



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NAI 12 OF 2019

BETWEEN

JOEL MBUTHIA.....1<sup>ST</sup> APPLICANT

SAMSON O. ONGERA.....2<sup>ND</sup> APPLICANT

STEVE O. HANGALA.....3<sup>RD</sup> APPLICANT

AND

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS (KUPAW).....1<sup>ST</sup> RESPONDENT

REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT

*(An application for stay of execution order arising from the Judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J) dated 3<sup>rd</sup> October 2018 in ELRC No. 3 of 2017)*

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RULING OF THE COURT

This Notice of Motion dated 11<sup>th</sup> January 2019 is made under *rules 5 (2) (b)* of the *Court of Appeal Rules*, and has been brought for orders that pending the hearing and determination of the appeal in *Civil Appeal No. 469 of 2018* a stay of execution be issued against the decree and judgment of the trial court in ELRC Appeal No. 3 of 2018, and that costs be provided for.

The motion was premised on the grounds that the applicants have challenged the decision of the trial court delivered on 3<sup>rd</sup> October 2018, and that they have lodged their appeal in this Court; that the trial court declined to grant the orders of stay of execution sought in a Notice of Motion dated 19<sup>th</sup> December 2018, and instead directed the taxing officer to proceed with taxing the pending party and party bill of costs for taxation for the Interested Party (*the 1<sup>st</sup> respondent*) dated 12<sup>th</sup> November 2018, which if allowed to proceed would render the applicants' appeal nugatory; that by its own motion the 1<sup>st</sup> respondent sought to be joined as an interested party in the suit, and having done so, cannot purport to turn around and seek payment of costs from the applicants herein, as this would be against public policy, and would be prejudicial to the applicants. It was finally contended that the appeal raised triable issues with a high probability of success.

The motion was supported by the affidavit of *Samson Omechi Ongera*, the 2<sup>nd</sup> applicant sworn on the same date as the motion wherein it was deposed that the trial court's judgment awarded costs to the respondents; that the applicants were dissatisfied with that decision and have sought to challenge it by way of an appeal; that when the deponent sought to establish from the deputy Registrar whether the correct process of execution for costs had been commenced in the face of an impending appeal, the deputy Registrar's response was that the decision lay with the court; that they thereafter sought to stay the proceedings, which application was declined by the court below. It was averred that the applicants' appeal would be rendered nugatory as the taxing officer has already taxed the costs and execution was imminent. It was further deposed that as a consequence, the applicants withdrew the stay of execution application that was before that court and have instead sought to obtain a stay of execution in this Court.

In a replying affidavit sworn on 5<sup>th</sup> March 2019 by *Alfred Nyabena*, counsel for the 1<sup>st</sup> respondent who had conduct of the suit deposed that,

the motion was frivolous, scandalous and incurably defective; that the 1<sup>st</sup> respondent was not a union of straw and was in a position to refund the taxed sums if the applicants' appeal were to succeed; that the appeal will not be rendered nugatory, as it is a money decree which was capable of being satisfied; that the applicants have not demonstrated that they will suffer any loss. It was averred that the application is an abuse of the court process as a certificate of taxation has yet to be issued by the taxing officer, and that it would be unfair for a judgment debtor to determine when and how the process of taxation should be undertaken, and who should file the party and party bill of costs in a suit that involved more than one respondent.

The applicants filed written submissions, and in highlighting them, **Mr. S. Ongera** who appeared for the applicants submitted that an appeal against the judgment had been filed, that is *Civil Appeal No 469 of 2018*, and that a draft memorandum had been included in the record, of which one of the grounds was that the trial court fell into error when learned judge relied on facts that were neither pleaded nor disclosed to the applicants; that if the taxation of party and party costs against the applicants was completed and execution of the trial court's order was to ensue, the appeal would be rendered nugatory. It was further submitted that the 1<sup>st</sup> respondent was only an interested party, and that the 2<sup>nd</sup> respondent is the proper party to the suit and has yet to file its own bill of costs.

Relying on its replying affidavit, **Ms. Tono**, learned counsel for the 1<sup>st</sup> respondent submitted that **section 94** of the **Civil Procedure Act** does not bar a party from taxing its bills, and that in any event, the certificate of taxation was yet to be issued; that in effect, no loss or prejudice was demonstrated.

**Mr. Motende**, learned counsel for the 2<sup>nd</sup> respondent submitted that since the 2<sup>nd</sup> respondent was not a party to the bill of costs for taxation it requested to be excused from the application.

We have considered the pleadings and the submissions of the parties. In the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012***, this Court stated *inter alia*:

***“That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.*”**

It is therefore well established that, two principles guide the court. First, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Second, that unless a stay of execution or injunction as the case may be is granted, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under **rule 5 (2) (b)**, the court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See ***Ruben & Others vs Nderitu & Another (1989) KLR 459***.

As to whether the appeal is arguable, from the draft memorandum of appeal, the applicants' main complaint was that the Interested Party has proceeded to tax its party and party bill of costs whilst an appeal is pending before this Court; that their appeal has a high chance of success since, the learned judge misdirected herself by taking into account matters that were not pleaded or disclosed to the court, particularly with respect to the existence of other trade unions registered in the same sector as the 1<sup>st</sup> respondent. If indeed this be the case, and it is put for us to decide the matter, then having regard to the mandate of this Court as set out in ***Selle vs Associated Motor Boat Co Ltd [1968] EA, Mariera vs Kenya Bus Service (KBS) Ltd [1987] KLR 440*** and various other oft cited authorities, whether the trial court took into account matters that it ought not to have taken into account, and failed to take into account matters that ought to have been taken into account, then indeed the appeal is arguable, and we so find.

On whether the appeal would be rendered nugatory, it is apparent that the Interested Party, the 1<sup>st</sup> respondent herein has commenced a process of taxing its party and party bill of costs. Once taxed, it will be possible for it to execute against the applicants. The 1<sup>st</sup> respondent has sought to pursue its costs, while an appeal, that is, *Civil Appeal No. 469 of 2018* is pending before this Court. If the applicants' appeal were to succeed, they would be entitled to seek reimbursement of those taxed costs from the 1<sup>st</sup> respondent. More likely than not, this would involve another round of litigation for recovery of those sums.

It is apparent from the nature of the dispute that it concerns trade unions, and there is the likelihood that it would be workers' contributions that would be expended towards recovery of those taxed costs. We do not consider this type of needless litigation to be a prudent or indeed pragmatic usage of union resources. Our view is that, in the circumstances of this case, it would be more expedient, and in the interest of justice for the appeal to be heard and determined, so that thereafter the question of costs can be dealt with all inclusively. And therefore pursuing costs of the suit in the trial court at this point in time would in effect render the appeal nugatory if it were to succeed.

In sum, the twin principles having been satisfied and, we find merit in the application. A stay of execution of the judgment of the Employment and Labour Relations Court of 3<sup>rd</sup> October 2018 in ELRC Appeal No. 3 of 2017 is granted pending the hearing and determination of *Nairobi Civil Appeal No. 469 of 2018*. The costs to abide by the outcome of the appeal.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of September, 2019.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**