



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

[CORAM: GATEMBU, SICHALE & KANTAI JJA]

CIVIL APPLICATION NO. 18 OF 2019 (UR 12 OF 2019)

BETWEEN

FINLAY FLOWERS (K) LIMITED.....1ST APPLICANT

JAMES FINLAYS (K) LIMITED.....2ND APPLICANT

AND

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal from the judgment made

on 1st February 2019 (Marete, J.)

in

Kericho Employment and Labour

Relations Cause No. 171 of 2016)

RULING OF THE COURT

1. In their application dated 18th February 2019 and lodged in the Nakuru Sub-Registry of this Court on 19th February 2019, the applicants seek an order under Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Court of Appeal Rules for an order for stay of execution of the judgement of the Employment and Labour Relations Court (Marete, J) delivered on 1st February 2019 pending the hearing and determination of an intended appeal from that judgment in which the Court ordered reinstatement of 286 grievants into employment without loss of emoluments, promotion and benefits.

2. In its memorandum of claim presented before the Employment and Labour Relations Court (ELRC) at Kericho, the Kenya Plantation and Agricultural Workers Union, the respondent in this application complained that the summary dismissal of 286 employees of the applicant was unprocedural, wrongful and unfair in both procedure and substance. It prayed for an order of their immediate reinstatement without loss of benefits and privileges. In the alternative, there was a prayer for payment of full terminal benefits comprising of notice in lieu of pay; days worked and not paid; leave earned and not paid; one-way travelling allowance; overtime worked and not paid; gratuity for each completed year of service and 12 months gross monthly wages as compensation for wrongful loss of employment.

3. In their defence and counterclaim, the applicants averred that the summary dismissal of the employees was warranted and justified on account of breach of the collective bargaining agreement and the applicable provisions of the law in that the employees refused to perform their allocated tasks as instructed and unlawfully absented themselves from work. The applicants counterclaimed for security of costs and for compensation for lost income.

4. In its judgment delivered on 1st February 2019, the ELRC allowed the respondent's claim and ordered that the 286 employees (grievants) be reinstated into employment without loss of emoluments, promotion and benefits and that they should resume work on 8th February 2019.

5. Aggrieved by that decision, the applicants intend to challenge it and lodged a notice of appeal on 14 February 2019. Meanwhile they pray that execution of the judgment be stayed.

6. Learned counsel for the applicants Mrs. E. Opiyo submitted that the applicants' application meets the required conditions; that the intended appeal is arguable as demonstrated by the draft memorandum of appeal in that the Judge did not consider the parameters defined under Section 49 of the Employment Act before ordering the reinstatement; that the Judge did not consider that the employees had gone on strike in contravention of the orders of the court that had been issued by this Court; that the employees failed to turn up for disciplinary hearing; that despite the Judge finding that the strike by the employees was not lawful, he went ahead to order reinstatement unconditionally without loss of benefits and emoluments; that based on the computation by the applicants, benefits and emoluments are in excess Kshs. 81 million; that unless the orders sought are granted, the intended appeal will be rendered academic in that the respondent would not be in a position to repay the same if the appeal succeeds.

7. Furthermore, it was submitted that the applicants will suffer undue hardship as the first applicant is undergoing staged closure to be completed by the year 2020; and that the dismissed employees have in any event been replaced. It was indicated that to avoid contempt of the impugned orders, the employees have been reinstated and sent on leave and that the applicants are shouldering a heavy burden on that account. In support of the application reliance was placed on numerous authorities.

8. Opposing the application Mr. Cyprian O. Ochieng learned counsel for the respondent referred to a replying affidavit sworn by Meshack Khisa the Assistant General Secretary of the respondent and submitted that the application does not meet the twin requirements that should be fulfilled in an application of this nature. Counsel submitted that it is admitted that the employees were not accorded a hearing prior to their dismissal; that considering that a hearing is a fundamental right, the intended appeal cannot, on that ground alone, be arguable. It was submitted that the Judge cannot be faulted in granting the remedy of reinstatement as the circumstances in this case warranted such relief.

9. As to whether the intended appeal will be rendered nugatory, it was submitted that the applicant has already partially complied with the impugned judgement having reinstated the employees but subsequently sent them on indefinite leave with full pay; that the applicant does not stand to suffer as it has demonstrated its ability to pay the grievants salary even though they are not in active employment; that in the event that this Court is inclined to allow the application, it should be on terms that the main appeal is heard within 3 years to avoid a situation where the relief of reinstatement would no longer be available to the grievants. Counsel also cited numerous authorities in opposition to the application.

10. We have considered the application, the submissions and the authorities cited. Counsel are evidently alive to the requirement that to succeed in an application of this nature, the applicant is required to demonstrate that the intended appeal is arguable and that if we do not accede to the request to grant the orders sought the intended appeal will be rendered nugatory. In *Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006* this Court stated:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show 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 the appeal will be rendered nugatory.”

11. Does the applicant's application meet that standard? As to whether the intended appeal is arguable, the applicants contend that the learned Judge of the ELRC failed to consider the provisions of Section 49(4)(b)(c) and (d) of the Employment Act when ordering reinstatement. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we do not think that the intended appeal is frivolous. It is indeed arguable.

12. As to whether the appeal will be rendered nugatory unless we grant the orders sought, it has been asserted that the order on reinstatement was coupled with an order for payment of dues from December 2016 to 8th February 2019 which according to the applicants translates to an amount in excess of Kshs. 81 million; and that in the event that the appeal succeeds, it is unlikely that the employees would be in a position to refund that amount.

13. On its part, the respondent asserts that the employees “*are unionsable (sic) employees whose benefits are covered under the respondent's collective bargaining agreement and that no financial loss will be occasioned as the appellant can off-set any [of] the grievants so called dues paid through the benefits*”.

14. It is not entirely clear from the respondent's replying affidavit how the collective bargaining agreement would facilitate a refund in the event of the appeal succeeding. The circumstances, in this regard, are not very different from those in the case of *Association for Physically Disabled of Kenya vs Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [2016]eKLR* where, although the employees in that case had been laid off by way of redundancy and an order for reinstatement without loss of salaries and benefits had been made, this Court expressed:

“ In support of the application, the applicant has deponed that should the respondent execute the award before the hearing and determination of the intended appeal, the appeal will be rendered nugatory and the applicant would suffer irreparable loss and damage as the employees would not be in a position to refund the sum of Kshs. 9,792,261/-being the accrued salary arrears as at May, 2015. The amount would obviously continue to accrue interest after the said date if the award is forced upon the applicant. This assertion has not been countered at all by the respondents. This state of affairs will certainly render the intended appeal nugatory.”

15. In *Reliance Bank Limited vs Norlake Investments Limited [2002] 1 EA 227* the Court stated that where a decree is for payment of money, “*the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each*

particular case.”

16. Having regard to the circumstances of the present case, namely, that the dismissed employees have been replaced; that the grievants have been reinstated and sent on leave with pay; and that the prospect of the grievants refunding the amount in excess of Kshs. 81 million does not appear realistic in the event of the appeal succeeding, we are persuaded that unless we grant the orders sought, the intended appeal will be rendered academic.

17. We accordingly allow the applicant’s application filed on 19th February 2019 and order that execution of the judgment of the ELRC in ELRC No. 171 of 2016 delivered on 1st February 2019 is hereby stayed pending the hearing and determination of the intended appeal.

18. The applicants shall, within 45 days from the date of delivery of this ruling, file and serve the memorandum and record of appeal. Once filed, the appeal shall be heard and determined on basis of priority so as not to remove the remedy of reinstatement out of reach of the grievants.

19. The costs of the application shall abide by the outcome of the intended appeal.

Dated and Delivered at NAKURU this 11TH day of JUNE, 2019.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR