



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & SICHALE, J.J.A.)

CIVIL APPLICATION NO. 296 OF 2019

BETWEEN

MJENGO LIMITED.....APPLICANT

AND

BAKERY, CONFECTIONERY,

FOOD MANUFACTURING & ALLIED WORKERS UNION (KENYA).....RESPONDENT

(Being an application for stay of execution and stay of further proceedings arising from the

judgment and decree of the Employment and Labour Relations Court of Kenya

at Nairobi (B. Ongaya, J.) dated 29th March 2019

in

NRB. ELRC CAUSE NO. 1720 of 2017)

RULING OF THE COURT

[1] The motion on notice dated 5th September 2019 is brought by *Mjengo Limited* (the applicant) wherein it is seeking an order of stay of execution and stay of further proceedings arising from the judgment and decree of the **Employment and Labour Relations Court (ELRC) Cause no. 1720 of 2017**. Briefly stated, the applicant filed suit before ELRC seeking an order to terminate and/or revoke a Recognition Agreement dated 30th March 2012 on the grounds that the respondent being a Union of Workers did not represent a simple majority of the applicant's unionisable employees.

[2] The applicant accused the respondent of misrepresentation and forgery of signatures of workers and that the persons who signed the recognition agreement were presented as if they were the applicant's employees when indeed they were not. The applicant further alleged that the check-off forms submitted by the respondent were forgeries and the matter was reported to Thika Police Station and that a document examiner at the Directorate of Criminal Investigations established that certain signatures were not made by the same authors.

[3] On the other hand, the respondent maintained that the appellant had voluntarily signed the recognition agreement which was valid; that the appellant had records of its employees and could not have executed the agreement without verifying if the persons recruited by the respondent were its employees; and that the appellant never raised issue that the said persons were not its employees; and that consequently, the appellant was estopped from reneging on the recognition agreement.

[4] The learned trial Judge, Ongaya, J. in the impugned judgment declined to revoke the Recognition Agreement, ordered the suit to be dismissed and the applicant to pay costs of Kshs. 100, 000/=. Further, on 22nd July, 2019 the court directed the respondent to serve the applicant with a draft Collective Bargaining Agreement (CBA) for purposes of negotiations. That is the gravamen of the applicant's intended appeal as it intends to challenge the order directing them to negotiate a CBA which in their view is premised on a defective Recognition Agreement.

[5] In the instant motion, the applicant posits that unless the order of stay is granted, the court is likely to adopt the draft CBA submitted by

the respondent based on the Recognition Agreement to the prejudice of the applicant thus rendering the intended appeal nugatory. This is in a nutshell is what is deposed to by the applicant's managing director one, Mr. Raj Malde, in an affidavit sworn on 25th August, 2019.

[6] The motion was opposed by the respondent's written submissions filed and dated 15th March, 2021. It is the respondent's case that it lodged a trade dispute based on the applicant's refusal to execute a Recognition Agreement in line with **section 62** of the **Labour Relations Act, 2007**; that during the pendency of the dispute the applicant signed the Recognition Agreement leading to the withdrawal of the suit; that the applicant has moved to this Court eight (8) years later seeking revocation of the Recognition Agreement on the ground that the respondent did not represent the simple majority and that the check-off forms provided by the respondent were forgeries. Moreover, the applicant has nothing to stay as the order made by the court was an order dismissing the suit which is a negative order.

[7] That said, we have considered the instant motion which was heard without appearance of counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. The application is predicated under the provisions of **Rule 5 (2) (b)** of this Court's Rules. The applicable guidelines in regard to orders sought in this regard are now an old hat. For the applicant to succeed, it must establish that; the intended appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[8] Has the applicant demonstrated that the appeal is arguable? We think so, granted the raft of allegations made by the applicant against the respondent touching on misrepresentation and forgery of documents in regard to the Recognition Agreement are arguable points. We will therefore not interrogate the other issues raised by the applicant as just one issue is sufficient and in fact the arguable issue need not succeed at the appeal. That was held in the case of; -

Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others [2014] eKLR thus: -

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication.”

[9] While we are prepared to find that the applicant's intended appeal is arguable, we are however not persuaded that it will be rendered nugatory if it succeeds. We note that the order being appealed against is an order dismissing the suit which is a negative order not capable of being stayed save for the order of costs of Ksh.100,000 to be paid by 1st May 2019 failure to which interest would be paid thereon at Court rates from the date of judgment until payment in full. It is our considered opinion that the aforesaid sum is not a huge sum and, in any event, should the appeal succeed, there was no material placed before us to show that the respondent will not be able to reimburse.

[11] The above being our view, it goes without saying that the motion dated 5th September, 2019 is unmerited and is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 18th day of June, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR