



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, KIAGE & KANTAL, J.J.A)

CIVIL APPLICATION NO. 118 OF 2019 (UR 94/19)

BETWEEN

ROADTAINERS (MSA) LTD.....APPLICANT

AND

PATRICK KIPLANGAT KIRUI.....RESPONDENT

(Being an Appeal (sic!) against the Judgment of the Employment and Labour

Relations Court in Mombasa (Rika, J.) dated 13th June 2019 in Cause No. 714 of 2017)

RULING OF THE COURT

By a Notice of Motion dated 6th February 2020, Roadtainers Mombasa Limited, the applicant seeks the following prayers;

1.

2.*THAT this Honourable Court be pleased to issue stay of execution of the judgment delivered on the 13th of June 2019 by Justice James Rika in Msa ELRC No. 714 of 2017 and any other consequential orders pending the hearing determination of this application.*

3. *This Honourable Court be pleased to list down for hearing and/or directions the application dated 19th December 2019 and lodged in the registry on 20th December 2019.*

4. *The costs of this application be provided for.*

Whether by mistake or inattention to detail, this application as brought is problematic. Perhaps it is a cavalier attitude as further exemplified by the description of the motion as *an appeal*, in its heading, which it is not. On the face of it, the application is omnibus in nature, because prayer 2 is brought under **Rule 5 (2) (b)** for an order of stay of execution, which is to be heard by a full bench, while prayer 3 concerns itself with an application for extension of time which is an application under **Rule 4** and ought to be heard by a single Judge. The two prayers ought not to be lumped together as they cannot be heard in one application. They are distinct and the avenues and procedures to be adhered to for their adjudication are different. We reiterate the holding of M’Inoti, JA in **RICCARDO FANELLI & 2 OTHERS V FRIGRIERI GRAZIANO** [2015] eKLR;

“For the record applications for extension of time under Rule 4 of the Court of Appeal Rules are, by virtual of the provisions of rule 53 (1) to be heard and determined in the first instance by a single judge. Such an application comes to the full court under rule 55 only by way of reference from the decision of the single judge. On the other hand, an application for stay of execution, injunction or stay of proceedings under rule 5 (2) (b) must be made to the full court. These are two separate and distinct applications that should be filed and prosecuted as such.”

The prayer for seeking a hearing date for a different application, apparently for extension of time, is really a case management issue and avails the applicant little. We shall ignore it and deal with the prayer 2 which is for stay of execution.

A prayer under **Rule 5 (2) (b)** is interlocutory in nature and its sole purpose is to protect the subject matter pending an appeal. This was well

“[35] These cases show that Rule (5)(2)(b) applications arise at an interlocutory stage, and Orders issued thereunder are for the purpose of protecting the subject-matter of the appeal. In addition, the Court of Appeal exercises its original and discretionary jurisdiction, when issuing Orders under that provision.”

For such an interlocutory application to be heard, there has to be a proper appeal in place. We note that prayer 3 is seeking for a hearing date for the application for extension of time to file the record of appeal out of time and for the notice of appeal belatedly filed to be deemed as properly on record. This is a clear admission that at this stage there is no appeal before this Court since the notice of appeal stands incompetent unless validated and vivified by an order of extension of time at the discretion of a single Judge of the Court. This is why as a matter of logical sequencing, the application for extension of time ought to be dispensed with first before the Court can be clothed with the requisite jurisdiction to consider an application for stay of execution.

In the result, we find that this application is incompetent as it is omnibus in nature and premature and we accordingly strike it out with costs.

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

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR