ST APPLICANT

MINISTRY OF LABOUR ..... 2ND APPLICANT

ATTORNEY GENERAL ..... 3RD APPLICANT

SALARIES AND REMUNERATION COMMISSION ..... 4TH APPLICANT

AND

KENYA UNION OF DOMESTIC, HOTELS EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA) ..... 1ST RESPONDENT

INTER-PUBLIC UNIVERSITIES COUNCIL CONSULTATIVE FORUM OF THE FEDERATION OF KENYA EMPLOYERS ..... 2ND RESPONDENT

(An application for a stay of execution pending an intended appeal against the Judgment of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) dated 15th January 2021 in ELRC CBA 1 of 2020, CBA 2 of 2020 and CBA 3 of 2020)

RULING

1. This application is brought pursuant to Rules 5(2) (b) and 47 of the *Court of Appeal Rules*, and Article 159 of the *Constitution*. The applicants seek a stay of execution of the judgement and orders of the Employment and Labour Relations Court(ELRC) at Nairobi date and delivered on January 15, 2021 pending hearing and determination of the intended appeal against the entire judgment; and that costs of the application be in the cause.

2. The application is premised on the grounds on the face of the application and supported by an affidavit sworn on October 12, 2021 by Amb. Simon Nabukwesi, the Principal Secretary, State Department for

University Education and Research in the Ministry of Education. The grounds may be summarised as follows: The judgment of January 15, 2021 was to the effect that the Collective Bargaining Agreements did not include the annual increments and the resultant pension liabilities payable by the Inter Public Universities Council Consultative Forum (IPUCCF) members on behalf of their staff.

3. The ELRC directed the Salaries and Remuneration Commission to work together with the IPUCCF Implementation Committee, the Ministries of Education and Labour, and the Treasury to make provision for the additional budgetary allocation necessary for the implementation of the CBAs. To that extent, they contend that the judgment is highly prejudicial to the applicants and ought to be set aside as it is based on misinterpretations that the applicants did not pay annual increments to public universities. In fact, Kshs 8.8 billion has already been disbursed to public universities for implementation of the salary review, in addition to Kshs 5.8 billion in annual salary increments that public universities paid to their staff between July 2017 and June 2020.

4. The applicants are apprehensive that the respondents may commence contempt proceedings to compel them to pay the decretal sum. If the applicants are compelled to pay the decretal sum, which is huge and unjustified, this will occasion double payments to the respondents thus ballooning the wage bill. This will also result in unfair enrichment of the respondents at the expense of the public.

5. The respondents issued a strike notice on August 23, 2021 to the Council Chairpersons of 35 public universities, taking issue with the failure to negotiate, sign and implement the CBA for 2017 – 2021; the violation of Article 41 (1), (2) a, and (5) of *the Constitution*; and the violations of the university workers' fundamental rights and freedoms in Chapter 4 of *the Constitution*.

6. The strike notice indicated that failure to meet its demands within 7 days, all the respondent's members in all public universities shall withdraw their labour and not resume duty until the CBA is implemented. The applicants are apprehensive that unless the judgment is set aside and/or stayed, the respondents will go on strike. A strike would lead to nationwide paralysis of higher learning institutions and have far reaching ramifications on the students and those institutions.

7. The applicants have lodged a Notice of Appeal and requested for typed proceedings which were not ready as at the time of filing the application. They contend that the intended appeal is arguable, has very high chance of success, and that the same would be rendered nugatory unless a stay of execution of the judgment is issued. The applicants undertake to expeditiously file the record of appeal once issued with the typed proceedings. The subject matter of the appeal is of immense public interest and, if the judgment and consequential orders are not stayed, the applicants and the Government as a whole stand to lose

8. The 1st respondent response came in the form of a replying affidavit sworn on December 10, 2021 by Dr Constantine Wasonga, the Secretary General of the 1st respondent. He averred that on 3rd July 2020, the court delivered a ruling in CBA No. 2 of 2020 where it accepted the CBA dated 28th October 2019 on an interim basis and ordered that the same be implemented in a horizontal manner pending determination of the case; that the judgment of January 15, 2021 directed that the CBA signed and registered, as well as the computation by the Implementation Committee of the universities, is correct and, therefore, the figure of KShs 8.8 billion is not sufficient to implement the CBAs; and that the SRC was directed to work with the Implementation Committee, Ministry of Education and Treasury to make provision for additional budgetary allocation necessary to implement the CBAs.

9. The Secretary General averred that, as of the date of this application, 25 out of 34 public universities had fully complied with the judgment and placed staff in the salary scale contained in the 2017 – 2021 CBA; that 7 other universities have implemented the CBA in a horizontal manner according to the

ruling of 3rd July 2020 and are having discussions to fully implement the CBA; that the applicants completely refused to facilitate the implementation of the CBA until after several discussions and deliberations leading to implementation starting in July 2021 and others in October 2021; and that the applicant employer initially resisted the formation of a National Implementation Committee to aid in the implementation of the CBA until September 2021.

10. The 1st respondent's view is that a stay would mean reverting their staff to the 2013 – 2017 CBA, resulting in the reduction of their salaries and amounting to unfair labour practices contrary to Article 41 of *the Constitution*, which protects CBAs. Upon registration and implementation of the 2017 – 2021 CBA, the previous CBA ceased to have any legal effect and cannot be used as legal documents. Hence, any stay order would be injurious, prejudicial, and would create hardship to the members of staff. According to the 1st respondent, the KShs 8.8 billion allocated in the 2017 – 2021 CBA had all been utilised in payment of arrears and salaries, and hence there is nothing to stay.

11. The 1st respondent also contends that, on the other hand, the applicants will not suffer any irreparable damage having already released the funds and paid the salaries and arrears to the staff; that the 2017 – 2021 CBA has run its full 4 year cycle ending on 30th June 2021; and that the parties are in negotiation for 2021 – 2025 CBA and, therefore, there is nothing to stay.

12. The 1st respondent observes that, according to their correspondences, the applicants and SRC are attempting to unilaterally vary and amend the judgment and substitute it for the views of the SRC. That the Government has not stopped funding public sectors and public universities were given additional funds in the supplementary budget of 2020, and therefore there is no reason not to fully implement the CBA.

13. If the CBA is not fully implemented, the 1st respondent's members will be condemned to earn a salary that does not match their qualifications and thereby lose their employment rights. That it is imperative that the applicants and Interested Parties carry out their mandate consultatively during the implementation of the CBA according to Article 232 (1) b, c, d, and f of *the Constitution*.

14. The 1st respondent insisted that Article 42 of *the Constitution* accords its members the right to go on strike, but added that, currently there is no pending strike or intention to go on strike.

15. Counsel for the applicants submitted that their appeal is arguable as evidenced by the memorandum of appeal, and that the applicants have raised issues of immense public interest. He reiterated that there is already a strike notice in place by the respondents demanding the payment and implementation of the CBA in toto, and that the strike will lead to a nationwide paralysis of higher learning institutions as the academic calendar will be disrupted leading to the detriment of students and the concerned institutions.

16. Further, counsel argued that the trial judge's direction that the applicants work together with the IPUCCF Implementation Committee, to make provisions for the additional budgetary allocation necessary for the implementation of the CBA, was not workable as the amount of money involved runs in the billions of shillings and cannot be accommodated or cured by supplementary budget. The applicants are also apprehensive that if they are compelled to pay the decretal amount, this will occasion double payment to the respondents and unfair enrichment of the respondents as well as a ballooning wage bill at the taxpayers' expense.

17. On the nugatory aspect, Counsel submitted that the amount the trial court directed SRC to pay the respondents is so huge that if stay of execution is not granted and the amount paid to the respondents, the said amount will not be recovered if the intended appeal succeeds. The stay orders will also afford

the applicants the right to be heard, right to fair hearing and due process of the law as enshrined in Article 50 of *the Constitution*.

18. Counsel for the 1st respondent submitted that the CBA was mutually negotiated between the parties and later voluntarily ratified, hence the applicants cannot turn around and disown the document. He reiterated that there is nothing to stay since several universities have already implemented the CBA as directed by the trial court. That granting the orders sought by the applicants will be in vain because several parties have already complied with the judgment, and the CBA has already run its life cycle and the parties are already in negotiations on another CBA.

19. Counsel submitted that the application has long been overtaken by events; that it has already been rendered nugatory and is a waste of the Court's judicial time; that if the stay is granted, it would amount to failure to implement the CBA on the part of the applicants and, as a result, would infringe on the respondents' right to collective bargaining rights as enshrined in Article 41(1) and (2) of *the Constitution*; and that staying the implementation of the CBA would mean reverting to the 2013 – 2017 CBA and the resultant reduction of the respondent's members' salaries.

20. The Court exercises unfettered original, independent and discretionary jurisdiction in entertaining applications under Rule 5 (2) (b) with the objective of preserving the subject matter of the appeal. As was stated in *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR:

> " It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 C.P. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction... From the foregoing, it is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

21. A point raised by the 1st respondent in opposition to the application is that there is nothing to appeal because of the fact that a majority of the public universities have already implemented the CBA; that the CBA has already run its life cycle; and that the parties are already in negotiations for a new CBA.

22. The intended appeal is against the trial court's finding that the implementation of the CBA ought to include annual increments and resultant pension liabilities payable by the IPUCCF members on behalf of their staff, thereby raising the figure needed for implementation from the KShs 8.8 billion, already disbursed to KShs 13.812 billion as computed by the Implementation Committee of IPUCCF. The status quo, if the judgment remains unchallenged, would be that the CBA has not been fully implemented and public universities are in arrears of about KShs 5.8 billion as annual salary increments for their staff. There is nothing preventing the respondents from claiming these sums . The subject matter of the appeal is therefore still intact and is not dependent on whether the CBA has run its course or whether a new CBA is being negotiated.

23. On whether or not the appeal is arguable, this Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated as follows:

> " vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

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. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008."

24. The key issue of the intended appeal, as can be discerned from this application and the annexed draft memorandum of appeal, is whether the learned judge misinterpreted the SRC's proposals to thereby find that annual increments formed part of the implementation of the CBA. According to the applicants, the annual increments were implemented through the normal budgetary process and public universities had already paid the annual salary increments to their staff between July 2017 and June 2020.

This is an arguable issue and cannot be said to be frivolous. The intended appeal is therefore arguable.

25. Regarding whether the appeal would be rendered nugatory should the orders of injunction sought not be granted, this Court in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* (supra) 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."

26. The Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders against any prejudice the respondent might suffer while awaiting the hearing and determination of the appeal. See *Reliance Bank Limited v Norlake Investments Ltd [2002]1 EA 227.*

27. In the present case, it is not in dispute that the CBA has largely been implemented, save for the niggling issue of the annual salary increments that the applicants seek to resolve with finality through their intended appeal. Should the stay not be granted, there is a risk of double payment to the respondents' members to the tune of billions of shillings from public funds. If the payment is made and the appeal subsequently succeeds, the process of reversing the payment could be as lengthy and as complicated as the negotiation of the CBA itself. The applicants have therefore sufficiently demonstrated that the appeal shall be rendered nugatory if a stay order is not issued.

28. Having satisfied the two limbs required for the grant of the order sought, the application succeeds. The stay order shall remain in place until the appeal is heard and determined. The costs of the application shall abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR