



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI JJA)**

**CIVIL APPLICATION NO. NYERI 21 OF 2017**

**BETWEEN**

**GREAT RIFT VALLEY LODGES AND GOLF RESORT/GREEN PARK &  
COUNTRY COMPLEX..... APPLICANT**

**AND**

**KENYA HOTELS AND ALLIED WORKERS UNION.....RESPONDENT  
KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS,  
HOSPITALS & ALLIED WORKERS UNION.....INTERESTED PARTY**

(Being an application for stay of execution pending the hearing and determination of an Intended Appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nakuru (Radido, J.,) dated 2<sup>nd</sup> September, 2016) *in E.L.R.C NO. 377 OF 2016*)

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**RULING OF THE COURT**

The Applicant, GREAT RIFT VALLEY LODGES AND GOLF RESORT/ GREEN PARK AND COUNTRY COMPLEX (the then respondent) filed a Notice of Motion dated 8<sup>th</sup> February, 2017. It sought several orders including an order:

**“3. That, pending the lodging, hearing and determination of an Intended Appeal herein, there be a stay of execution of the judgment of the Employment & Labour Relations Court of Kenya judgment (sic) by Honourable Justice Stephen Radido dated 2<sup>nd</sup> September, 2016 in Employment & Labour Relations Court Cause No. 377 of 2016.”**

KENYA HOTELS AND ALLIED WORKERS UNION (the then claimant) was named as the respondent whilst KENYA UNION OF DOMESTIC HOTELS, EDUCATION INSTITUTIONS, HOSPITALS & ALLIED WORKERS UNION was named as the Interested Party.

A brief background to the Motion is that on 27<sup>th</sup> November, 2015 the respondent filed a statement of claim and contended that it had recruited 218 out of 230 applicant’s employees and that the applicant had failed to sign a recognition agreement. The applicant filed its response to the respondents’ statement of claim and averred that it had an existing recognition agreement with the respondent having signed one through the Kenya Hotel Keepers & Caterers Association. The dispute between the two was arbitrated by a conciliator but to no avail. Having exhausted the Industrial Relations machinery, the respondent filed suit in the Employment and Labour Relations Court.

In a judgment dated 2<sup>nd</sup> September, 2016, Radido, J. rendered himself as follows:

**“59. The Court finds and holds that the Claimant has met and satisfied the requirements for grant of recognition agreement and orders that:**

- a. The Respondent grants the Claimant recognition within 21 days from today.**

**b. Interested party meets the Claimant's costs of Kshs.50,000/-.**

**c. The Respondent meets its own costs.**

The applicant was dissatisfied with the said outcome hence the filing of the Notice of Appeal dated 13<sup>th</sup> September, 2016, upon which the motion before us is predicated.

In support of the Motion before us the applicant's position was that:

**“ 6. That the Appellant is a member of Kenya Hotelkeepers & Caterers Association which is an employer's organization which has a recognition agreement with Kenya Union of Domestic, hotels, Education Institutions, Hospitals and Allied Workers Union and have negotiated several Collective Agreements with the association in which the Appellant is a member.”**

On 27<sup>th</sup> September, 2017 the motion came before us for hearing. Learned counsel, Mr. Masese George urged the motion, Mr. Tombe appeared for the Interested Party whilst Mr. Simiyu, the Deputy Secretary General to the respondent represented the Union.

The appellant contended that it had an arguable appeal as it is a member of the Kenya Hotel Keepers & Caterers Association which has a recognition agreement with the Kenya Union of Domestic, Hotels, Education Institutions, Hospitals & Allied Workers Union; that the views espoused by Radido, J. were different from the views of Nduma Nderi, J. (another Judge of the ELC Court) in respect of the interpretation of Article 41(2) of the Constitution and that there was uncertainty as to the correct legal position. On the nugatory aspect it was the appellant's position that unless they be granted an order of stay, it stands to lose the benefits of association with the Interested Party.

Mr. Simiyu for the respondent relied on their replying affidavit dated 25<sup>th</sup> June 2017 and their written submissions dated 4<sup>th</sup> May, 2017. The respondent contended that the applicant does not have an arguable appeal; that the applicant in filing the motion seeks “*...to breach the fundamental rights of the respondent and her members at the Applicants premises...;*” that the respondent has “*.....attained 100% membership at the appellant's premises surpassing the simple majority rule envisaged at section 54(1) of the Labour Relations Act 2007;*” and finally that the recognition agreement relied on by the applicant had been invalidated.

Mr. Tombe for the Interested Party supported the appeal.

In an application made pursuant to Rule 5(2) (b) of this Courts rules, an applicant has to demonstrate that he has an arguable appeal and the appeal will be rendered nugatory unless an order of stay is 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.”**

From the record, it would appear that the Employment and Labour Relations Court has varying views as to whether a claimant ought to recruit a simple majority of unionsable employees employed by members of the Union of Kenya Hotel Keepers and Caterers Association of which it is a member and not just one employer member. In **Nairobi Cause No. 1394 of 2014 Kenya Hotels and Allied Workers Union vs Hilton Hotel Nairobi**, Nderi, J., held:-

**“The Claimant union to dislodge KUDHEIHA from being the sole union to negotiate the terms and conditions of employment of the employees of Hotels who are members of the Association, it has to recruit a simple majority of the employees of the Hotels who are members of the Association and not a simple majority of one hotel only.”**

In respect of the above position held by Nderi, J., Radido, J., rendered himself as follows:

**“40. With much deference to my brother Judge, I hold a contrary view.**

***41. In my view the right of every worker in Article 41(2) (c) of the Constitution to form, join or participate in the activities and programmes of a trade union; Article 41(4) (b) to organize coupled together with the right to freedom of association in Article 34 of the Constitution cannot be subordinated to the provision of section 54(2) of the Labour Relations Act”***

In our view therefore the two varying positions as regards interpretation of a relevant statute is sufficient for purposes of finding that there is an arguable appeal.

On the nugatory aspect, we think that if the recognition agreement was to be signed, the applicant will be bound to negotiate alone. We have therefore, come to the conclusion that the motion before us is merited. Accordingly we give the orders sought in the motion dated 8<sup>th</sup> February, 2017. Costs shall be in the intended appeal

***Dated and delivered at Nakuru this 1<sup>st</sup> day of November, 2017***

**G.B.M. KARIUKI SC**

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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**