IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KARANJA & WARSAME JJ.A.)

CIVIL APPLICATION NO. 53 OF 2018

BETWEEN

TRAILINK GROUP LIMITED.....APPLICANT

AND

KENYA LONG DISTANCE TRUCK DRIVERS

AND ALLIED WORKERS UNION.....RESPONDENT

(Being an application for stay of execution of judgment and orders pending the

hearing and determination of an appeal from the Employment and Labour Relations

Court (N. N. Nduma) dated 26th May, 2017 and 24th November, 2017 in Nairobi ELRC Cause No. 2181 of 2014

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RULING OF THE COURT

Before us is a Notice of Motion dated 23rd February, 2018 under **Rule 5(2)(b)** inconsequential erroneously indicated as of the **Appellate Jurisdiction Act, Cap 9 Laws of Kenya,** instead of **Court of Appeal Rules, 2010 and all enabling provisions of the Constitution,** substantively seeking orders: to stay the order of **M. N. Nduma, J.** granted on 26th May, 2017 and 24th November, 2017 in Employment and Labour Relations Court (ELRC) Cause No. 218 of 2014, Nairobi, pending the hearing and final determination of the applicant's intended appeal; directing the applicant to recognize the respondent on the basis of a disputed recognition agreement signed on 15th December, 2014 and to remit in Court dues pending the hearing and determination of the applicant's intended appeal; stay any further proceedings pursuant to the judgment of **M. N. Nduma, J.** delivered on 26th May, 2017 and ruling delivered on 24th November, 2017 pending the hearing and determination of the intended appeal together with an attendant order that costs of the application be provided for.

It is supported by grounds on its body, a supporting affidavit of **Peter Njenga** together with annextures thereto. It is opposed by the respondent's replying affidavit deposed by **Nicholas Mbugua** on 17th February, 2020 together with annextures thereto. It was canvassed virtually through rival pleadings of the respective parties and written submissions and legal authorities relied upon by the applicant without presence and oral highlighting by learned counsel for the respective parties.

The background to the application albeit in a summary form is that the applicant filed a claim in cause No. 2181 of 2014 in the ELRC seeking various reliefs. The cause was resisted by the respondent who also put in a counter claim also seeking various reliefs.

The merit disposal of the above respective parties rival interests is what resulted in the final orders of the judgment of **M. N. Nduma, J**. of 26th May, 2017 as follows:

> **a) The dismissal of the grievants was wrongful and in violation of the Return to Work Formula. All the grievants dismissed between the 21st November, 2014 and 16th December, 2014 be paid equivalent of eight (8) months' salary as compensation. The respondent to file computation of compensation within thirty (30) days and claimant to file a reply within 14 days if any for consideration and approval by the Court.**
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> **b) The claimant to compute all terminal benefits due to the dismissed employees, file and pay within 30 days.**

c) The claimant is directed to recognize the respondent forthwith in terms of the Recognition Agreement signed on 15th December, 2014 by the parties.

d) Compensation is payable with interest at court rates from date of judgment till payment in full.

e) Claimant to pay the costs of the suit."

The applicant was aggrieved and filed a notice of appeal dated 2nd June, 2017 intending to appeal against the whole of that judgment. The applicant filed an application dated 9th June, 2017 seeking an order of stay of execution. The application was resisted by the respondent resulting in the order made on 24th November, 2017 granting the applicant a stay of execution on condition that the award of eight months' salary payable to the dismissed employees is deposited in an interest earning account in the joint names of advocates for the parties within 14 days of the ruling failing which the order on conditional stay would lapse, but declined to stay the directive issued by the court to the applicant requiring them to recognize the respondent's Union and effect checkoff of the Union members.

Subsequent to the above orders, the applicant filed another application dated 14th December, 2017 seeking *inter alia* an order to review, vary or set aside the ruling and orders of **M. N. Nduma, J.** delivered on 24th November, 2017 and substitute order (a) of the said ruling with an order for a deposit of bank guarantee and to wholly set aside order (b) of the orders granted on 24th November, 2017 pending hearing and determination of the intended appeal. That application was resisted by the respondent resulting in the order of **S. Radido, J.** dated 16th February, 2018 dismissing the application with costs to the respondent.

Undeterred, the applicant is now before this Court in the application under consideration seeking reliefs set out above. The applicant avers and submits *inter alia* that they have satisfied the twin prerequisites for granting relief under the above rule. In support thereof, the applicant erroneously annexed an amended memorandum of appeal which we have discounted as being alien to these proceedings. We have however traced the intended grounds of appeal set out in paragraphs 5 – 15 of the supporting affidavit of **Peter Njenga**; these are that the learned Judge erred in law and fact in finding the return to work formula and recognition agreement to have been voluntarily signed notwithstanding sufficient evidence to the contrary, in failing to interrogate the authenticity of the check list containing the names of the purported unionized employees and finding that the purported Union had attained 50 plus one percent threshold for recognition; failing to appreciate that the unprotected strike by the employees was without any notice to the applicant, the earlier notice having been withdrawn on 21st November, 2015, paying undue regard to the recommendations of the second conciliator, **Mr. Mwanzia** dated 31st December, 2014 and disregarding the report of **Mr. Twanga** of 21st November, 2014 by the same employer; holding that the reason for the strike was due to harassment of the employees by the applicant without any basis for so finding, failing to appreciate that the purported union was in full charge and control of the strike; in unduly exercising discretion in awarding unquantified eight (8) months' salary to unknown, uncertained and undeterminate number of dismissed employees which was not only unreasonable but also illegal and not based on any material particulars, all of which the applicant contends are arguable with high chances of success.

Turning to the second prerequisite, the applicant contends that the amount demanded of Kshs. 32,616,329.00 is colossal. Second, that the financial capabilities and assets of the respondent and the alleged 140 morphed up employees are unknown making recovery of the said amount impossible should the appeal ultimately succeed. Third, execution for the said amount would cripple applicant's operations.

To buttress the above submissions, the applicant relies on **Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014] eKLR**; **Nakuru Water Sanitation Services vs. Trusted Society of Human Rights Alliance [2014] eKLR**; **Kenya Methodist vs. Mary Kaungania & Another [2017] eKLR**; **Kenya National Police Service & 3 Others vs. Police Constable Henry Nyakoe Obuba [2016] eKLR** all in support of the applicant's contention that on the facts laid before Court, they have satisfied the prerequisite for granting relief under the above rule and should be granted the relief sought.

In rebuttal, the respondent relying on the replying affidavit averred *inter alia* that the relief sought does not lie as the order granted against the applicant was a negative order dismissing its claim and is therefore incapable of being stayed; applicant has come to Court with unclean hands and is therefore undeserving of the exercise of the Court's discretion in their favour, granting relief sought herein will not serve any purpose considering that there is already filed an appeal No. 88 of 2018 arising from the same judgment; the intended appeal is not arguable as the judgment intended to be impugned was well founded and reasoned based on the material on record which were properly appreciated and considered by the learned Judge resulting in the decision intended to be impugned.

We have given due consideration to the record and considered in light of the rival position of the respondent parties highlighted above. Our mandate to intervene on behalf of the applicant has been invoked under **Rule 5(2)(b)** of the Court's **Rules**. It provides:

"5(2)(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just."

The principle that guides the Court in the discharge of its mandate under the said Rule now form a well-trodden path. See the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**.

We have applied the above threshold to the rival position herein but before we delve into the determination of the merits of the application, we find it prudent to deal with preliminary issues we have observed on the face of the record. The first of these is, whether we have mandate to grant the omnibus prayers sought in prayer 2 and 4 of the application seeking stay of the main judgment dated 26th May, 2017 and the ruling on stay of execution dated 24th November, 2017. It is now trite that our jurisdiction to grant relief under the above rule stems from demonstration of existence of a valid notice of appeal on which the application for relief is to be anchored. See the case of **Githunguri vs. Jimba Credit Corporation Limited [1988] KLR 838** in which the Court expressed itself that

"...Court's jurisdiction under Rule 5(2)(b) to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 74.". As already alluded to

above, the record only has one notice of appeal dated 5th June, 2017 intending to appeal against the main judgment. There is no notice to appeal against the ruling of 24th November, 2017. This omission in itself is not however fatal to the entire prayers. It is severable which we hereby do by severing and declaring inconsequential the segment of the prayer inviting us to pronounce ourselves on matters touching on the said ruling of 24th November, 2017.

The second preliminary issue is that the applicant has exhausted the right to a relief of stay of execution on account of the two applications filed before the trial court highlighted above. **Rule 41** of the Court's **Rules** provides as follows:

> **"The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court."**

Our take on the construction of the above **Rule** is that it donates jurisdiction to the Court to entertain an application of this nature by an aggrieved party notwithstanding any order made by the trial court with regard to issues sought to be ventilated before it. We are therefore properly seized of this matter. We shall now proceed to interrogate its merit.

Turning to the merits of the application, the respondent's major opposition to this application is that it does not lie having been triggered by a negative order. There is therefore nothing to stay. This argument is informed by the undisputed position on the record that the applicant's claim was dismissed. Second, timelines set for performance of the attendant reliefs granted in favour of the respondents are long lapsed. There is therefore nothing to stay. In **Nairobi Metropolitan PSV Saccos Union Limited and 25 Others vs. County of Nairobi Government & 3 Others [2014] eKLR**, the Court was categorical that there is no jurisdiction to grant a relief under **Rule 5(2)(b)** of the Court's **Rules** where the High Court's order either resulted in a dismissal or a striking out order; or alternatively where the Court did not order either party to do or refrain from doing something capable of being restrained. See also **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2013] eKLR**, for the proposition that where this Court is not being asked for an order of status quo, there is no jurisdiction to grant a relief under **Rule 5(2)(b)** of this Court's **Rules**.

Applying the above threshold to the rival position herein, it is our finding that the applicant's claim before the trial court having been dismissed, there is nothing capable of being stayed. Likewise, the timelines in the orders granted in favour of the respondent having lapsed they are incapable of being stayed. The above being the conclusion we have reached, we have no basis for interrogating as to whether on the record as laid, the application meets the threshold for granting relief under **Rule 5(2)(b)** of the Court's **Rules**.

In the result, the application is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR