



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 56 OF 2015 (UR 45/15)

BETWEEN

KASKAZI BEACH

HOTEL.....APPLICANT

AND

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS &
HOSPITAL....RESPONDENT**

(Being an application for an injunction and/or a stay of orders of the Employment & Labour Relations Court at Mombasa (Rika, J.) dated 14th October, 2015

in

E.& L.R.C. Cause No.504 of 2015)

RULING OF THE COURT

In their application of 20th July 2015 the respondent sought, before the Employment & Labour Relations Court, orders compelling the applicant **“to pay all the pending salary arrears from January 2015 to date to the tune of Kshs.9,448,000”**, to its members. It also sought an injunction to restrain the applicants from intimidating, harassing, or declaring employees represented by the respondent redundant, and finally to order the applicant to permit the branch secretary, **Zacheaus Osore** to be a signatory to all accounts held in the name of the applicant until full payment of salary, service charge and union dues arrears amounting to Kshs.9,448,000. Because the application was heard *interpartes* we presume that the respondent intended the orders, if issued, to last until the hearing and determination of the claim.

In his 2^{1/2}-page ruling rendered immediately after the close of arguments on 14th October 2015, **Rika, J** ordered the applicant to pay, within 14 days, the 96 employees involved the arrears of salary from January 2015 to the date of the ruling and in the event the exact amount of arrears was in dispute, the parties were directed to engage the relevant County Labour Officer to compute the arrears. The applicant has been aggrieved by this decision and has evinced its intention to challenge it on appeal to this Court by filing a notice of appeal.

In the meantime by an amended motion dated 3rd November 2015 the applicant prays that pending the

judgment, hearing and determination of the intended appeal, this Court be pleased to stay further proceedings in Employment & Labour Relations Court Claim No. 504 of 2015 and execution of the aforesaid orders of 14th October, 2015 on the ground that by granting the orders of 14th October 2015 the court below issued final orders which determined the suit; and that this could only be done after hearing the suit. The applicant has also deponed that if an order of stay is not granted execution may issue and the intended appeal will be rendered nugatory; that the applicant has an arguable appeal; and that owing to the substantial amount of money involved, the balance of convenience tilts in favour of the applicant.

The respondent filed grounds of opposition in which it argued that there was no order capable of being stayed; that the application does not satisfy the strictures for granting orders of stay under **Rule 5(2) (b)** of the Court of Appeal Rules; and that the applicant has not furnished security pending the hearing and determination of the appeal.

The foregoing rival arguments were canvassed by **Mr. Mogaka**, learned counsel for the applicant and **Mr. Onwong'a**, a union official, on behalf of the respondent. For this application to succeed it must be demonstrated from the averments that the intended appeal when ultimately lodged will be arguable, and that the appeal will be rendered nugatory should the application fail. See **Nguruman Ltd v Jan Bonde Nielsen & 2 ors Civil App. No. 77 of 2012 (Nrb)**.

An arguable appeal, as has been repeatedly stated, is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See **Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd Civil Application No. 124 of 2008**. Even a single arguable ground, would be sufficient. What the applicant in this matter sought was clearly an order of mandatory injunction at an interlocutory stage, compelling the applicant to pay Kshs.9,448,000 in arrears of salary. While it is not in doubt that a court can issue a mandatory injunction at that stage as was held in the famous case of **Locabail International Finance Ltd v Agro Export & others (1986) 1 ALL ER 901**, the question that will be at the centre of the intended appeal will be whether the learned Judge in granting the orders compelling the payment of salary arrears, judicially exercised his discretion; that is, whether, in the circumstances of the case a mandatory injunction could properly issue at an interlocutory stage. That, no doubt is an arguable point.

But we do not think that the intended appeal will be rendered nugatory if the orders sought in this application are not granted. The respondent (that is the union) on behalf of the claimants has stated that should the intended appeal succeed after the funds have been paid over to the claimants, it would ensure restitution to the applicant. In addition, the claim being that of salary, the livelihood of the claimants, we think on the facts of this particular case it will be unconscionable to stay the orders of the court below or the proceedings before that court. For these reasons this application fails and is dismissed. Costs will be costs in the intended appeal.

Dated and delivered at Mombasa this 27th day of May, 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