



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & J. MOHAMMED J.J.A)

CIVIL APPLICATION NO. 96 OF 2019

BETWEEN

TELKOM KENYA LIMITED.....APPLICANT

AND

COMMUNICATION WORKERS UNION.....RESPONDENT

(Being an Application for Stay of Execution of the Judgment of the Employment and Labour Relations Court at Nairobi (Ongaya, J.) dated 28th November, 2018

in

ELRC. No. 2105 of 2015)

RULING OF THE COURT

1. By a Notice of Motion dated 20th March 2019, the applicant **Telkom Kenya Limited** has invoked our jurisdiction under **Rule 5(2) (b)** of the Court of Appeal Rules seeking to stay the Judgment before the superior Court pending the hearing and determination of its appeal.
2. Briefly, the background of the application is that the respondent, **Communication Workers Union** filed a suit before the ELRC seeking *inter alia*; a declaration that the applicant's criteria or policy for payment of bonuses to its employees was unlawful, unfair and illegal and in violation of **Article 27(5)** and **41** of the Constitution; and an order directing payment of bonuses to its union members in accordance with the applicant's HR policy.
3. On 23rd November, 2018 **Ongaya. J** entered judgment in favour of the respondent and found that the applicant's failure to pay its employees the due bonuses in line with its policy contravened Section (5)2 of the Employment Act and Section 5(2) and (3) of the Labour Relations Act thereby amounting to Violation of Article 41(1) and (2) (c) of the Constitution. He consequently ordered the applicant to pay all outstanding bonuses in accordance with its HR policy by 31st December 2018, failure of which interest would be paid at court rates from date of judgment and the respondent to compute the quantum payable. The respondent computed the sum due as **Kshs 25, 347,718.08**.
4. Aggrieved, the applicant filed a notice of appeal dated 7th December, 2018 Memorandum of appeal dated 15th March 2019 and the instant application before us. The grounds on the face of the application and reiterated in the Supporting Affidavit of **Robert Irungu**, dated 20th March, 2020 are that:
 - i. The applicant has no knowledge of the means of the respondent's members and if the sum computed is paid to them. the applicant will have no way of recovering it in the event the appeal is successful*
 - ii. If orders sought are not granted the respondent will execute and there is a real risk that it may never recover the sums paid to the 930 members hence rendering the appeal nugatory*
 - iii. The respondent stands to suffer no prejudice as the applicant has filed its appeal before the court being Civil Appeal No. 96 of 2019 and the record of appeal which shall be prosecuted expeditiously*
 - iv. The intended appeal is arguable and in the Interest of justice*

5. The application was opposed by the respondent in a Replying Affidavit dated **24th June 2019** by **Benson Okwaro**, the General Secretary for the respondent who deponed that: the appeal had no chance of success and would not be rendered nugatory as the sum due is defined and could be recovered from the respondent's assets or its members' salaries; that the respondent's members will be denied the fruits of the judgment resulting in injustice and that the application did not meet the mandatory conditions of grant of stay under **Rule 5(2) b**.

6. We have considered the application along with the rival affidavits and the law. It is settled that for an applicant to succeed in an application such as the one before us they must establish the twin principles that its intended appeal is arguable and that unless the Court grants the orders sought, the intended appeal if successful will be rendered nugatory(**Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR**).

7. Taking into account the parameters of our discretion in the application before us as well as being careful not to make final determination on the merit of the intended appeal, we have perused the draft memorandum of appeal and find that the applicant's appeal is not frivolous as it raises arguable points, inter alia, whether it the respondent's members bonuses could be computed without a performance appraisal process.

8. As for the nugatory aspect, the core submission by the applicant is that it may not recover the colossal sum of **Kshs 25, 347,718.08** if the same is paid to the respondents and their intended appeal is successful. Conversely, the respondents contend that the intended appeal shall not be rendered nugatory as the sum can be recovered through deductions from future member salaries or the respondent's assets.

9. In **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another, Nairobi Civil Application No. 238 of 2005** this Court expressed itself thus:

“... Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

10. Having considered all the material before us, we think that the applicant would suffer substantial loss if the impugned judgment is executed and its intended appeal is successful, given that the recovery of the decretal sum might prove difficult as the current financial status of the respondent and its members remains unknown. The application is therefore allowed with no orders as to cost.

Dated and Delivered at Nairobi this 6th day of November, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR