IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & MURGOR, JJ.A)

CIVIL APPLICATION NO. 8 OF 2018 (UR. 7/2018)

BETWEEN

KENYA TEA GROWERS ASSOCIATIO

UNILEVER TEA GROWERS ASSOCIATION....APPLICANTS

AND

KENYA PLANTATION AND

AGRICULTURAL WORKERS UNION...............RESPONDENT

(An application for stay of execution pending the hearing and determination

of an appeal from the order of the High Court of Kenya

at Nairobi (Mbaru, J.), dated 26th February, 2016

in

ELRC No. 1578 of 2017

As consolidated

with Nos. 1576, 1579, 2078 and

Misc. Nos.154 and 155 of 2017

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RULING OF THE COURT

By a notice of motion application dated the 19th January, 2018, **Kenya Tea Growers Association** (KTGA) and **Unilever Tea Growers Association** (UTGL) (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. The application was brought against **Kenya Plantation and Agricultural Workers Union** (the respondent), under the provisions of **sections 3A** and **3B** of the appellate Jurisdiction Act and **Rules 5(2)(b)** and **103** of the Rules of this Court.

The application is premised on five grounds set out on the face of the application and is supported by the affidavits of **Apollo Kiarii**, the Chief Executive Officer of KTGA and **Alison Kariuki**, the Legal Director of UTGL. The application is opposed by way of a replying affidavit sworn by **Meshack Khisa**, the Assistant Secretary General of the respondent.

In summary, the facts leading up to this application are largely uncontested. The respondent herein is a trade union which represents agricultural sector workers mainly in the tea, coffee and flower farms in Kenya. The respondent is affiliated to the Central Organization of Trade Unions. As such the respondent is engaged in various activities which mainly focus on championing labour related rights of its members.

On the 31st July, 2017 the respondent issued a seven days strike notice which was to be effective from the 14th August, 2017. In light of the strike notice the applicants moved to the ELRC at Nairobi and got orders restraining the respondent or its members from engaging in a strike with respect to the strike notice issued on the 31st July, 2017.

The respondent issued another strike notice dated the 11th October, 2017, which was to be effective within seven days of its issuance. Again, the applicants rushed to court and got orders stopping the strike pending the hearing and determination of their application. However, it would appear that the respondent's members disregarded the orders issued by the court restraining them from going on strike and went ahead with the strike.

In the meantime, the respondent approached the ELRC at Kericho and got orders restraining the applicants herein together with Sotik Tea Company Ltd, Kakuzi Limited (Kaboswa Estate) and Eastern Produce (K) Ltd (Kibwari Estate) from terminating and/or dismissing any of their employees in respect of the strike notice dated the 11th October, 2017. The suit in Kericho was consolidated with the one in Nairobi and on the 7th November, 2017 the ELRC at Nairobi issued orders directing all the employees to return to work within 24 hours. The court further directed the applicants not to victimize any of the employees. Thereafter the respondent called off the strike and its members resumed work.

However, according to the applicants before the ELRC at Kericho issued the order restraining them from dismissing its employees, some of the employees had already been dismissed for failure to return to work when called upon to do so by the applicants by virtue of the fact that the strike was illegal. In total 362 employees had been dismissed and the applicants refused to have the said employees resume work. The applicants filed an application dated the 17th November, 2017 seeking interpretation of the word "no victimization" as contained in the order of 7th November, 2017, because according to the applicants the order of 7th November, 2017 did not apply to the employees who had already been dismissed.

That application came up for hearing on the 17th January, 2018 but the same did not proceed. Counsel for the respondent, however, made an application that all the employees should return to work including the 362 that had been locked out by the applicants. Despite stiff opposition from counsel for the applicants, the court ordered that all employees were to return to work unconditionally. The applicant aggrieved by that decision filed a notice of appeal and also filed an application for stay of execution pending hearing and determination of the intended appeal by this Court. It is this application that is now before us.

At the hearing learned senior counsel, Mr. Ojiambo, appeared for the applicants. On whether the appeal is arguable, counsel submitted that on the 17th January, 2018 the applicants' application seeking clarification of the orders issued on 7th November, 2017 was what was coming up for hearing but the court gave the order directing all employees to resume work without hearing the application. Counsel contended that the employees who were dismissed were on strike in defiance of a court order and that the application was not frivolous.

On the nugatory aspect counsel submitted that the salary for each month amounts to Kshs.10,000,000.00 which amount cannot be recovered from the respondent.

In response, Ms. Guserwa appearing for the respondent, submitted that the intended appeal was not arguable because it had been overtaken by events as more 6,000 employees had already resumed work. Counsel submitted that both the applicants and the respondent were applying that the employees be reinstated. On the nugatory aspect, counsel contended that this is a monetary decree and that the employees are working and would be able to pay in the event the intended appeal is successful. Counsel prayed that the application be dismissed.

We have considered the application, affidavits on record, submissions by counsel as well as authorities submitted by counsel and the law. In an application under **Rule 5(2)(b)** of the Court of Appeal Rules, the applicant ought to establish two twin principles before this Court can exercise its discretion in its favour. The principles were set out in ***Patrick Mweu Musimba vs Richard N. Kalembe Ndile & 3 Others [2013] eKLR*** as follows:

> ***"The law applicable in respect of applicants under Rule 5(2)(b) of the Court of Appeal Rules is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he had an arguable appeal i.e. one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective."***

In addition an applicant must satisfy the court of the existence of both the twin principles before he can be granted the relief sought.

We have applied the principles to the present circumstances. In considering whether the appeal is arguable, we have considered the applicant's arguments and the draft memorandum of appeal. The applicants have questioned the legality of the learned judge decision in ordering all the employees including those who had been dismissed to unconditionally resume work at an interlocutory stage and before hearing of the application seeking clarification of the court's orders. The applicants were also aggrieved by the decision to reinstate the dismissed employees despite the fact that they had disobeyed court orders. Another issue raised by the applicants is that the reinstatement of the dismissed employees was made in the absence of a formal application. In our view these complaints raise serious questions of law and are not frivolous, as such, in our view the intended appeal is arguable.

In determining the nugatory aspect, it is important that when considering whether or not an appeal will be rendered nugatory the court bears 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***). The applicant contends that if the intended appeal is successful it will be rendered nugatory because the respondent will not be in a position to pay the salary received by the employees. On the other hand the respondent argues that this is monetary decree and the employees are working and will be able to pay in the event of success of the intended appeal. In our considered opinion we do not think that if the intended appeal is successful it will be rendered nugatory. In ***Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR*** this Court stated as follows: -

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

We think that even if the intended appeal is successful the applicants have a remedy in damages.

The upshot of the foregoing is that the notice of motion application dated the 19th January, 2018 lacks merit and is hereby dismissed. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 13th day of July, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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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