



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & KIAGE, J.J.A.)

CIVIL APPLICATION NO. 149 OF 2019

BETWEEN

INSIGHT MANAGEMENT

CONSULTANTS LIMITED.....APPLICANT

AND

BERNARD BARONGO

AMWOMA & 116 OTHERS.....1ST RESPONDENT

ORBIT CHEMICALS LIMITED.....2ND RESPONDENT

(An application for stay of execution and further proceedings pending the lodging

hearing and determination of an intended appeal from the ruling of the Employment and

Labour Relations Court of Kenya at Nairobi (Radido, J.) dated 15th March, 2019 in Cause No. 1324 of 2017)

RULING OF THE COURT

By a memorandum of claim filed in the Employment and Labour Relations Court (ELRC), the 1st respondent sought payment of terminal dues for unlawful termination and unfair labour practices in the sum of Kshs.145, 303, 353 plus interest thereon from the applicant and the 2nd respondent.

The basis of the 1st respondent's claim was that the 2nd respondent, an employment agency, engaged their services on behalf of the applicant on short term contractual basis for over 10 years; that the continuous short term engagement coupled with the applicant's failure to draw the contracts of employment, despite being the employer, was calculated to circumvent the provisions of the Employment Act; that following their unlawful termination a meeting was held on 22nd July, 2016 between the applicant and the 1st respondent's union, Kenya Chemicals & Allied Workers Union, wherein an agreement on an exit package was reached; and that contrary to this, the applicant and 2nd respondent failed to pay the terminal dues agreed upon, necessitating the suit.

In response, the applicant filed a motion dated 9th November, 2018 calling upon the ELRC to strike out the suit on the grounds that it was a non-starter and an abuse of the court process. According to the applicant, not only had the negotiated exit package covered the issues raised in the suit but the agreed terminal dues had already been paid. Further, the applicant believed that the 1st respondent being members of the Union lacked *locus standi* to institute the suit in their individual capacities by dint of **Section 73(3)** of the Labour Relations Act.

Radido, J. in a ruling dated 15th March, 2019 dismissed the motion. In his view,

“... the cause(s) of action presented by the claimants raise substantial factual and legal questions which require an in-depth

examination. It would be an injustice to shut the Claimants from the temple of justice summarily in the circumstances.”

Intent on challenging the above decision in the substantive appeal, Civil Appeal No. 204 of 2019, the applicant has in the meantime by a motion dated 14th May, 2019 applied for stay of execution of the impugned ruling and the proceedings at the ELRC.

The motion is premised on the grounds that, the appeal is arguable; in that, the learned Judge erred in disregarding a further agreement made on 23rd July, 2016 by the applicant and the 1st respondent’s union in which all the issues and final dues raised in the suit had been addressed; and that the learned Judge misconstrued the provisions of **Section 73(3)** of the Labour Relations Act with regard to the 1st respondent’s standing. Secondly, it is contended that the appeal would be rendered nugatory in the event it succeeds since the proceedings in the ELRC would have been a waste of judicial time and resources; and finally, that the applicant stands to suffer irreparable loss, taking into account the amount sought in the suit and the 1st respondent’s capability to refund the same is in doubt.

As far as the 1st respondent is concerned, the appeal is not arguable since their suit raises triable issues which ought to be considered on merit; and loss or damage, if any, that may occur is capable of being compensated by an award of damages.

On its part, the 2nd respondent by an email dated 17th March, 2021 to the Deputy Registrar of this Court, notified the Court that it did not wish to participate in this motion.

It is common ground that the ruling in question dismissed the applicant’s motion which had itself sought the striking out of the 1st respondent’s suit. The dismissal was a negative order which by its nature was incapable of being enforced or executed. See **Charles Munyendo Olingo vs. Salim Chetechi Makokha & Another** [2019] eKLR. It therefore follows that the prayer for stay of execution of those orders cannot issue.

As for stay of the proceedings in the ELRC, we are required in the exercise of the unfettered discretionary power under **Rule 5(2)(b)** of this Court’s Rules to apply the very same strictures as in an application for stay of execution, that; the applicant has to demonstrate that its appeal is not frivolous; and that if the orders sought are not granted, the appeal will be rendered nugatory, in the event it is successful. See **Juanita Adhiambo Otieno (Suing on behalf of the Estate of Solomon Ochieng Oyoko (Deceased)) vs. Martin Ouma Okumu & 2 others** [2021] eKLR.

Taking caution not to make a determination on the merits of the appeal, we doubt that the appeal is arguable. The impugned ruling was an interlocutory decision which save for directing that the dispute be heard on merit did not make any definite findings on the rights of the parties.

On the nugatory aspect, which we need not consider after our finding on arguability, it is our position that the applicant’s contention is premature. The suit is yet to be determined by the ELRC and this Court cannot speculate that the suit would be resolved in favour of the 1st respondent or otherwise.

Therefore, we find that the applicant’s motion lacks merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKE, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR