



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GATEMBU, MURGOR & SICHALE J.J.A.]

CIVIL APPLICATION NO. E297 OF 2020

GLOBAL APPARELS EPZ LIMITED..... APPLICANT

AND

TAILORS AND TEXTILES WORKERS UNION.....RESPONDENT

*(Being an application for a stay of any further proceedings and/or a stay of execution of any subsequent orders of Wasilwa J dated and delivered on 16<sup>th</sup> September 2020.)*

IN

(Nairobi ELRC Cause No. 678 of 2018)

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RULING OF THE COURT

Before us is a motion dated 23<sup>RD</sup> September 2020, brought under the provisions of Rule 5 (2) (b) of the Court of Appeal Rules, 2010 and all other enabling provisions of the Law in which Global Apparels Limited (*the applicant*) seeks a stay of proceedings in Nairobi Employment and Labour Relations Court Cause No. 678 of 2018, pending the hearing and determination of an appeal from the Ruling and Orders of Lady Justice Hellen Wasilwa dated and delivered on 16<sup>th</sup> September 2020.

In the alternative, the applicant seeks a stay of execution of any subsequent orders and/or any sentence issued on 29<sup>th</sup> September, 2020, or on any other date thereafter, pursuant to the decision of Lady Justice Hellen Wasilwa dated and delivered on 20<sup>th</sup> May, 2020 pending the hearing and determination of an appeal from the ruling and orders of Lady Justice Hellen Wasilwa dated and delivered on 16<sup>th</sup> September 2020.

The motion is supported on the grounds on the face of the motion and an affidavit sworn by Tom Mboya the administration manager of the applicant who deposed *inter alia*, that the suit in Nairobi Employment and Labour Relations Court Cause No. 678 of 2020, was filed by a statement of claim dated 8<sup>th</sup> May 2018 seeking orders *inter alia*, to compel the applicant to submit union dues for 1644 employees whom they alleged were members of the Union, that vide a ruling delivered on 30<sup>th</sup> April, 2019, the court ordered the applicant to deduct and remit union dues for 1644 Union employees, that subsequently, the respondent filed a notice of motion dated 10<sup>th</sup> July 2019, seeking *inter alia*, orders to hold the applicant guilty of contempt of court and commit the applicant to civil jail for a period not exceeding 6 months and that vide a ruling dated 21<sup>st</sup> May, 2020, the court found the applicant guilty of contempt.

He further deposed that being aggrieved with ruling on contempt aforesaid, the applicant filed an application for review which was dismissed on 16<sup>th</sup> September 2020, thus provoking the instant motion. He further deposed that the applicant had an arguable appeal with good prospects of success and that the same would be rendered nugatory unless stay of proceedings and/or stay of any subsequent orders is granted by the court.

The application was opposed by Rev Joel Kandie Chebii, the National General Secretary of the Respondent who deposed *inter alia* that the applicant did not lodge any notice of appeal in this Honourable Court on time so as to lay a platform from which the intended appeal could be filed but proceeded to file a review application which was heard and dismissed and that the applicant only acted when the respondent’s advocates proceeded to fix the matter for sentencing of the applicant having been found in contempt and that the instant motion was baseless and intended to mislead the court as there was nothing to stay since the matter had been determined and that the applicant cannot suffer any damage or loss, in remitting deductions of union dues which is their statutory duty under Section 48 of the Labour Relations Act.

It was submitted for the applicant that they had satisfied the requirement for consideration under Rule 5 (2) (b) of the Court of Appeal Rules and that as to whether they had an arguable appeal, it was not necessary that a draft memorandum of appeal be filed and that it was sufficient if the grounds are stated either in the body of the application or supporting affidavit. On the nugatory aspect, it was submitted that should the trial court proceed and sentence the applicant, then the appeal would be rendered an academic exercise as the subject matter which is the contempt proceedings will have been concluded.

On the other hand, it was submitted for the respondent that the appeal was not arguable as it sought to stay the proceedings pending the hearing of an appeal against the orders given on **16<sup>th</sup> September 2020** and in the said ruling, the Honourable trial court at paragraph 21 observed that the applicant did not indicate that they had filed any appeal against the orders given on **21<sup>st</sup> May 2020**, and that the orders sought were merely to stay sentencing of the contemnors. On the nugatory aspect, it was submitted that no substantial loss will be occasioned upon the applicant since they hold funds that were remitted by the employee for onward transmission to the respondent Union to date despite having been found to be in contempt of court order for release of the said money.

We have carefully considered the motion, the grounds thereof, the supporting affidavit, the further affidavit, the supplementary affidavit, the replying affidavit, the rival submissions by the parties and the authorities cited.

The applicant motion is brought *inter alia* under **Rule (5) (2) (b)** of this Court. **Rule 5 (2) (b)** of this Court's Rules which guide the Court in applications of these nature provides:

***“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:***

***(a)...***

***(b) in any civil proceedings, where a notice of appeal has 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 principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR**.

A cursory perusal of the pleadings herein does not show that the applicant has an arguable appeal or that the appeal will be rendered nugatory if the orders sought are not granted for the following reasons: firstly, there is nothing to stay as the superior court merely dismissed the applicant's motion for contempt of court. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the superior court is in the nature of a negative order in capable of execution and as such there is nothing to stay. See **Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR** where the Learned Judges stated thus;

***“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”***

Similarly, in **Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010**, **Makhandia J** (as he then was) stated thus:

***“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”***

From the circumstances of this case and the applicant's motion having been merely dismissed by the superior court, it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory if the stay orders are not granted as the applicant has not demonstrated that they will suffer substantial loss in the event stay orders are not issued.

In view of the above, we have come to the conclusion that there is nothing to stay and further the applicant has not established the twin principles for consideration in an application under **Rule 5(2) (b)** of this Court to grant an order of stay of proceedings/execution.

The upshot of the foregoing is that the motion dated **23<sup>rd</sup> September 2020** is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

**Dated and Delivered at Nairobi this 21<sup>st</sup> Day of May, 2021.**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A.K MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**