



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA (P), KARANJA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. E001 OF 2021

BETWEEN

INSIGHT MANAGEMENT CONSULTANTS LIMITED.....APPLICANT

VERSUS

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....1ST RESPONDENT

CARGILL KENYA LIMITED.....2ND RESPONDENT

(Being an Application for Stay of Execution of the judgment of the Employment and

Labour Relations Court of Kenya at Mombasa, (James Rika, J.) dated and

delivered on 13th March 2020 pending the lodging,

hearing and determination of an intended Appeal

in

ELRC Case No. 85 of 2018)

RULING OF THE COURT

1. Kenya Plantation and Agricultural Workers Union (The Union), 1st respondent, filed at the Chief Magistrate’s Court Mombasa, Employment and Labour Relations Cause No. 85 of 2018. Before the matter could be heard, the applicant herein raised a preliminary objection on the question of the court’s jurisdiction to entertain the claim. The Hon. Chief Magistrate, in a ruling dated 3rd April, 2019 ordered that his court did not have pecuniary jurisdiction to entertain the claim as the claim exceeded the Chief Magistrate’s pecuniary jurisdiction of 20 Million. The Union sought a total amount of Ksh. 50 million for its Members/ Grievants. Having found the suit incompetent on that account, the magistrate nonetheless went a step further and directed the parties to move the relevant court for transfer of the Claim.

2. A Miscellaneous Application was then filed at the ELRC Mombasa on 12th April, 2019 with the Union seeking transfer of the suit to the Employment and Labour Relations Court. The applicant opposed the application by way of the Notice of Preliminary Objection and Grounds of Opposition which stated, *inter alia*, that there was nothing to transfer once the Chief Magistrate’s court ruled it did not have jurisdiction; the application was not made in good faith and the lower Court did not have jurisdiction to transfer.

3. The learned Judge (Rika, J) held that proceedings of the ELRC were special proceedings of a specialized court, regulated under Employment & Labour Relations Court (Procedure) Rules 2016 and not by the Civil Procedure Act; that the Civil Procedure Act and the Rules made thereunder, applied only to the extent allowed by the Employment & Labour Relations Court Act and Procedure Rules; that the Employment & Labour Relations Court was neither the High Court, nor a subordinate court exercising civil jurisdiction but a specialized court created pursuant to **Article 162 (2) (a)** of the Constitution and the Employment & Labour Relations Court Act, 2011.

4. The court further held that Magistrates’ courts exercising employment and labour relations jurisdiction were similarly specialized Courts, which did not exercise civil jurisdiction in their role as Employment & Labour Relations Courts but drew their jurisdiction in employment

and labour relations matters from **Section 29(3) (4)** of the Employment & Labour Relations Court Act 2011; that there was no express provision of the law, on transfer of cases from the High Court to the Employment & Labour Relations Court, from the Employment & Labour Relations Court to the High Court or from the Chief Magistrate's Court to the Employment & Labour Relations Court and vice versa.

5. The Court held that this was a transitional problem, repositioning of the Employment & Labour Relations Court and its interaction with the Civil Courts, having taken place only recently and that Courts must however continue to exercise judicial co-operation and comity, and discharge their obligation to administer justice fairly, without undue regard to technicalities, as commanded by Article 159 of the Constitution.

6. The learned Judge found that the High Court did not have jurisdiction to transfer matters to courts of Equal Status but parties knew, and it was accepted, that matters were daily being transferred or forwarded to the ELRC from the High Court on jurisdictional grounds; that the ELRC had transferred matters to the High Court on jurisdictional grounds and had transferred matters to the Chief Magistrate's court; that transfer of matters ought to be a jurisdiction conferred even on the Chief Magistrate's court, as it is only meant to facilitate parties in access to justice.

7. The court further held that the ELRC had relied on Section 3 of the Employment & Labour Relations Court Act in transfer of cases and it was the mandate of the ELRC to facilitate the just, expeditious and proportionate resolution of employment disputes; that there was in existence a Claim in the Magistrate's court, Cause No. 85 of 2018 but in the wrong platform; that the Union had paid court fees upon filing and it would not be helpful to argue that there was no Claim capable of being transferred.

8. The Court ordered that the CM's Court Mombasa ELRC Cause No. 85 of 2018 be transferred to the ELRC Mombasa for hearing and determination and parties move the ELRC for pre-trial conferencing, upon the arrival of the file from the CM's Court.

9. The applicant was aggrieved by that decision and filed the application now before us seeking stay of execution of the Orders and/or stay of further proceedings under **rule 5(2) b** of the Court of Appeal Rules dated 24th June, 2020 pending the hearing and determination of the intended appeal.

10. The grounds relied on are that the applicant has a strong and arguable intended appeal that is not frivolous and that in the circumstances, if the Court does not exercise its unlimited judicial discretion and grant the orders sought, the appeal, were it to succeed would be rendered nugatory.

11. The respondents have opposed the application and filed a replying affidavit. It depones that no proper Notice of appeal has been filed and there is therefore, no appeal before the Court; that there exists no triable issues for determination; that the applicant stands to suffer no irreversible harm; that it is not correct that he intended appeal would be rendered nugatory; the dispute herein would result into a money decree which it is capable of refunding in the event the appeal is successful, that in the circumstances it is fair and just that the application be disallowed.

12. The applicant has filed submissions which buttress the grounds replicated above. According to the applicant, the application satisfies the two mandatory requirements, that on the issue of arguability of the intended appeal the Memorandum of Appeal raises *bona fide* issues meriting trial, that the issue of jurisdiction cannot be described as technicalities of procedures and easily cured by judicial craftsmanship, that the quest for interpretation of **Section 18** of the Civil Procedure Act on ELRC's transfer of cases from subordinate to superior court constitutes an arguable point of law.

13. The applicant further submits that the applicant will be subjected to irreparable loss, damage and harm if the application is not allowed, that if the appeal were to succeed any proceedings in Mombasa ELRC No. 37 of 2020 which would result from the Orders of Hon. Justice Rika in Misc. Application No. 13 of 2019 would not only be a total wastage of public resources, but a total wastage of time.

14. We have carefully considered the application before us, the rival affidavits and submissions. It is trite that for this Court to grant an order of stay of execution, the applicant must demonstrate that its intended appeal is arguable and that if stay is not granted, the intended appeal would be rendered nugatory in the event that it succeeds. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR**).

15. The first issue for consideration is whether the applicants have an arguable appeal. As has been held by this Court innumerable times, an arguable appeal is one that is not frivolous but raises a *bona fide* issue deserving determination by a court and a single *bona fide* issue would suffice to demonstrate arguability. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**).

16. On the arguability aspect, the applicant has proffered Eight (8) grounds in the memorandum of appeal. We have no hesitation in finding the intended appeal arguable. We say so because the gravamen of this matter is the issue of jurisdiction. There is the very important germane issue as to whether Order 18 of the Civil Procedure Act applies to Employment and labour related matters. We are therefore satisfied that the limb on arguability has been demonstrated.

17. On the nugatory aspect, indeed as averred by the applicant in the application, if the appeal were to succeed any proceedings in Mombasa ELRC No. 37 of 2020 which would result from the Orders of Rika J in Misc. Application No. 13 of 2019 would not only be a total wastage of public resources, but a total wastage of time.

18. It would not be prudent or economical use of judicial time to proceed with the hearing of a matter to conclusion only for the appeal to succeed and for this Court to determine that the trial court was bereft of jurisdiction to entertain the suit. Valuable resources would have been wasted if the appeal were to succeed and the matter commences all over again.

19. In sum, we are satisfied that the applicant has satisfied both limbs as required and deserves to be granted the orders sought. Accordingly,

we allow this application with orders that costs abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR