



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA,OUKO & M'INOTI, J.J.A.)**

**CIVIL APPLICATION NO. 48 OF 2015**

**BETWEEN**

**ASSOCIATION FOR PHYSICALLY DISABLED OF KENYA.....APPLICANT**

**AND**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS, HOSPITALS**

**AND ALLIED WORKERS ..... RESPONDENT**

*(Being an application for stay of execution pending hearing and determination of the intended appeal against the Award of the Employment & Labour Relations Court at Mombasa, (Rika, J.) dated 23<sup>rd</sup> March, 2015*

*in*

*ELRC.C.No. 348 OF 2013)*

\*\*\*\*\*

**RULING OF THE COURT**

The applicant is a Non-Governmental Organization involved in the rehabilitation and welfare of persons with physical disabilities. On the other hand the respondent is a union that represents unionisable employees from a wide range of institutions among them the applicant.

On 31<sup>st</sup> December 2012, the applicant declared 24 of its employees redundant due to persistent losses it had incurred over the last 4 years leading to the depletion of its revenues and imminent closure. The 24 employees had worked for the applicant for 24 or so years in various capacities such as wood carvers, jewellery workers and cleaners. The said employees did not like the turn of events. Accordingly, through the respondent they lodged a claim with the Employment and Labour Relations Court at Mombasa against the applicant praying that the applicant do withdraw all the letters of termination served upon them and that they be allowed to continue working in order to assist themselves and their families.

In opposing the claim, the applicant stated that it had endured a steady decline in business from the year 2007 resulting in massive losses. Its financial resources had gone down from 19 million in 2007 to 10 million in 2012 at the time redundancy was declared. That several attempts by the applicant to secure funding from the National Government had been unsuccessful. The applicant had therefore been compelled to restructure, rendering the positions held by the 24 employees redundant. It maintained that all the procedural and substantive requirements in declaring the 24 employees redundant were met and prayed for the dismissal of the claim.

The claim was heard by **Rika J.** and in a judgment dated and delivered on 23<sup>rd</sup> March, 2015 he held that:-

- i. The applicant's decision to declare the 24 employees redundant was made within the law and the Collective Bargaining Agreement concluded between the parties, and was legally fair.
- ii. The respondents were however, a special class of employees requiring the protection of the court and therefore ordered for their reinstatement, without loss of salaries, seniority, privileges and other benefits.
- iii. Any terminal benefits which may have been received by the respondents should be offset from their salaries accrued from January 2013.
- iv. The employees do report to their former work stations at 8.00 a.m. on 1<sup>st</sup> June, 2015 for assignment of duties.
- v. Parties do communicate this decision to the Government of Kenya.

Aggrieved by the award, the applicant in good time filed a notice of appeal on 31<sup>st</sup> March, 2015. Soon thereafter, the applicant took out a motion on notice in this Court seeking stay of the implementation and execution of the award pending the hearing and determination of the intended appeal.

The grounds upon which the application was anchored and which were expounded and elaborated on by **Dickson Orina Bwana** in his supporting affidavit dated 30<sup>th</sup> June, 2015 were that, aggrieved by the award, the applicant intended to lodge an appeal to this Court and as a demonstration of that intent had lodged and served a Notice of Appeal; that the respondent was determined on executing the award, that the applicant is unable to implement and abide by the award due to its current financial constraints; that its officers risk being cited for contempt of court and its remaining properties sold in execution of the award. It was further contended that the respondent may not be in a position to refund the decretal sum ordered to be paid should the appeal succeed as the employees' financial means is unknown thereby rendering the intended appeal nugatory; that though the court had recommended to the Government to release to the applicant a subsidy of Kshs.5,000,000/- annually from the National Development Fund for people with disability, the money had yet to be released; that the intended appeal had overwhelming chances of success since the trial court had exonerated the applicant from any wrongdoing and yet proceeded to order the reinstatement of the 24 employees on grounds that they were a special class of employees requiring protection of the court; and that in the premises the applicant was being punished for no fault of its own by being forced to take up responsibilities that ought to be borne by the Government.

Lastly the applicant submitted that it was not legally tenable for the trial court, having found that the redundancy was done in accordance with the law, to turn around and order it to reinstate the employees when the applicant had actually demonstrated its financial inability to continue having in employment the said employees; that the trial court did not even appreciate the practical difficulties that would be faced by the applicant in implementing the order of reinstatement; and that the trial court equally never based his order of reinstatement on any law but was driven by emotions.

The respondent did not file any affidavit in opposition to the application. Accordingly the averments and depositions by the applicant remain unchallenged and uncontroverted.

When the application came before us for hearing on 9<sup>th</sup> November, 2015 parties agreed to canvass it by way of written submissions. The respective written submissions were subsequently filed and exchanged. We have carefully read and considered them.

So what goes into consideration in applications of this nature? First and foremost the jurisdiction of this Court in such an application is both original and discretionary. It is properly invoked when the applicant or intended appellant has filed a notice of appeal. To be entitled to the orders, the applicant must satisfy the court that the appeal or intended appeal is arguable and secondly, that it will be rendered nugatory if it succeeds in the absence of an order of stay of execution. The applicant has to satisfy both limbs though. Satisfying one and failing short on the other will not be sufficient. Further an arguable appeal is not necessarily an appeal that must succeed at the end of the day, but is sufficient if it raises an issue (s) that are worthy of further interrogation by this Court. Arguable points need not be many. It suffices if a single one is disclosed. For all these propositions see:

- i. **J.K. Industries Ltd v Kenya Commercial Bank Ltd (1982-88)1KAR 1088,**
- ii. **Kenya Tea Growers Association & Anor v Kenya Planters & Agricultural Workers Union Nai. Civ. App. No. 72 of 2001 (UR) and**
- iii. **Accredo Ag & 3 others v Stefano Uccelli & Anor (2015) eKLR**

One issue in the judgment that the applicant has vehemently protested against is that having found that the redundancy was within the law, the Collective Bargaining Agreement between the parties, and was legally fair, there was no legal basis for the same court to order reinstatement of all the 24 employees. This is an issue that deserves, in our view proper consideration by this Court. It is not a frivolous issue but an arguable issue. Accordingly, we are satisfied that there is at least an issue which makes the intended appeal arguable.

On whether the intended appeal will be rendered nugatory were it to eventually succeed, we stated in the case of **Accredo Ag** (supra) thus:-

**“...the primary consideration is this: assuming that what the applicants are seeking to stop happens and the appeal is ultimately successful, will the success of the appeal be of any benefit to them, or will it amount to a mere pyrrhic victory? (See STANLEY KANGETHE KINYANJUI V TONY KETTER & 5 OTHERS C.A. No. 31. Whether or not a successful appeal will be rendered nugatory of course depends on the circumstances of each case (see RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD (2002) 1 E.A.”**

There is uncontroverted evidence that the applicant is in dire financial straits. That was the basis upon which the 24 employees were laid off by way of redundancy. Compliance with the order of reinstatement without loss of salaries, seniority, privileges and benefits must mean a further dent on the applicant's finances, which may lead it over the precipice from which it might not be able to recover even if the appeal would end up in its favour. Further, in its affidavit in support of the application, the applicant has deponed that should the respondent execute the award before the hearing and determination of the intended appeal, the appeal will be rendered nugatory and the applicant would suffer irreparable loss and damage as the employees would not be in a position to refund the sum of Kshs.9,792,261/- being the accrued salary arrears as at May, 2015. The amount would obviously continue to accrue interest after the said date if the award is forced upon the applicant. This assertion has not been countered at all by the respondent. This state of affairs will certainly render the intended appeal nugatory.

On the whole therefore we are satisfied that this is a fit and proper case for which we ought to exercise our discretion and grant the order sought in prayer 1 of the motion. Costs of the application shall abide the outcome of the intended appeal. It is so ordered.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of April, 2016**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**