IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & MURGOR, JJ.A)

CIVIL APPLICATION NO. 152 OF 2019 (UR. 141/2019)

BETWEEN

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....APPLICANT

AND

THE HON. CABINET SECRETARY

LABOUR & SOCIAL PROTECTION.....1ST RESPONDENT

KENYA EXPORT FLORICULTURE,

HORTICULTURE & ALLIED WORKERS UNION...2ND RESPONDENT

*(An application for stay of execution of the Judgment and Decree of the Employment & Labour Relations Court at Kericho (**M. Mbaru, J.**) dated 14th May, 2019*

in

E.L.R.C. Petition No. 222 of 2018)

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RULING OF THE COURT

The applicant intends to appeal to this Court against the judgment and decree of the Employment & Labour Relations Court, "ELRC" at Kericho (**M. Mbaru, J.)** dated 14th May, 2019. The applicant moved the ELRC in its capacity as the registered trade union under the provisions of the Labour Relations Act representing employees in the agriculture and plantation sector through a statement of claim seeking:

> **"(a) A permanent injunction to prohibit and/or restrain the 1st and 2nd respondents by themselves, their servants, agents or anyone claiming through them from demanding, compelling and/or requiring any employer or employee to deduct trade union dues and or implementing Gazette Notice No. 157 dated 13th June, 2018 of the Labour Relations Act, No 14 of 2014 citing Kenya Export Floriculture, Horticulture & Allied Workers Union deduction of union dues order, 2018.**
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> **(b) A declaration to issue suspending/setting aside and or implementing Gazette Notice No 157 dated June 2018 of the Labour Relations Act, No 14 of 2007 citing Kenya Export Floriculture, Horticulture & Allied Workers Union deduction of union dues order, 2018.**

(c) The Court be pleased to issue any other or further remedy as it may deem fit.

(d) The respondents bear costs."

The applicant's claim was based on the fact that on 13th June, 2018 the 1st respondent published a Gazette Notice No. 157 under the Labour Relations Act which cited the 2nd respondent for deduction of union dues order, 2018 and required all employers who employ more than five members of the 2nd respondent to deduct a monthly dues and pay to the account and notify the 2nd respondent on the deduction and payment and file returns with the Registrar of Trade Unions. That the order was issued by the 1st respondent without the 2nd respondent disclosing to the 1st respondent that the applicant represented 80% of all employees in the floriculture and horticulture sector and that it had signed recognition and collective Bargaining agreements with the employers in the sector. The applicant also intimated that the 2nd respondent had obtained the orders through fraud and misrepresentation of material facts as the 2nd respondent did not have members in the said sector. That the order was obtained without disclosure that there were interim orders against the 2nd respondent barring it from obtaining union dues from employers in the horticulture and floriculture sector until that suit was heard and determined. Finally, the applicant claimed that there was Petition Number 4 of 2018 before the Supreme Court filed by the applicant which would be rendered nugatory were the order issued by the 1st respondent aforesaid not rescinded.

The 1st respondent did not defend the claim. The 2nd respondent in countering the claim stated that the applicant did not represent 80% of the employees in the horticulture and floriculture sector. It disposed that it had members in several flower and vegetable farms which it presented to the 1st respondent and formed the basis of its decision. That the interim orders alluded to by the applicant were not relevant with regard to the decision by the 1st respondent. That this Court had validated registration of the 2nd respondent and hence the decision of the 1st respondent was in compliance with the law. That no loss could be occasioned to the applicant with regard to 2nd respondent's members paying their dues to it. Lastly, it deposed that, it had recruited members and had obtained recognition agreement which justified the decision made in its favour by the 1st respondent.

Upon hearing the parties, the trial court rendered its verdict thus:-

> **"There is no tangible appraisal to the court in the submissions as to how Supreme Court Petition No. 4 of 2018 has been addressed. There is judgment in Civil Appeal No. 141 of 2014 by the Court of Appeal dismissing the Appeal. This court finds no good cause to allow the orders sought herein.**
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> **As the interim orders herein allowed the court to hear the parties on their merits, the same stopping the implementation of the Order and Notice of the Minister vide Gazette No. 157 dated 13th June, 2018 of the Labour Relations Act, No. 14 of 2014 for completeness, the same shall take effect as of this date. This will protect any employer not subject of these proceedings and who was subject of the Order and Notice of the Minister.**
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> **Accordingly, the claim herein is dismissed and Gazette Notice No. 157 dated 13th June, 2018 of the Labour Relations Act, No. 14 of 2014 citing Kenya Export Floriculture, Horticulture & Allied Workers Union deduction of union dues order, 2018 shall take effect on the date of this judgement noting the subsisting interim orders. In this regard, each party shall bear own costs."**

Aggrieved by the decision, the applicant lodged a notice of appeal on 17th May, 2019 signifying its intention to lodge an appeal to this Court. Subsequently, the applicant filed the present application dated 20th May, 2019 predicated upon sections 3, 3A, & 3B of the Appellate Jurisdiction Act and rules 5(2) (b) and 42 of the Court of Appeal Rules, in which it, *inter alia* sought a stay of execution of the judgment and decree aforesaid pending the hearing and determination of the intended appeal.

The grounds in support of the application are that the order by the learned Judge directing Gazette Notice No. 157 dated 13th June, 2018 to take effect on the date of the judgment was erroneous, irrational and unreasonable; the Supreme Court petition was still active and if the impugned judgment is to be executed then the applicant's intended appeal would be rendered nugatory should the same be successful; the appeal will be an academic exercise if the Court does not grant stay orders; that there had been no delay in bringing the application; and that it was crucial and in the interest of justice that the orders sought be granted since the intended appeal was arguable.

The application was also supported by the affidavit sworn by **Henry Omasire**, the national organizing secretary of the applicant. The said affidavit merely reiterates and expounds on the above grounds.

The 1st respondent did not file a response to the application. In reply to the application however, the 2nd respondent filed a replying affidavit sworn by **David Benedict Omulama,** its national secretary general. He deposed that the 2nd respondent was a duly registered trade union under the Labour Relations Act mandated to represent workers engaged in export of floriculture, horticulture and allied sectors; that the interim order issued in Gazette Notice No. 157 had caused it loss; that it had furnished the 1st respondent with sufficient information to warrant the publication of Gazette Notice No. 157; that the applicant did not produce evidence to show that the 2nd respondent's members were not authentic; that the instant application was fatally defective as it was not clear on which appeal it was anchored; that the judgment in Civil Appeal No. 141 of 2014 gave the 2nd respondent legitimacy to carry out activities of a trade union which included recruitment of members and receiving trade union dues; that if the application was to be allowed, this Court will have impliedly stayed the judgment if this Court in Civil Appeal No. 141 of 2014; that the application did not meet the requirements of rule 5 (2) (b) of this Court's Rules; that the draft memorandum of appeal did not disclose any arguable appeal; and that the applicant had not demonstrated the prejudice it would suffer should the application not be granted; nor had it demonstrated that it was willing to pay the 2nd respondent the money it would lose by stopping collection of union dues should the appeal not succeed.

At the hearing of the application, **Mr. Khisa** appeared for the applicant, **Mr. Omulama** appeared for the 2nd respondent whereas **Mr. Ochola,** learned counsel appeared for the interested party, Vegpo (K) Limited. Both Khisa and Omulama merely regurgitated what had been deposed in their affidavits in support of and in opposition to the application.

Mr. Ochola opposed the application and submitted that the moment they were notified of the judgment they complied and may not be able to recover the deductions already remitted to the 2nd respondent.

We have carefully considered the record, the submissions by counsel and the law. To our mind, the issue for our determination is whether the applicant has satisfied the laid down principles for grant of stay of execution of a judgment pending appeal or intended appeal.

The jurisdiction of this Court under Rule 5 (2) (b) of this Court's rules to grant stay of execution is original and discretionary. Of course the discretion has to be exercised judiciously and with reason; not on the craze of impulse or pity. Rule 5(2) (b) is a procedural innovation designed to enable the Court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of **Stanley Kang'ethe Kinyanjui v 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."**

Therefore, for an applicant to succeed, he must first demonstrate that he has an arguable appeal which is the same as saying that the appeal is not frivolous. Such an applicant, upon satisfying that principle, has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. In **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others, Civil Application Nai. 258 of 1999** (unreported) this Court stated:

> **"The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case ..."** (Emphasis ours).

It is trite law that by arguable it does not mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court. In the case of **Dennis Mogambi Mang'are v Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011**) this Court stated that:

> **"An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."**

But to succeed, the applicant must satisfy both limbs.

On whether the applicant has established an arguable appeal, we answer in the affirmative. The applicant has annexed a draft memorandum of appeal to the application which raises five intended grounds of appeal. Among the issues raised by the applicant which we think merit consideration by this Court in the intended appeal is whether the trial Court erred in failing to apply the provisions of sections 48 and 50 (2) (a) of the Labour Relations Act to the dispute and to acknowledge that there was an interim order restraining the 2nd respondent from obtaining union dues from employers in the floriculture, horticulture and other allied sectors. There are also allegations of fraudulent mispresentation which will require interrogation by this Court in the

intended appeal.

We now turn to consider whether the appeal will be rendered nugatory should the judgment of the ELRC not be stayed. The factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the competing claims of both sides. It has been claimed by the applicant and we did not hear the respondents discount that allegation that they misled the court into issuing the impugned orders without disclosing that there were interim orders in place in another suit barring the 2nd respondent from demanding and obtaining Union dues from employers in the horticulture and floriculture sector until that suit was heard and determined. The 2nd respondent appears to concede to the existence of such interim orders but claims that they were irrelevant to the 1st respondent's decision. The issue we are concerned with here is the judgment and decree of ELRC and not the 1st respondent's decision with regard to the registration of the 2nd respondent as a trade union. Accordingly, the existence of the interim orders is relevant. Further we wish to add that it may also be near impossible for the applicant to recover dues collected by the 2nd respondent should the intended appeal be successful. We did not hear the 2nd respondent undertake that in the event that the intended appeal was successful they were in a position to reimburse the deducted dues that they would have received. In **Reliance Bank Ltd v. Norlake Investments Ltd [2002] E.A. 227**, this Court while faced with almost similar facts 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 applicants appeal to be heard and determined."** (Emphasis ours).

Further in the case of **Mukuma v Abuoga [1988] KLR 645**, this Court held *inter alia*:

> **"The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory."**

From the foregoing, we are persuaded that the applicant has satisfied us on both limbs to warrant us to grant the prayers sought. Accordingly, we exercise our discretion in its favour by allowing the application dated 20th May, 2019 and direct that there be a stay of execution pending the hearing and determination of the applicant's intended appeal against the judgment and decree of Mbaru, J. dated 14th May, 2019. Costs shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 8th day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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