



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J.

MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 97 OF 2017 (UR.64/2017)

BETWEEN

KISUMU COUNTY PUBLIC SERVICE BOARD.....1ST APPLICANT

H.E. PROF. PETER ANYANG NYONGO.....2ND APPLICANT

AND

SAMUEL OKURO.....1ST RESPONDENT

SAMUEL ONDORA.....2ND RESPONDENT

JACOB MUGA.....3RD RESPONDENT

GEORGE AKONG'O.....4TH RESPONDENT

CEPHAS KASERA.....5TH RESPONDENT

DERRICK OBURA.....6TH RESPONDENT

GEROGE OYIER.....7TH RESPONDENT

CELINE ODHIAMBO BONYO.....8TH RESPONDENT

(Being an application for stay of execution from the Judgment of the High Court of Kenya at Kisumu (Onyango, J.), dated 7th November, 2017

in

ELR No. 36 of 2017)

RULING OF THE COURT

1. On 7th November, 2017, the Employment and Labour Relations Court (Onyango,J,)sitting in Kisumu delivered a judgment in which it ordered that the letters dated 24th August, and 26th September, 2017, issued by the applicants to the respondents sending the respondents on compulsory leave and giving notice of termination of the respondents' employment respectively, be removed into the Court for the purposes of quashing.
2. Being aggrieved by that judgment the applicants filed a notice of appeal and on the same day lodged a notice of motion dated 21st November, 2017 under certificate of urgency seeking orders under Order Rule 5(2)(b) of the Court of Appeal Rules for stay of extension of the judgment delivered on 7th November, 2017 and the decree arising therefrom.
3. The notice of motion was anchored on grounds stated on the motion and an affidavit sworn by Dr. Olango Onudi, the then acting County Secretary of the 1st applicant. In effect, the applicants are apprehensive that unless the orders issued by the Labour and Employment Relations Court are stayed, the respondents may go back to their former offices. That such action may result in breach of harmonious working relationship between the 2nd respondent and his staff, and paralyze the operations of the 1st respondents because a good number of the offices have either been restructured or reconstituted by the applicants in a bid to implement the 2nd respondent's manifesto.
4. The application was opposed through grounds of opposition in which the respondents maintained that the applicants have not satisfied the requirement for issuing an order under Rule 5(2)(b) of the Court Rules as their intended appeal is premised on matters that were not in issue in the trial court and therefore not arguable at all. Secondly, that the applicants have not demonstrated that the appeal will be rendered nugatory if the orders sought are not granted. The respondent further contends that the orders sought by the applicant are not the type that can be granted under Rule 5(2)(b) of the Court of Appeal Rules. In addition, the respondents filed a notice of preliminary objection on a point of law contending that the Court does not have jurisdiction and or powers to hear, the application or grant the prayers sought by the applicant.
5. On 7th December, 2017, when the applicants' motion came up for hearing, the respondent raised the preliminary objection contending that under Order 5(2)(b) of the Court of Appeal Rules, the Court can only be called upon to intervene in civil proceedings or criminal proceedings; that what was before the learned judge was a constitutional petition in which a declaration was made that the applicants had violated the rights of the respondents under Article 27, 28, 35, 41, 47 and 50 of the Constitution; that consequently the letters issued by the applicants to the respondents sending them on compulsory leave and giving them notice of termination of their employment were quashed.
6. In support of the submission, counsel for the respondent relied on ***Civil Appeal No.50 of 2014 Judicial Service Commission vs. Gladys Boss Shollei & Another***. Counsel further argued that the order issued by the learned judge, was vindicating the rights of the respondents at interlocutory stage, and if a stay is ordered the Court will have permitted the violation of rights of the respondents without any redress. He pointed out that the respondents were back in office pursuant to the court order.
7. On his part, counsel for the applicant's, countered that the respondents were allowed back in office pursuant to the order of the court but were subsequently served with letters of suspension and were therefore currently not in office; that the preliminary objection was misguided as the jurisdiction of the Court under Rule 5(2)(b) is both original and discretionary; that the Court was being called upon to make a determination on two competing rights that is the respondents' rights, and the public interest or the exercise of sovereign rights. Further, that the wider public interest overrides the private interests of an individual; that Article 165 of the Constitution must be construed broadly, and therefore the Court must factor in the spirit and intention of the Constitution in interpreting Rule 5(2)(b) of the Court of Appeal Rules, and be guided by the satisfaction of the two requirements of arguability of the appeal and the nugatory aspect. The Court was thus urged to overrule the preliminary objection and determine the application on merit.
8. In response to the submissions made by the applicants' counsel, the respondents' counsel urged

that a broader interpretation could only be applied where there was ambiguity; that in this case Rule 5(2) (b) of the Court Rules is very clear on jurisdiction; that the Court must be seized of jurisdiction before it could determine the competing interests; that jurisdiction must be construed in accordance with the statutes; and that the issue of stay could not arise because by suspending the respondents the applicants had already complied with the court order and taken them through a different process.

9. We have considered the preliminary objection and the rival submissions made by counsel. As stated in the renowned case of *Mukhisa Biscuit Company vs West End Distributors Ltd [1969] EA 696*, a preliminary objection must be one that:

“consists of a point of law which has been pleaded or which arises by clear indications out of pleadings and which if argued at a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court...”

10. In this case, the preliminary objection raises an issue as to whether this Court has authority under Rule 5(2)(b) of the Court of Appeal Rules to hear the applicants’ motion. It is clear that the objection raises an issue concerning this Court’s jurisdiction and this is an issue regarding a point of law. Secondly, as was stated by Nyarangi JA in *The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited [1989] KLR 1*:

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. Therefore it is evident that if the preliminary objection raised by the respondents’ is upheld, the applicant’s motion will have been disposed of. The issue raised is therefore a proper preliminary issue that we must first deal with.

12. Rule 5(2)) of the Court of Appeal Rules states as follows:

“5(2): subject to (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may –

(a) In any criminal proceedings where a notice of appeal has been given in accordance with Rule 59, order that the appellants be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

(b) In any Civil proceedings where a notice of appeal has been lodged in accordance with Rule 75, Order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

13. Rule 75 of the Court Rules deals with the filing of notice of appeal in civil appeals. The question that this preliminary objection raises is what is the nature of the appeal that the applicants intend to raise? Does it qualify to support an application under Rule 5(2)(b)?

14. The judgment subject of the notice of appeal that was lodged in this Court on 21st November 2017, was a judgment delivered in a constitutional petition filed by the respondents’ in the Employment and Labour Relations Court. From paragraphs 2 to 30 of the petition filed by the respondent, it is clear that the petition was anchored on the relationship of the applicants and the respondents as employer/employee, and the rights and obligations that arise from this relationship under the Constitution and the Employment and Labour laws.

15. In *Judicial Service Commission v Gladys Boss Shollei [2014] eKLR*, the Judges of this Court in separate judgments were in agreement that the Employment and Labour Relations Court had jurisdiction to hear petition raising constitutional issues provided the constitutional issues arise in and are intertwined with a labour relation dispute. Therefore the respondent’s petition was properly heard and determined by

the Labour and Employment Relations Court.

16. In our view the applicants' intended appeal falls within Section 17(1) of the Industrial Court Act that states as follows:

“1) Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.”

17. Article 164(3) of the Constitution gives this Court power to hear appeals from the High Court or any court or tribunal as prescribed by an Act of Parliament. In the case of appeals from the Employment and Labour Relations Court, this has been done through section 17 of the Industrial Court Act. Under the Court of Appeal Rules 2010, appeals to the Court are categorized into two i.e. criminal appeals in regard to which notice is filed under Rule 59 and civil appeals in regard to which notice is filed under Rule 75. There is no category known as constitutional appeals as these are apparently subsumed in the broader category of civil appeals. For the purpose of the appeals before this Court, the proceedings from the lower courts fall into the two broad categories of civil proceedings or criminal proceedings and the proceedings from the Employment and Labour Relations Court subject of the applicant's intended appeal is considered a civil proceeding and therefore appropriate to anchor an application under Rule 5(2)(b) of the Court Rules.

18. We are therefore satisfied that we have jurisdiction and are properly seized of the applicant's motion. As regards the argument that the applicant having complied with the order of reinstatement that was made by the High Court, there is nothing for this Court to stay, we reiterate the sentiments made by Githinji JA in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) 2015 eKLR* that:

“... where the Employment and Labour Relations Court has ordered reinstatement of an employee within a short time which does not give an employer reasonable time to exercise the right to apply for, and prosecute an application for stay of execution of the decree pending appeal to this Court, and the employer reinstates the employee in compliance of the decree to obviate contempt of court proceedings, the employer does not thereby waive his right to seek a stay of execution of the decree or to appeal to this Court or deprive the Court jurisdiction to grant a stay. If it were otherwise the employer would be denied his undoubted legal right to mount an effectual appeal.”

19. It therefore behoves us to consider the applicants' motion and determine it on merit. For that reason we find it premature at this stage to comment any further on the propriety or suitability of the order of stay that has been sought by the applicants, as this will form the substantive arguments in the applicants' motion. Suffice to state that we find no substance in the preliminary objection and therefore overrule the objection. We direct that a date shall be fixed for the hearing of the notice of motion dated 21st November 2017 on priority basis.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of December, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR