



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM; VISRAM, KARANJA & KOOME JJA)**

**CIVIL APPEAL NO. 311 OF 2017**

**BETWEEN**

**RONALD KIPROTICH TONU.....APPLICANT**

**AND**

**ROBERT NYABUTO OBWONCHA.....1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY**

**EDCUATION TEACHERS (KUPPET).....2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the judgment/decree of the*

*Employment & Labour Relations Court of Kenya at Nairobi (Ndolo, J.)*

*delivered on 2<sup>nd</sup> September, 2016 in Petition Cause No. 28 of 2016)*

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**RULING OF THE COURT**

[1] The Notice of Motion before us is principally brought under **Rule 5 (2) b** of this Court Rules seeking an order to stay execution of the judgment of Linnet Ndolo J., delivered on 2<sup>nd</sup> September, 2016 in **ELRC PETION NO 28 of 2016**, pending the hearing and determination of the appeal. In the said suit, Robert Nyabuto Obwoncha, (respondent) filled a petition challenging the eligibility of Ronald Kiprotich Tonui, (applicant) to contest for re-election as Assistant National Treasurer of the 2<sup>nd</sup> respondent that is the Kenya Union of Post Primary Education Teachers (KUPPET) which is a Trade Union. The constitution of KUPPET required that elections of national officials be held every five (5) years. Pursuant to the elections held in 2011, the applicant was elected and held the position of Assistant National Treasurer which position he intended to defend during the elections that were scheduled to be held on 19<sup>th</sup> March, 2016 even after he had become a Member of Parliament 2013.

[2] The challenge was predicated on the fact that the applicant being a Member of Parliament is a State Officer within the meaning of **Article 260** of the Constitution, and **Article 77** expressly bars a state officer from participating in any other gainful employment. It was contended that the position of Assistant Treasurer within KUPPET was gainful and full time employment. The applicant was categorical that the only qualification one needed to contest for the position is being a teacher by profession. He therefore

was of the view that he was eminently qualified under the Labour Relations Act to vie for any position in the Union and the Constitution did not bar a Member of Parliament from running for office in a Trade Union.

[3] The Secretary General of KUPPET did not oppose the petition stating that the matter of the applicant's continuation to hold the position was Assistant Treasurer after he had become an MP was raised during the National Delegates conference, where the 1<sup>st</sup> respondent was present and it was resolved that he should nonetheless continue to serve the Union in the same capacity.

[4] Upon hearing the matter and interrogating the provisions of the Constitution; decided cases on whether an MP is a state officer who is precluded from engaging in other gainful and full time employment; in particular the KUPPET Constitution Article 8;6 which provided that the National Executive Board comprised of ten elected national officials; those officials included the Assistant National Treasurer and their work was full time; the learned Judge concluded the applicant was a state officer and therefore precluded by the Constitution to contest the position of Assistant National Treasurer of KUPPET. The Judge further directed the elections for the position be held within sixty days from the date of the impugned judgement.

[5] Aggrieved by the foregoing, the applicant filed a Notice of Appeal and the instant application that is seeking an order of stay of execution. In the supporting affidavit, the applicant deposes that he became an MP in 2013, while serving as the Assistant National Treasurer of KUPPET where he rendered services without drawing any salary or allowances at all. Unless an order of stay is granted, the applicant will be precluded from participating in the forthcoming elections and he will suffer prejudice whereas the appeal itself will be rendered nugatory. During the plenary hearing, Mr. Mariaria appeared for the applicant, he relied on the written submissions and went on to emphasise that the applicant being a teacher by profession is qualified under the Labour Relations Act, to vie for any position within the Union. According to counsel, the appeal presents arguable issues especially the interpretation of **Article 77** on whether an MP is a full time State Officer.

[6] Mr Wada learned counsel for KUPPET did not oppose the application and counsel for the 1<sup>st</sup> appellant did not attend Court for hearing although served. That notwithstanding, a party seeking orders under **Rule 5 (2) b** of the Court Rules which are discretionary in nature, must satisfy the two conditions; that is the intended appeal is arguable and unless the order of stay is granted, the appeal if successful would be rendered nugatory. This has been stated in a plethora of cases determined by this Court, among them the case of;- **TRUST BANK LIMITED & ANOTHER VS INVESTECH BANK LIMITED & 3 OTHERS, CIVIL APPEAL NOS. 258 & 315 OF 1994** (unreported):

***“The jurisdiction of the court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable or put another way, it is not frivolous and secondly, that unless he is granted a stay the appeal or intended appeal if successful, will be rendered nugatory. There are guiding principles but these principles must be considered against facts and circumstances of each case. ....”***

[7] We do not wish to delve into the merit of the appeal, that being the mandate of the Bench that will deal with it, save to say the gravamen of this application is the interpretation of the provisions of **Article 77** as read with the **Article 260** of the Constitution on whether MPs are precluded from engaging in other full time and gainful employment. We have also considered the various provisions of the Constitution of KUPPET especially **Article 8; 7** which provides that the National Executive Board is responsible for the day-to-day running of the affairs of the Union. We would not wish to say much regarding the interpretation of all those provisions, our provisional view is that we are sceptical about the arguability of the appeal. In **BUTT VS RENT RESTRICTION TRIBUNAL (1982) KLR 417 at pages 419 & 420**, Madan JA (as he then was) said:

***“It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in***

***a way so as not to prevent the appeal, if successful from being nugatory: per BRETT LJ IN WILSON VS CHUCH (No 2) 12 CHPP (1879 454 at p. 459).***

[8] This now takes us to the nugatory aspect of the appeal. Counsel for the appellant was emphatic that if elections for the Assistant National Treasurer were to be held as ordered by the trial Judge, he will be prejudiced. He however did not elaborate on what prejudice he will suffer as he is a serving MP. To us we see no prejudice as the applicant stated that he did not earn any salary or allowances from the said position; moreover, the elections of KUPPET are regularly held and should the appeal be successful, the consequential order will be to direct an election be held.

[9] Taking into account our view on the twin issues of arguability and nugatory aspects arising from this matter, we are not convinced that the application deserves the exercise of this Court's discretion in favour of the applicant.

The upshot of the foregoing is instant the application is dismissed. As there was no opposition by the respondents, we make no order as to costs.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of December, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original.*

**DEPUTY REGISTRAR**