



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, GATEMBU & MURGOR JJ.A.)**

**CIVIL APPLICATION NO. E223 OF 2020**

**BETWEEN**

**KENYA AIRPORTS AUTHORITY.....APPLICANT**

**AND**

**KENYA AVIATION WORKERS UNION.....RESPONDENT**

*(Being an application for stay of execution from the ruling of the*

*Employment and Labour Relations Court at Nairobi (Wasilwa, J.)*

*dated 28<sup>th</sup> July 2020 in ELRC Case Number 2204 Of 2015)*

**RULING OF THE COURT**

By a notice of motion dated 7<sup>th</sup> August, 2020, **the applicant, Kenya Airports Authority** has sought orders for injunction and stay of execution against the judgment of the Employment and Labour Relations Court (*Wasilwa, J*) pending the hearing and determination of the appeal. The application was supported by the sworn affidavit of **Anthony Njagi**, the applicant's General Manager, Human Resources Development, as well as its written submissions.

The motion was premised on the grounds that by a ruling of 28<sup>th</sup> July 2020, the Employment and Labour Relations Court ordered the applicant to pay the respondent union dues of Kshs. 38,669,171.20 which it claimed had been deducted and withheld from it from the year 2016 to 2020.

The background to the motion was that in December 2019, the applicant paid its employees in Job Grade S5 outstanding arrears for annual salary adjustments that had accrued for the period between January 2016 and December 2019; that when paying the amounts, it inadvertently effected a 2% deduction of dues from each employees' back pay of a total of Kshs.38,669,171.20. The affected employees immediately lodged protest letters demanding a refund of the deductions for reason that they had never joined nor subscribed to a Trade Union including the respondent, which the applicant effected after verifying that the deductions were erroneous.

This action prompted the respondent to file an application in the Employment and Labour Relations Court wherein it sought orders requiring the applicant to remit to it the deducted dues. Also sought and obtained was an order for the applicant to continue to deduct Union dues from the employees in Grade S5, which was unjustified since it was demonstrated through the protest letters that the deductions were not due.

Further, the respondent had already obtained orders of execution and it was apprehensive that execution was imminent, and since the dues had long since been refunded to the employees, the amounts demanded were not available to be paid; that to satisfy the court order, the applicant would have to either deduct the dues from the concerned employees which would result in unnecessary industrial action and disrupt the applicant's operations. In sum, the applicant contended that it had an arguable appeal which would be rendered nugatory in the event the orders sought were denied and the appeal were to succeed.

In a replying affidavit of 21<sup>st</sup> August 2020, **Moses Ndiema**, the National Secretary General of the respondent deponed that whether the employees in Grade S5 were unionisable or not was a matter that was resolved in Petition No. 88 of 2017, and further, that the relationship between the respondent and its members did not involve the applicant. It was therefore not its prerogative to respond to letters of withdrawal or refund deductions to employees of sums meant for the respondent.

The respondent further admitted that it had since extracted the order in respect of the impugned ruling, and had also obtained garnishee

orders against the applicant's bankers; that furthermore, the applicant will not suffer irreparable loss, since the deducted amounts did not belong to it. In addition, the intended appeal would not be rendered nugatory as the applicant has unlimited access to union dues from which it can refund itself the amounts; that the respondent continues to suffer great prejudice as it has been denied its dues. The respondent also filed written submissions reiterating the averments in the replying affidavit.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

***“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”***

Upon considering the application, the affidavits and submissions, we are satisfied that a viable question arises which is whether, in granting the orders, the learned judge rightly concluded that the affected employees' letters were for withdrawal from the respondent or were protest letters against the deductions for the reason that the affected employees had never subscribed to the respondent's membership. The appeal is therefore arguable.

As concerns the second limb on whether the appeal would be rendered nugatory in the event that it were to succeed, the applicant stated that it has already refunded the dues back to the affected employees, and therefore the monies, that is, Kshs. 38, 669,171.20 was no longer within its custody; that execution of the court orders is imminent, and this continues to place the applicant in a perilous situation; that in addition, were the applicant to effect the court's order and deduct union dues from the employees in job Grade S5, there is the risk of the applicant's operations being thrown into confusion by unwarranted industrial action.

On the other hand, the respondent has admitted that it is in the process of executing the court orders, and has gone so far as to seek to extract garnishee orders. It further asserts that in the event the appeal were to succeed, the applicant can seek refund of the amounts from deductions of dues from its employees.

All factors considered, our view is that, the sums are substantial and there is nothing to show that the respondent will be in a position to refund them were the appeal to succeed which would undoubtedly render the appeal nugatory.

Consequently, the two limbs having been satisfied, we order a stay of execution of the orders of the Employment and Labour Relations Court of 28<sup>th</sup> July 2020, pending the hearing and determination of the appeal. Costs in the appeal.

***It is so ordered***

***Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2021.***

**HANNAH M. OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**