



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MAKHANDIA, J.J.A.)

NYERI CIVIL APPLICATION NO. 35 OF 2020

BETWEEN

KENYA NATIONAL UNION OF

TEACHERS NAKURU BRANCH.....1ST APPLICANT

JOSEPH BII, CHAIRMAN, KNUT NAKURU BRANCH.....2ND APPLICANT

BRANCH EXECUTIVE COMMITTEE,

KNUT NAKURU BRANCH.....3RD APPLICANT

AND

JAMES MUNGAI MUHIA.....RESPONDENT

(An Application under Rule 5(2)(b) of the Court of Appeal Rules, 2010 for stay of execution of the ruling and orders of the Employment and Labour Relations Court at Nyeri pending the filing, hearing and determination of the Intended Appeal from the Ruling and Orders of the Employment and Labour Relations Court at Nyeri (Nzioka wa Makau, J.) delivered on 6th April, 2020

in

ELRC Cause No. 31 of 2019)

RULING OF THE COURT

1. The three applicants have moved this Court pursuant to Rule 5(2)(b) of the Rules of this Court praying in the main for an order as follows:-

“That pending the lodgment, hearing and determination of the intended appeal from the Ruling of Honourable Justice Nzioka Wa Makau delivered on 6th April, 2020 in Nyeri ELRC Cause No. 31 of 2019 James Mungai Muhia v. Kenya National Union of Teachers & 2 Others, this Court be pleased to grant a stay of execution of the said orders.”

The application is predicated on a plethora of grounds on its face and is supported by the affidavit of Joseph Bii sworn on 5th May, 2020 on his behalf and on behalf of the two other applicants.

2. A brief background will put this application in perspective. The respondent, James Mungai Muhia used to be the Executive Secretary of Kenya National Union of Teachers (KNUT) Nakuru Branch. His services were terminated sometime in July, 2018 and this triggered litigation between himself and the officials of KNUT Nakuru Branch before the Employment and Labour Court (ELRC) in Nakuru ELRC No. 220 of 2018.

3. Some orders were given in favour of the respondent in that suit which orders triggered an appeal before this Court, viz Nairobi Court of Appeal Civil Appeal No. 5 of 2019. Bearing in mind that we are only dealing with an application under Rule 5(2) b as stated earlier, we shall not delve into the details of that suit.

4. It is important however to note that at one point the said appeal came up for hearing before this Court, sitting in Nakuru on 29th April,

2019 where the following orders were issued.

“By consent

- 1. The freezing order dated 3rd December, 2018 be and is hereby set aside.**
- 2. The consolidated causes i.e Petition No. 6 of 2018 and ELRC No. 220 of 2018 be heard on the merits on priority basis by the ELRC Judge sitting in Nyeri.**
- 3. Pending the hearing and determination of the consolidated cases, the appellant shall continue to pay the 2nd respondent, Mungai Muhia, his emoluments, allowances and medical cover.**
- 4. All pending interlocutory applications be marked as settled.**
- 5. Each party to bear their respective costs of the appeal.”**

5. The above order has not been set aside. According to the respondent herein the applicants failed to comply with the said order and that is what prompted him to file the Notice of Motion dated 5th November 2019 seeking committal of the applicants herein to civil jail for a period of six months, or as the court deems fit.

6. Having heard the parties, the learned Judge expressed himself as follows:-

“The respondents were ordered to pay the claimant/ applicant his emoluments as per the court order in Civil Appeal No. 5 of 2019 made on 29th April, 2019. That order subsists and must be complied with as willful failure to obey it amounts to contempt of court... In this case it is apparent that the three respondents have convoluted the matters that were before court and failed to comply by deceitful conduct of withdrawal of emoluments ordered to be paid by the Court of Appeal and in orders made by this Court. In the premises, I find the 3 respondents in contempt of court and order that each pays a fine of Ksh. 100,000/= within 14 days of the decision herein. Failure to pay the fine shall be punished with imprisonment of the officials concerned for one month in default of the payment of the fine ...”

This is the order appealed against.

7. For purposes of this Ruling, we must eschew making any definitive findings that might embarrass the court that will be seized of the appeal. We shall not therefore comment on most of the issues raised by the applicants in the grounds in support of their application and supporting affidavit. The germane parts of the affidavit in support state that the applicants have paid the respondent all the dues that were due to him. That is nonetheless not for us to determine.

8. According to the applicants, if they pay the amount in excess of Ksh. 12,000,000/= as ordered by the Court to the respondent before the main suit is heard and determined, the appeal will be rendered nugatory as the respondent has not demonstrated his ability to refund the money in the event the intended appeal succeeds. They maintain that their appeal is arguable and it raises weighty matters of law. The applicants have also offered security for the due performance of the Ruling and resultant decree pending determination of the appeal.

9. On his part, the respondent opposes the application through his 68 paragraph replying affidavit. He says that the application is not merited; that the applicants have no audience before this Court as they have failed to purge contempt following their conviction by Makau J. He urged the Court to take stern action against the applicants in order to preserve the dignity and authority of the judiciary. He maintains that the applicants have no arguable appeal and the application should therefore be dismissed. He has nonetheless not demonstrated his ability to refund the Ksh. 12,000,000/= if paid to him now in the event the intended appeal succeeds.

10. We have considered the application along with the rival affidavits, and submissions of counsel and the applicable law. It is trite that for an application such as this one to succeed, the twin principles of arguability and nugatory aspect have to be satisfied. **See Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [2013] eKLR.**

11. In this case, from the contents of the supporting affidavit which also includes all the grounds of appeal, we are persuaded that arguability has been established. It is, for instance, an arguable point whether the respondent has been paid his emoluments or not and if so, whether there has been compliance with the consent order referred to earlier. The applicants only need to establish one arguable issue, and it must be borne in mind that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others**, Civil Application No. 124 of 2008.

12. On the second limb, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. Where, as is alleged by the applicant, that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity the onus shifts to the latter to rebut the claim by adducing sufficient evidence. See **International Laboratory for Research on Animal Diseases v Kinyua**, [1990] KLR 403.

13. In this case, the impugned ruling has two aspects to it. The first one is the fine imposed as punishment for contempt of Court, and the other is payment of the 12 million. The respondents maintain that if the money is paid to the respondent, he will be unable to refund the same should his appeal fail. The respondent has not placed any evidence before us to show that he is not impecunious as claimed and will be in a position to refund the money. In that respect, we are persuaded that if the money is paid to the respondent, it will be difficult to recover it in

the event the appeal succeeds. For that reason, we are satisfied the nugatory aspect has been demonstrated.

14. Lastly on the issue of the fine imposed as punishment for contempt of court, the question as to whether the applicants should be heard before purging the contempt is not an idle one. The question as to whether the conviction and sentence was proper or not will be determined in the appeal. We, nonetheless, appreciate the difficulty in trying to recover money paid to the Government as fine once an order for payment of fine has been reversed. In the circumstances we order that each respondent deposits Ksh.100,000 in Court within 14 days from the date of this Ruling, failing which the orders granted herein will be automatically vacated and the respondent will be at liberty to execute. The money will be held in Court pending hearing and determination of the intended appeal. The applicants are therefore granted stay orders as prayed subject to the above condition.

15. We also order that costs of this application be in the intended appeal.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR