



IN THE COURT OF APPEAL

AT NYERI

(CORAM G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A

CIVIL APPLICATION NO. 80 OF 2017

BETWEEN

COUNTY PUBLIC SERVICE BOARD KITUI.....APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION.....RESPONDENT

(Being an application for stay of any further proceedings in Nyeri Employment and Labour Relations Court Cause Number 45 of 2016 pending the hearing and determination of an intended appeal from the ruling and orders of (Ongaya , J.) dated 16th June, 2017)

RULING OF THE COURT

The motion dated 12th July 2017 having been certified as urgent sought inter alia, the following orders:

“1. Spent.

2. Spent.

3. That the honourable court be pleased to grant a stay of proceedings in Nyeri Employment and Labour Relations Court Cause No. 45 of 2016 pending the hearing and determination of an intended appeal from the ruling and orders of Justice Byram Ongaya delivered on 16th June, 2017.

4. That the costs of this application be provided for.

5. That the court be pleased to grant any further orders if any in the interest of justice.”

A brief background to the motion is that vide a statement of claim dated 24th February, 2016, **THE KENYA GOVERNMENT WORKERS UNION** (the respondent herein) filed suit against the **COUNTY PUBLIC SERVICE BOARD OF KITUI**, the appellant herein (and the then respondent). According to the statement of claim the “**issue in dispute**” was the unlawful termination of OSCAR KIILI NZILU by the then Kitui Municipal Council, the predecessor of the appellant. The dispute between the two came up for hearing on 18th December, 2016 and it was then established that the grievant, OSCAR KIILI NZILU was deceased. The applicant, through his counsel on record sought to have the matter stayed, pending substitution of the deceased’s legal representative. In a ruling dated 16th June, 2017, Ongaya J. dismissed the applicant’s objection to the effect that the death of the grievant did not have any effect on the proceedings. The applicant was dissatisfied with the said outcome and duly filed a Notice of Appeal dated 27th June, 2017, as the applicant is intent on challenging the finding of the trial judge that the suit can proceed the death of the claimant notwithstanding.

On 18th September, 2017 the motion was before us for hearing. We ascertained that the respondent was served with a hearing notice on 1st August 2017. As there was no representation on the part of respondent inspite of service of the hearing notice, we directed that the application proceed to hearing.

In his brief remarks Mr. Obura learned counsel for the applicant urged us to find that the applicant has an arguable appeal as the issue they wish to pursue on appeal is whether **Section 82** of the Law of the Succession Act that calls for substitution of a deceased litigant applies to Trade Union members. On the nugatory aspect, it was his contention that unless stay is granted, the trial court will proceed to hear and determine the matter and this would render their intended appeal superfluous.

The principles for the grant of relief under Rule 5(2)(b) of this Courts Rules are well stated. Firstly, an applicant must demonstrate that he has an arguable appeal. However, this does not mean that it has to be an appeal that will necessarily succeed, suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that the appeal would be rendered nugatory, if the stay is not granted. These principles were restated in the case of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI** (2014) eKLR wherein this court whilst 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 underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] 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 of 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 bona fide 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.”**

Mr. Obura’s submissions is that they intend to challenge the trial court’s findings to the effect that the death of a claimant notwithstanding, the trial can proceed to full hearing without a legal representative being appointed. We too think that this is an arguable point as it would appear that the Law of Succession Act applies to all deceased litigants whether they be members of a Trade Union or otherwise.

As to the second limb of the appeal being rendered nugatory, we are in agreement with counsel for the applicant that unless we grant an order of stay, the hearing before the Nyeri Employment and Labour Relations Court may proceed to conclusion, hence rendering the intended appeal nugatory.

The upshot of the above is that we grant prayer (3) of the Notice of Motion dated 12th July, 2017 with costs to the applicant.

Dated at Nyeri on this 20th day of September, 2017.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR