IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & SICHALE, JJ.A)

CIVIL APPLICATION NO. 87 OF 2016

BETWEEN

HON. JUSTUS ALOO OGEKA

OUMA JUMA

SEBASTIAN NGORWE

RICHARD ONGORO

MARK AMIMO

MONICA KENDI

NANCY JERUTO

KENYA NATIONAL UNION OFCO-OPERATIVE STAFF.....APPLICANTS

AND

REGISTRAR OF TRADE UNIONS…….....……...1ST RESPONDENT

KENYA UNION OF COMMERCIAL FOOD ANDALLIED WORKERS ..2ND RESPONDENTS

BANKING INSURANCE AND FINANCE UNION (K) …….....3RD RESPONDENTS

*(An Application for injunction and stay of execution of the Decision/Ruling of the Nairobi Employment & Labour Relations Court (Ndolo, J) dated 10th March, 2016, pending the hearing and determination of an intended appeal from the said decision in **NAIROBI EMPLOYMENT & LABOUR RELATIONS COURT APPEAL NO. 1A OF 2012**)*

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RULING OF THE COURT

The applicants, **HON. JUSTUS ALOO OGEKA, OUMA JUMA, SEBASTIAN NGORWE, RICHARD ONGORO, MARK AMIMO, MONICA KENDI, NANCY JERUTO** and **THE KENYA NATIONAL UNION OF CO-OPERATIVES STAFF** (Union) filed a Notice of Motion dated 4th April,

2016 and sought several orders. In the main, they sought two orders:

> **"(b) An order of stay does issue staying the execution of the order of the Nairobi Employment & Labour Relations Court (Hon. Lady Justice L. Ndolo) given on 12th February, 2016 and upheld on 10th March, 2016, pending hearing and determination of the Intended Appeal.**
>
> **(c) An order of mandatory injunction does issue compelling the Registrar of Trade Unions to authorize the opening of a bank account (s) in the name of Kenya National Union of Co-operative Staff; and, for the Registrar of Trade Unions to allow change of name of officer(s) of Kenya National Union of Co-operatives Staff, and to permit the Union to undertake its lawful activities unhindered."**

The **REGISTRAR OF TRADE UNIONS, THE KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS AND THE BANKING INSURANCE AND FINANCE UNION (K)** were named as the 1st, 2nd and 3rd respondents respectively.

A brief background to the motion is that the applicants herein (save the Kenya National Union of Co-operative Staff, herein after the Union) were aggrieved by the decision of the 1st respondent in refusing to register the Union. They appealed against the said decision in ELRC Appeal No. 1A of 2012. The matter came before Ndolo, J who in a judgment dated 22nd January, 2016 found in favour of the then applicants and made the following orders:

> **(a) The appeal against the decision of the Registrar of Trade Unions refusing to register Kenya National Union of Cooperatives Staff is allowed;**
>
> **(b) The objections by the 1st and 2nd Interested Parties are rejected;**
>
> **(c) The Kenya National Union of Cooperatives Staff is hereby granted registration from the date of this judgment.**
>
> **(d) The Registrar of Trade Unions is directed to issue the Appellants with a certificate of registration and enter the name and particulars of the Trade Union in the appropriate register forthwith;**
>
> **(e) Each party will bear their own costs.**

Pursuant to this judgment, the Union was registered on 26th January, 2016 by the 1st respondent.

However, the 2nd respondent was dissatisfied with the judgment of 22nd January, 2016 and filed a Notice of Appeal on 25th January, 2016 as well as an application seeking stay of the said judgment. On 27th January, 2016, Ndolo, J granted an interim order of stay, albeit ex parte. The order of stay was served upon the 1st respondent who on 28th January, 2016 issued a letter suspending the activities of the Union. The application for stay was subsequently heard inter partes and in a ruling delivered on 12th February, 2016, the learned Judge ordered that the status quo be maintained. She proceeded to clarify the status quo as being ***"… as directed by the Registrar of Trade Unions in her letter dated 28th January, 2016 that the activities of the Kenya National Union of Co-operative Staff are suspended until further orders of the court."***

It was now the turn of the Union to be dissatisfied with the orders of the court. Consequently, the Union filed a Notice of Motion application dated 15th February, 2016 and sought *inter alia*, the following orders:

> **"(b) For purposes of this application, the Kenya National Union of Co-operatives Staff be joined to the proceedings herein as an Interested Party, pending hearing and determination of the application.**

(c) The Honourable court be pleased to review and set aside its order given herein on 12th February, 2016."

Undeterred, the 2nd respondent raised a preliminary objection vide a notice dated 19th February, 2016 on the basis that the Union was not a party to ELRC Appeal No. 1A of 2012 and that the court having delivered its judgment in the appeal and a ruling staying the execution, the court had become *functus officio.* In a ruling delivered on 10th March, 2016 Ndolo, J upheld the 2nd respondent's preliminary objection. The consequence of this was that the Union was not made a party to the suit. The learned judge further found that she had become *functus officio*. The applicants were dissatisfied with the outcome of the preliminary objection and duly filed a Notice of Appeal dated 10th March, 2016. Thereafter they filed the instant motion dated 4th April, 2016. In the motion the applicants sought the following orders:

"(b) An order of stay does issue staying the execution of the order of the Nairobi Employment & Labour Relations Court (Hon. Lady Justice L. Ndolo) given on 12th February, 2016 and upheld on 10th March, 2016, pending hearing and determination of the Intended Appeal.

(c) An order of mandatory injunction does issue compelling the Registrar of Trade Unions to authorize the opening of a bank account(s) in the name of Kenya Union of Co-operative Staff; and, for the Registrar of Trade Unions to allow change of name of officer(s) of Kenya National Union of Co-operatives Staff, and to permit the Union to undertake its lawful activities unhindered."

The motion came before us for hearing on 8th February, 2017. Miss Maumo learned counsel for the applicants in urging the appeal faulted the trial Judge for upholding the preliminary objection. She contended that the Union had been rendered impotent as it cannot plan its programmes and activities as required by law; that the Union has been denied its existence and livelihood and finally that an alternative Union was in the process of being registered to the detriment of the applicants. It was her contention that the applicants have an arguable appeal. On the nugatory aspect, it was her submission that the Union had been curtailed from carrying out its activities, thus denying its existence and if an order for stay was not granted, the intended appeal would be rendered nugatory. The applicants urged us to grant an order of stay of execution of the orders given on 10th February, 2016 by Ndolo, J and to further grant a mandatory injunction to compel the 1st respondent to allow the Union to carry out its operations.

Mr. Motende for the 1st respondent submitted that the 1st respondent obeyed the orders of the court granting an interim order of stay on 27th January, 2016 by suspending activities of the Union, vide its letter of 28th January, 2016. It was his contention that the 1st respondent merely complied with those orders and that they have no other interests in the matter.

Mr. Nyabera for the 2nd respondent in opposing the appeal pointed out that the Union had no *loci standi*. As regards the mandatory order being sought by the appellants, counsel contended that this was not an issue before the trial court, and hence cannot be a subject of appeal.

On behalf of the 3rd respondent M/S Guserwa opposed the appeal. She echoed the submission of the 2nd respondent's counsel to the effect that the applicants have no *loci standi.* It was her further submission that the motion sought to stay a negative order, which in her view was not capable of being stayed.

In a brief rejoinder, it was Miss Maumo's reply that in establishing arguability, an applicant need not show that his/her appeal will succeed.

We have considered the motion and its supporting affidavit, the replying affidavits of the 1st and 3rd respondents, the rival arguments before us and the law.

The principles for the grant (or refusal) of an application under Rule 5 (2) (b) of this Court's Rules are

now well settled. In **Multimedia University & Another v Professor Gitile N. Naituli (2014) eKLR** this Court while considering an application under **Rule 5 (2) (b)** expressed itself as follows:-

> ***"When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5 (2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR as follows:***
>
> ***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.***
>
> ***v. The discretion of this Court under Rule 5 (2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
>
> ***vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
>
> ***vii. 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.***
>
> ***viii An applicant must satisfy the Court on both the twin principles.***
>
> ***ix. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.***
>
> ***x. 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.***
>
> ***xi. 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.***
>
> ***xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
>
> ***xiii. 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."***

The issue for our determination is whether the applicants have demonstrated that they have an arguable appeal and whether, if the appeal succeeds, it will be rendered nugatory unless an order of stay is granted. Suffice to state that the impugned ruling of 10th March, 2016 declined to have the Union enjoined as a party, following a preliminary objection raised by the 1st respondent. This was therefore a negative order which this Court has previously held that it is incapable of staying. In **Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63** this Court whilst declining to grant an order for stay of a negative order stated thus:

> ***"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs …***
>
> ***The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this***

Court in any application for stay to enforce or to restrain by injunction."

As stated above, the order of 10th March, 2016 declined to have the Union enjoined in the suit. It was therefore a negative order which if we were to stay, would have the effect of enjoining the Union as a party in the proceedings, albeit indirectly. As a court, we cannot undo at this stage what the Employment and Labour Relations Court has done. (See **Devani & 4 Others v Joseph Ngindari (Civil Appeal No. Nai 130 of 2004 unreported).**

Besides, and as pointed out by both counsel for the 1st and 3rd respondents, the fact that the Union was not enjoined in the proceedings means that they have no *loci standi*. It is important to point out that the appeal against the refusal of the 1st respondent to register the Union, namely ELRC No. 1A of 2012 was filed by the applicants to the exclusion of the Union. At the time the Union was not in existence as it was registered on 26th January, 2016. Having come into existence with effect from 26th January, 2016, they sought to be enjoined in the proceedings in the motion dated 15th February, 2016 which was commenced before they were registered. In its ruling dated 10th March, 2016 the court declined to have the Union enjoined in the proceedings. Having failed to be enjoined in the proceedings, we too are of the considered view that the Union has no *loci standi* to file the motion before us. We also find merit in the argument that the mandatory order sought before us was not an issue that was in the lower court and hence cannot be a subject of appeal before us.

It is in view of the foregoing reasons that we have come to the conclusion that the application before us is devoid of merit. It is hereby dismissed with costs.

Dated and delivered at Nairobi this 31st day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR