



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: W. OUKO (P) W. KARANJA, & M. KOOME, JJA)**

**CIVIL APPLICATION NO. 76 OF 2020**

**BETWEEN**

**THE COUNTY GOVERNMENT WORKERS UNION.....1ST APPLICANT**

**THE KENYA UNION OF NURSES.....2ND APPLICANT**

**THE UNION OF CIVIL SERVANTS.....3RD APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF LAIKIPIA.....1ST RESPONDENT**

**THE LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT**

*(Being an Application for Stay of Execution of the judgment of the High Court of Kenya*

*at Nyeri (Nzioki wa Makau, J) dated 28th July 2020 pending the lodging, hearing*

*and determination of an intended Appeal) in ELRC Judicial Review No. 1 of 2020)*

**RULING OF THE COURT**

1. This application emanates from judicial review proceedings instituted by the applicants herein against the respondents' decision, vide a notice dated 8th January, 2020, to carry out a restructuring exercise that would result in, among other things some positions of the employees and members of the applicants being declared redundant. The said judicial review also sought to challenge the respondents' subsequent advertisement for vacancies and recruitment of staff in the Daily Nation newspaper dated 2nd January, 2020 whose deadline for receipt of applications was Friday 24th January, 2020.

2. In the impugned judgment, dated 28th July, 2020, the learned Judge, (Nzioki wa Makau, J.), ruled in favour of the respondents stating as follows:

***“I find that the judicial review sought is misplaced and I dismiss the Judicial Review for being incompetent and brought to Court contrary to the doctrine of exhaustion. However, as the parties are social partners I will make no order as to costs in respect of the impugned proceedings before me.”***

3. The applicants herein have now moved this Court, vide a motion on notice dated 12th August, 2020, under **Rule 5(2)(b)** of this Court's Rules, for orders of stay of execution pending the hearing and determination of the intended appeal from the said judgment.

4. The application is supported by an affidavit sworn by the 3rd applicant's secretary, one Susan Wangui, which sets out the background to the motion and the grounds upon which it is anchored. It also has several annexures in support thereof. In sum, it is deposed that the learned Judge in dismissing the matter before him for failure by the applicants to exhaust the alternative dispute resolution mechanisms amounted to an improper exercise of his discretion under **section 9(3) and 9(4)** of the Fair Administrative Actions Act to uphold the interests of justice. Further, that such technicalities ought to have been ventilated under **Article 159(2)(a)(d) and (e)** of the Constitution.

5. It is further averred that the respondents have already written letters dated 29th July, 2020 to 172 members of the applicants threatening to terminate their services and asking them to clear with the respondents immediately hence the impending danger of rendering the intended appeal nugatory.

6. Urging the Court to allow the application, counsel for the applicants submitted that the instant application was filed without undue delay. Citing **Regnoil Kenya Ltd. v. Winfred Njeri Karanja Nairobi Civil Application No. 329 of 2018** he urged that the applicant's intended appeal is arguable with high chances of success and that unless stay is granted as prayed, the appeal will be rendered nugatory. He maintained that it is trite that the law requires demonstration of a single arguable point which he says they have done as can be seen from the draft memorandum of the intended appeal.

7. He contended that since the applicants' 172 members have already been issued with letters of termination of service and ordered to clear with the respondents and vacate the respondents' premises, failure to grant orders for stay would render the intended appeal nugatory. Further, that the said employees stand to suffer prejudice before their appeal is heard and determined.

8. Opposing the application, learned Counsel for the respondents relied on the respondents' replying affidavit sworn by one Karanja Njora, the 1st respondent's County Secretary. Placing reliance on **William Wambugu Wahome v. Registrar of Trade Unions & Another (2006) eKLR** and **Mombasa Seaport Duty Free Limited v. Kenya Ports Authority (2006) eKLR** counsel submitted that the impugned judgment resulted in a negative order in favour of the respondents which was incapable of execution and is incapable of being stayed. There is nothing capable of being stayed.

9. Moreover, submitted counsel, the applicants' draft memorandum of appeal did not disclose any arguable grounds and further that the applicants have not demonstrated that substantial loss is likely to be suffered by their affected members and employees if stay is not granted. He maintained that the respondent followed due process and sufficiently compensated the affected employees. In addition, that such employees are not left without recourse as they have the option to address any dissatisfaction through the alternative dispute resolution mechanisms and subsequently through the Employment and Labour Court. Counsel urged that the instant application did not meet the required threshold for granting of stay of execution and that it should be dismissed.

10. In the instant application, it is now settled law that the applicants have to satisfy this Court on the twin limbs that: the intended appeal is arguable and not frivolous and; that if stay is not granted, the intended appeal, if successful, would be rendered nugatory. (See: **Judicial Commission of Inquiry Into The Goldenberg Affair v. Kilach (2003) eKLR 249.**) In addition, in dealing with applications under rule 5(2) (b), this Court's discretion does not constitute an appeal from the trial judge's decision to this Court. (See: **Ruben & Others vs Nderitu & Another [1989] KLR 459.**)

11. As to whether the appeal is arguable, the applicant has set out 5 grounds of appeal in the draft memorandum of appeal. For the intended appeal to be termed as arguable the law requires that there be even one arguable point and that will suffice. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001.**)

12. Among the grounds raised is that, the learned Judge erred by dismissing the applicants' application for judicial review reliefs on grounds that it was incompetent by operation of the doctrine of exhaustion. It was their argument that the learned Judge ought to have been guided by the provisions of **Article 159(2)(a)(d)** and **(e)** of the Constitution and not have been bound by the strict rules of procedure. Further, that the learned Judge erred by holding that the applicants delved into the merits of the respondents' decision and not the process of redundancy.

13. On the question as to whether the learned Judge was right or wrong in declining to take up the matter as filed and not decline jurisdiction, we shall leave that for determination by the bench that will be seized of the appeal. However, as submitted by counsel for the respondents, the order we are being asked to stay is a negative order. This Court has held on several occasions that negative orders are not capable of being stayed. For instance, in **Kanwal Sarjit Singh Dhiman v. Keshavji Jivraj Shah (2008) eKLR**, the Court pronounced itself thus:

*“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”*

Also see: **College of Arts and Applied Sciences vs Oranga & Others [1976] KLR 63.**

14. Indeed, there is nothing arising from the trial Court's Judgment for this Court to stay. We may also add that from the annexures before us, some of the applicants have already been paid their terminal dues, others are said to have filed appeals to the County Public Service Board and it has not been demonstrated what prejudice they will suffer if the orders sought are not granted.

15. In view of the foregoing, we find this application devoid of merit and dismiss it with no order as to costs.

**Delivered and dated at Nairobi this 20th day of November, 2020.**

**W. OUKO, (P)**

**JUDGE OF APPEAL**

**W. KARANJA**

**JUDGE OF APPEAL**

**M.KOOME**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**