



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 43 OF 2017

BETWEEN

KHETIA DRAPERS LIMITED APPLICANT

AND

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS1ST RESPONDENT

(An application for stay of execution and stay of any further proceedings, while pending the hearing and determination of an intended appeal to the Court of Appeal against the orders of the High Court, Employment and Labour Relations Court at Kisumu,

(Maureen Onyango, J.) dated 29th March, 2017

in

ELC CAUSE NO. 66 OF 2017)

RULING OF THE COURT

[1] This is an application by **Khetia Drapers Limited** (*Employer*) under **Rule 5(2) (b)** of the Court of Appeal Rules for an order that the execution of the order of the Employment and Labour Relations Court (court) made on 29th March, 2017, be stayed pending the hearing and determination of the intended appeal from the order. There is also a prayer for stay of proceedings in the trial court. The impugned order enjoined the employer:

“to commence deduction of union dues of the employees in the check off forms whose names are in the respondent’s payroll as at 30/3/2017 with effect from April, 2017.”

On 23rd February, 2017, the Respondent, **Kenya Union of Commercial Food and Allied Workers Union** (*trade union*) filed a memorandum of claim against the employer seeking an award, compelling the employer to recognize the trade union and to pay Shs.3,986,400/= from its own sources apparently

being the un-deducted trade union dues. The employer filed a defence to the claim.

[2] By an application dated 21st February, 2017, the trade union sought interim orders requiring the employer to commence deductions and remittance of union dues for all employees who had acknowledged membership of the trade union pending the hearing and determination of the suit. The court declined to grant *ex parte* orders and fixed the application for hearing *inter partes*. The trade union was represented in the proceedings by **John Owiyo** – the Industrial Relations officer of the trade union.

[3] When the application came for hearing for the second time on 29th March, 2017, Mr. Owiyo applied for adjournment on the ground that he had just been served with a replying affidavit. **Ms. Owino**, the employer's counsel did not oppose the application for adjournment and the court thereupon made the impugned order. In addition, the court directed that the issue of recognition agreement be canvassed by way of written submissions to be highlighted on 15th June, 2017.

[4] The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2) (b)** are firmly established. An applicant is required to demonstrate that the intended appeal is arguable and further that unless the order sought is granted, the intended appeal or application would be rendered nugatory. By 31st May, 2017, when the present application was heard, the employer had already filed **Kisumu Civil Appeal No. 48 of 2017** against the order of 29th March, 2017.

From the draft memorandum of appeal filed by the applicant, the order of 29th March, 2017 will be assailed on the grounds, *inter alia*, the orders were made without jurisdiction; the order was made without the court being moved by any party and thus, a demonstration of bias and partiality; the applicant was condemned without being given an opportunity to be heard and that the court failed to appreciate that the order for deduction would only be made after the determination of the recognition dispute.

[5] We have considered the respective submissions. The memorandum of claim filed by the trade union identified two issues which were in dispute as:

“1. Refusal to sign Recognition Agreement.

2. Deduction of Union Dues.”

A perusal of the impugned order shows *ex facie* that part of the claim – that is, the deduction of trade union dues was summarily and finally determined at an interlocutory stage and that the only claim remaining for determination relates to the recognition of the trade union. Since the employer has already filed an appeal, it would be pre-emptory to make any comment on the trade union's submission that trade union dues and recognition agreement are two distinct issues. It is the duty of the appellate court to interpret the provisions of **sections 48 and 54 of the Labour Relations Act** which relates to trade union dues and recognition of a trade union respectively. The issue of the recognition of the trade union is also pending for determination before the trial court and any discussion on whether an employer is obliged to deduct trade union dues before it recognizes the trade union as representing unionisable employees is likely to embarrass the trial. Suffice to say that the appeal which is already filed is based on arguable grounds.

[6] On the claim that the appeal would be rendered nugatory if the execution of the order is not stayed, it is clear that by the statement of claim, the trade union is claiming Shs. 3,986,400/= from the employer being the total of union dues that should have been deducted from March, 2016 but were not deducted. By the impugned order, the employer was required to deduct union dues from employees in check off forms even before the serious controversy about the genuine members of the trade union has been ascertained. The employer alleges, amongst other things, that some of the names in the check off list are forged. The employer is likely to suffer criminal liability if it unlawfully deducts union dues from the employees (**see section 48(6) of the Labour Relations Act**). All in all, we are satisfied that the appeal would be rendered nugatory unless the orders sought are granted.

[7] The order appealed from has prolonged the resolution of the trade dispute before the trial court because the employer has exercised its right of appeal against the order. We hope that the parties will soon find a way of resolving the issues raised in the appeal expeditiously to facilitate the disposal of the trade dispute pending in the court.

[8] In the premises, the application is allowed. The execution of the order is stayed in terms of prayer 2 of the application. In expectation of a speedy resolution of the appeal, the court will grant a stay of proceedings for a limited time. Thus, the stay of proceedings in prayer 3 is granted to the extent that the proceedings are stayed for three months only to facilitate the resolution of the appeal.

Costs in the appeal.

Dated and Delivered at Kisumu this 6th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR