



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, JJA)

CIVIL APPLICATION NO. 149 OF 2020

BETWEEN

RIFT VALLEY RAILWAYS WORKERS UNION(K).....APPLICANT

AND

KENYA RAILWAYS STAFF

RETIREMENT BENEFITS SCHEME..... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION..... 2ND RESPONDENT

THE CORPORATE TRUSTEES..... 3RD RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY.....1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION..... 2ND INTERESTED PARTY

RIFT VALLEY RAILWAYS(K)LTD..... 3RD INTERESTED PARTY

ALEXANDER FORBES..... 4TH INTERESTED PARTY

(Being an application for stay of execution of the orders of the Employment and Labour Relations Court at Nairobi

(M.Onyango, J) dated 12th July 2019)

in

EMPLOYMENT AND LABOUR RELATIONS COURT CASE NO. 2289 OF

2015)

RULING OF THE COURT

The background to this motion on notice is that the 1st, 3rd respondents and 4th interested party filed preliminary objections dated 30th October, 2018 seeking to strike out an application filed by the appellant on the ground that the court was *functus officio* having pronounced itself in a similar application in which the applicant was seeking stay of execution of the decree against its proclaimed assets by the auctioneer; the application also sought to review the ruling delivered on 19th August 2016 in High Court Petition No. 468 of 2016 and it also included issues raised and already determined in a ruling delivered by **Abuodha, J** earlier on 13th October, 2017 in ELRC No. 783 of 2017.

The preliminary objection was opposed by the applicant herein who deposed that the court was not *functus officio*; the ruling delivered by **Ndolo, J** had not dismissed the matter but only referred the dispute to the Retirement Benefits Authority tribunal for resolution.

The court in its ruling delivered on the 12th July 2019, held that the application was *res judicata* for the reason that one of the prayers seeking stay of execution had been granted in an application dated 19th October 2017. The court further held that the applicant had filed several suits in respect of the same subject matter being; Misc. Applic. No. 197 of 2017, Nairobi Petition no. 468 of 2016, Misc. Applic. No. 84 of 2016, Misc. Applic. No. 76 of 2015, Misc. Applic. No. 59 of 2016, Misc. Applic. No. 10 of 2018 and Employment and Labour Relations Court (ELRC) No.2289 of 2015, hence dismissed the application.

Aggrieved by the decision, the applicant filed a notice of appeal on 12th July 2019 and this motion asking us to grant stay of execution of the ruling and the order aforesaid. The applicant has also sought several other prayers in the motion which are unnecessary in applications brought under Rule 5(2)(b) of this Court's Rules.

The grounds in support of the motion as well as the supporting affidavit sworn by **Munayi Isaac Opondo**, the Secretary General of the applicant point to the fact that in the absence of stay, the respondents might engage in actions injurious to the interest of the 8600 members of the applicant, who had not been paid their pension by the 2nd respondent; that the intended appeal raises triable issues with high chances of success and that the intended appeal may be rendered nugatory if stay is not granted and that parties in the intended appeal shall not suffer any prejudice.

The 1st, 2nd and 3rd respondents opposed the motion by principally stating that the order sought to be stayed was negative in nature and thus incapable of execution, further that the applicant had failed to demonstrate that its intended appeal raises arguable points of law which would be rendered nugatory in absence of stay and what kind of prejudice it shall suffer. On the whole the respondents maintained that the applicant had not met the threshold for the grant of stay under Rule 5(2)(b) of this Court's Rules. They cited the following authorities in support of the above propositions; **Cortec Mining Kenya Limited v. Cabinet Secretary, Attorney General & 8 others** [2015] eKLR and **Eric V.J.Makokha & 4 others v. Lawrence Sagini & 2 others** [1994] eKLR.

We have considered the application, the rival affidavits, the submissions by all parties and the authorities cited.

The motion is premised on rule 5(2)(b) of this court's rules. The purpose of this court granting stay is to preserve the substratum of the appeal. In **Teachers Service Commission v. Kenya National Union of Teachers & 3 Others, Supreme Court Application No. 16 of 2015**, the court pronounced itself as follows:

“It is clear to us that Rule 5 (2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years.”

Further this Court in **Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 others** (2015)eKLR, examined the manner in which it exercises its jurisdiction in relation to such applications. The first consideration is whether the intended appeal is arguable. The applicant does not have to establish a multiplicity of issues, it will suffice even if one issue is raised as was held in **Damji Praji Mandaria v. Sara Lee Household & Body Care(K) Ltd, CA No. 345 of 2005**. Further this one ground does not have to succeed but one which ought to be fully argued before the court.

See **Co-operative Bank of Kenya Ltd v. Banking Insurance of Finance Union(Kenya)(2015) eKLR**.

The applicant is seeking stay of execution of an application that had been struck out. The High Court did not ask any of the parties to do or refrain from doing something. The decision by the court was negative in nature and the same is incapable of being stayed. There is no positive and enforceable order, which should be the subject matter of this motion to be stayed. This court in **Western College of Arts and Applied Sciences v. Oranga & Others** [1976]KLR 63 while considering whether an order of stay can be granted in respect of a negative order stated as follows:

“But 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. An execution can only be in respect of costs....”

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 stay to enforce or restrain by injunction.”

See also **Nairobi Metropolitan PSV Sacco Union Ltd & 25 Others v. County of Nairobi Government & 3 Others** [2014]eKLR.

The application is on the above ground alone dismissed with no order as costs.

This Ruling shall apply *mutatis mutandis* to **Civil Application No. 174 of 2020 Rift Valley Railways Workers Union (K) v Kenya Railways Corporation & 6 Others & 2 Other Interested Parties**.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

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