



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KIAGE, J.J.A)

CIVIL APPLICATION NO. 157 OF 2020

BETWEEN

**KENYA INDUSTRIAL RESEARCH**

**AND DEVELOPMENT INSTITUTE (KIRDI).....APPLICANT**

AND

**UNION OF NATIONAL RESEARCH AND ALLIED.....RESPONDENT**

*(Being an application for stay of execution of the Ruling of the Employment and Labour Relations Court (M. Onyango, J.) dated 15<sup>th</sup> May, 2020 in ELRC No 370 (N) OF 2009)*

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**RULING OF THE COURT**

[1] The Notice of Motion before us is taken out by the applicant, who seeks an order of stay of execution of the ruling delivered on 15<sup>th</sup> of May, 2020 in the **Employment and Labour Relations Court (ELRC) (M. Onyango, J.)** pending the hearing and determination of an intended appeal. The application is supported by an affidavit sworn by **Jairus Ombui** on 10<sup>th</sup> June, 2020. In summary, it is stated that the applicant is aggrieved by the a ruling delivered on 15<sup>th</sup> May, 2020; that a Notice of Appeal was filed; that the intended appeal is arguable for reasons that the court directed parties to undertake a computation for each of the fifty-two (52) employees (grievants) who were declared redundant; that twelve (12) of the grievants who were ordered to be paid were never declared redundant and are still in employment and that in the event an order of stay is not granted, the intended appeal will be rendered nugatory.

[2] The motion was opposed by the respondent, represented by **Mr. Zacharia Acharia**, the Secretary General of the Union that represented the grievants. In the written submissions, it is contended that the award was made on 13<sup>th</sup> March, 2015. The applicant did not appeal against the award that declared the letter of redundancy that was issued to the grievants illegal and ordered the grievants be paid their dues. According to the respondent, the applicant consented to the computation of the dues but only paid forty (40) of the grievants leaving out twelve (12).

[3] Failure to pay the 12 grievants, prompted the applicant to file another application by way of a notice of motion before ELRC on 31<sup>st</sup> July, 2019 which resulted in the Ruling dated 15<sup>th</sup> May, 2020 that the applicant desires to appeal against. According to the respondent, the instant application does not satisfy the criteria for granting a stay, for reasons that the applicant consented to the computation of dues, and did not file any document to support the allegation that the 12 grievants who have not been paid were never declared redundant.

[4] We have considered this application against the background of established principles under **Rule 5 (2) (b)** of this Court Rules, that for the application to succeed, it must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”**

[5] Is the intended appeal arguable? We have difficulties to draw a clear line of whether the appeal is arguable or not. This is because the award was made by ELRC for all the 52 grievants who were declared redundant to be paid their dues. However, and bearing in mind that an arguable appeal is not one that must necessarily succeed, if the applicant reinstated some 12 grievants, perhaps the effect and consequences of that to the proceedings that were before the ELRC might be an arguable issue. We say so, because, the applicant did not produce any evidence or consent by the said grievants to show that they were no longer interested in pursuing compensation as they were still in employment. Nonetheless, whether this issue will succeed will finally be determined in the intended appeal whenever that will be.

[6] On the nugatory aspect, the applicant's complaint is that if the payment is made the appeal will be rendered nugatory. We are not at all persuaded by this argument bearing in mind that the award was made in respect of 52 grievants whereupon the applicant decided to settle the award in respect of 40 grievants leaving out 12 unpaid. There were no proceedings shown to us that the 12 grievants had terminated their claim. Taking the words from the applicant's own mouth, it was submitted that the 12 grievants are still in employment, therefore there is no danger as the applicant and the 12 grievants are still working together and in the event that the appeal will be successful, they can recover the amount paid from their own employees.

[7] In the result, the applicant having failed to satisfy the second of the twin limbs in order to succeed under **Rule 5(2)** of this Court's rules, the application must fail and is accordingly dismissed with costs to the respondent.

*Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2020.*

**M. K. KOOME**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**