



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & ODEK, J.J.A.)

CIVIL APPLICATION NO. NAI 360 OF 2018

BETWEEN

CABINET SECRETARY, MINISTRY OF LABOUR

AND SOCIAL PROTECTION.....1ST APPLICANT

HONOURABLE ATTORNEY GENERAL.....2ND APPLICANT

THE NATIONAL SOCIAL SECURITY FUND.....3RD APPLICANT

VERSUS

CENTRAL ORGANISATION OF TRADE UNIONS....RESPONDENT

(An application for stay of proceedings and stay of execution pending the

hearing and determination of an intended appeal from the ruling and

order of the Employment & Labour Relations Court of Kenya

at Nairobi (Makau, J.) dated 24th October, 2018

in

ELRC Misc JR No 31 of 2018)

RULING

1. By a notice of motion application dated 27th November, 2018, The **Cabinet Secretary, Ministry of Labour and Social Protection, Honourable Attorney General and The National Social Security Fund** (the applicants); seek inter alia an order of stay of execution of the order made by the Employment and Labour Relations Court (ELRC) at Nairobi dated the 17th January, 2018 pending the hearing and determination of the intended appeal.

2. The application was brought against **Central Organization of Trade Unions** (the respondent), under the provisions of **sections 3, 3A and 3B of the Appellate Jurisdiction Act, Articles 159, 162 and 164 of the Constitution, Section 8 of the Law Reform Act, Section 1(2) of the Labour Relations Act, Rules 5(2)(b) of the Rules of this Court and Order 53 of the Civil Procedure Rules 2010.**

3. The application is premised on thirteen grounds set out on the face of the application and is supported by the affidavits of **Ukur Yatani,**

the Cabinet Secretary, Ministry of Labour and **Gen (Rtd.) Julius Waweru Karangi, Chairman, National Social Security Fund Board of Trustees.**

4. The application is opposed by way of a replying affidavit sworn by **Francis Atwoli**, the Secretary General of the respondent.

5. A brief background of the facts leading up to the application before us is that the Respondent nominated **Mr. Francis Atwoli** as its nominee to the National Social Security Fund Board (The Board) by dint of Section 6(d)(ii) of the NSSF Act which mandates the Cabinet Secretary to appoint as members of the Board inter alia two persons, one of whom shall be of opposite gender, nominated by the most representative workers organization by virtue of their knowledge and experience in matters relating to employees to represent employees in Kenya.

6. The respondent's appointment was not gazetted and the Respondent herein filed an application seeking leave to commence judicial review proceedings to prohibit the applicants from convening any board meeting pending the re-appointment and gazetting of the Applicant's nominee to The Board and to seek an order of mandamus directed at the 1st applicant to re-appoint and gazette the respondent's nominee to the board of trustees of the 3rd Applicant. The respondent also sought the grant of leave to operate as stay.

7. The Employment & Labour Relations Court (**Makau, J.**) upon hearing the application, granted leave as sought, save for the order for leave to operate as stay which was to be determined inter partes. After hearing the matter inter partes, the Court granted the order for leave to operate as stay of all future meetings of NSSF Board and its committees pending the hearing and determination of the suit or gazetting of the respondent's representative to The Board, Mr. Atwoli, whichever came first. The Applicants being aggrieved by the said decision lodged a notice of appeal against the said ruling and have filed the present application in which they seek a stay of execution of the orders of **Makau, J.**, as well as a stay of further proceedings before the trial Court.

8. At the hearing, learned Counsel **Mr. Mbilo** appeared for the applicants. On whether the appeal is arguable, counsel contended that the Court did not have jurisdiction to question the statutory powers of The Board. He emphasized that the learned Judge acted in disregard of the law by issuing an order against an interested Party (NSSF board) who had no role in the appointment of its members. He stated the board members currently in place meet the quorum set in law and that there was no reason why the board could not proceed with its functions. In addition, he stated that the Cabinet secretary had duly executed his mandate by forwarding a gazette notice for publication appointing the respondent's nominee as members of the NSSF board.

9. In response, **Mr. Okweh**, learned counsel who appeared for the respondent submitted that the intended appeal was frivolous and was not arguable. He stated that the Cabinet Secretary was required to gazette the members of the board and that this requirement was couched in mandatory terms. He further argued that there was no indication that the government printer refused to publish the notice and that the applicants have failed to establish the appeal shall be rendered nugatory if stay is denied.

10. The principles applicable for determination of applications under rule 5(2)(b) of our Rules are now well settled and have been restated in several decisions of this Court. Firstly, an applicant has to demonstrate that he has an arguable appeal. Secondly, an applicant has to demonstrate that the appeal (or an intended appeal, as the case may be) will be rendered nugatory, absent stay. In the case of **Stanley Kangethe Kinyanjui vs Tony Ketter & 2 Others [2013] eKLR**, this Court held:

i. "In dealing with Rule 5 (2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.

ii. The discretion of this Court under Rule 5 (2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

iii. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

iv. In considering whether the appeal will be rendered nugatory, the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

v. An applicant must satisfy the Court on both the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

vii. 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.

viii. In considering an application brought under Rule 5 (2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

ix. The term "nugatory" has to be given its full meaning.

It does not only mean worthless, futile or invalid. It also means trifling.

x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

11. We have considered the application, affidavits on record, submissions by counsel as well as authorities submitted by counsel and the law. On the issue of arguability, we remind ourselves (and as stated above) that an arguable appeal is not necessarily one that will succeed, but one that raises an issue that should be argued fully before the Court and is no frivolous. (***Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008***).

12. The applicants have set out in their draft Memorandum of Appeal, several grounds under this limb including whether the learned Judge erred in disregard of the law in issuing an order against the 3rd Applicant who was named as an Interested party in the proceedings and that 1st Applicant had no control of the affairs of the board and whether the Court acted in excess of its jurisdiction. We are therefore satisfied that the applicants have an arguable appeal.

13. On the nugatory aspect, we are guided by the Court in ***Sicpa Securities Sol. Sa vs. Okiya Omtatah Okoiti & 2 others [2018] eKLR*** where the Court reaffirmed the principle that in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. (See ***David Morton Silverstein vs. Atsango Chesoni, Civil Application No. Nai 189 of 2001***).

14. In the case of ***Commissioner of Customs and Excise vs. Export Trading Company Limited [2019] eKLR*** the Court quoted with approval the persuasive case of ***James Wangalwa & Another vs. Agnes Naliaka Cheseto Bungoma Hc Misc Application No 42 of 2011*** where it was held that:-

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail...”

15. Put in a different way, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.

16. In ***Reliance Bank Ltd vs Norlake Investments Ltd [200] 1 EA 227***, the factors which could render an appeal nugatory have to be considered within the circumstances of each particular case, and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant’s appeal to be heard and determined.”

18. The Supporting Affidavit of **Mr. Ukur Yatani**, the Cabinet Secretary in the Ministry of Labour and Social Protection dated 27th November 2018, states in paragraph 15 that “...the intended appeal would be rendered nugatory thereby placing the Applicants in precarious positions and leading to miscarriage of justice and the appeal would be an academic exercise” while the Supporting Affidavit of **General Rtd. Dr Julius Waweru Karangi** similarly dated, lays out the mandate and functions of the board and its committees and highlights the necessity of the board to conduct its meetings to provide strategic direction, to receive management reports and make decisions for the effective running of the organization.

19. It is our considered view that despite the above averments, the applicants have still not established a prima facie case that the state of affairs created by the orders of the Court will irreparably affect or negate the very essential core of the functions of the Board, if they are the successful party in the appeal and that future deliberations or sittings cannot cure any pending exercise of their functions. We are skeptical whether the apprehensions expressed by the applicants would result to the appeal being rendered academic. In any case, the applicants can still go back to the trial Court for the interpartes hearing of the application.

20. The applicants, having failed to satisfy us on the nugatory aspect, we find that this application lacks merit and must fail and is dismissed with costs.

Orders accordingly.

Dated and Delivered at Nairobi this 22nd day of February, 2019.

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR