



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 589 OF 2019

BETWEEN

TRAILINK GROUP LIMITEDAPPELLANT/APPLICANT

AND

KENYA LONG DISTANCE TRUCK

DRIVERS & ALLIED WORKERS UNIONRESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) dated 4th February, 2019)

in

ELRC Cause No. 497 of 2014)

RULING OF THE COURT

We are asked in the Motion brought under **rule 5(2) (b)** of the **Court of Appeal Rules** and other enabling provisions of law to stay further proceedings "...on approval and adoption of any computation in Nairobi Employment and Labour Relations Court in Cause No. 2181 of 2014 pending the hearing and determination of Nairobi Court of Appeal Civil Appeals No. 88 of 2018 and 589 of 2019 between Trailink Group Limited Versus Kenya Long Distance Truck Drivers & Allied Workers Union." We are also asked to annul and/or set aside the ruling of M. Onyango, J. delivered on 20th December, 2019 together with any consequential decree ensuing therefrom in the said case "for want of jurisdiction *ab initio* forthwith..."; that we issue an order upholding the Applicant/Applicant's preliminary objection filed on 25th September, 2019 in the said case; that we consolidate the hearing of Nairobi Civil Appeal 88 of 2018 and Civil Appeal No. 589 of 2019 between the same parties and that we order costs against the respondent. In grounds set out on the face of the Motion and in a supporting affidavit of **Peter Njenga**, the applicant's Manager Human – Resource Service, it is said amongst other things that the applicant has filed two appeals in this Court being **Civil Appeal Nos. 88 of 2018 and 589 of 2019** which stem from the same Judgment of **M. Nderi, J.** delivered on 26th May, 2017 in Nairobi ELRC No. 2181 of 2014; that M. Onyango, J. of the ELRC "...has rewritten the Judgment of the Hon. Justice Mathews Nderi Nduma in her ruling delivered on 20/12/2019 in respect of the computation application of Respondent in favour of the Respondent in total disregard of two pending appeals before this Court on same issues; that the counter-claim in issue, filed and prosecuted by the Secretary General of the respondent on behalf of unknown grievant(s) renders the counter-claim and ensuing decree null and void *ab initio* for want of proof; that M. Onyango, J., misdirected herself when she adopted the list of persons listed in annexure to the applicant's witness Peter Njenga as persons who qualified for payment of one month notice and 8 months salary whereas "... the said list referred to the number of employees of the applicant and which number did not meet the threshold for simple majority for purposes of recognition and consequently had nothing to do with the alleged wrongfully dismissed witness." Further, that counsel for the applicant had made an oral application prior to hearing of the respondent's computation application to cross-examine 140 unknown persons introduced after delivery of Judgment; that money had been awarded to amorphous persons or unascertained grievants; at paragraphs 7, 8 and 9 of the said affidavit he deposes *inter alia*:

"7. THAT for this Court to re-write its judgment the same would prejudice the appellant's pending appeal as parties would be canvassing the appeal before a Court with no jurisdiction.

8. THAT the issue of computation alluded to at paragraph 11 of applicant's supporting affidavit are matters on appeal and there is no disobedience of Court orders committed by the Claimant save the Claimant exercise Constitutional Right of Appeal conferred by the Constitution.

9. THAT the entire proceedings of this Court are being challenged and the applicant should await determination of Claimant/appellant's appeal."

Further that an application to stay a ruling had been dismissed by ELRC, amongst so many other things that are said in the application.

There was no replying affidavit when we considered the Motion on 11th March, 2021.

We are asked in the Motion before us to stay proceedings in ELRC.

For an applicant to succeed in this Court on application for stay pending appeal he must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, demonstrate that the appeal would be rendered nugatory absent stay – those principles are well summarized in the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR**.

We have looked at the Record of the Motion. There is a ruling delivered on 24th January, 2019 by Wasilwa, J. where the applicant had applied for stay of proceedings pending hearing of an appeal. The Judge found that the applicant had previously been granted a conditional stay where it was ordered to deposit a decretal sum in an interest earning account. That condition was not met, the applicant instead applied for review. The application for review was dismissed. The Judge found the said application for stay of proceedings pending an appeal to be an abuse of the process of this Court.

In "Ruling 4" delivered on 20th December, 2019 M. Onyango, J. who made some assessments on terminal dues ordered the respondent to file an application to the Deputy Registrar of ELRC to issue a decree on the amount assessed in terms of that ruling.

We are in the circumstances enumerated unable to see any arguable point in the intended appeal. The applicant is in effect asking us to stay things that have already taken place, something we decline to do. Being of that view we need not consider the nugatory aspect of the matter.

The application has no merit and is hereby dismissed. We make no order on costs, the respondent not having filed a replying affidavit.

Dated and delivered at Nairobi this 23rd day of April, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR