



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, VISRAM & KANTAI, JJ.A)**

**CIVIL APPLICATION NO. NAI 182 OF 2015 (UR 147/2015)**

**BETWEEN**

**MURATA SACCO SOCIETY LIMITED.....APPLICANT**

**VERSUS**

**BANKING INSURANCE & FINANCE UNION (K).....RESPONDENT**

*(An application for a stay of execution of judgment pending lodging, hearing and determination of an intended appeal from the Judgment & Decree of the Industrial Court at Nairobi (Mbaru, J.) dated 7<sup>th</sup> October, 2014*

*in*

*Industrial Cause No. 616 of 2010)*

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**RULING OF THE COURT**

[1] This is an application under rule 5(2) (b) of the Court of Appeal Rules (Rules) for an order that the execution of the judgment of the Industrial Court (now named Employment and Labour Relations Court) delivered on 7<sup>th</sup> October 2014, be stayed pending the hearing and determination of the applicant's intended appeal. The application is supported by the affidavit of **James Kimani Mbui** – the Chief Executive Officer of the applicant and the annexed documents. The application is opposed on the grounds contained in the replying affidavit of **Joseph Ole Tipate** – First Deputy National Secretary General of the respondent.

[2] The applicant is a savings co-operative society which has hitherto concentrated on rural banking in Murang'a County. Its members are co-operative societies individual coffee and tea farmers, businessmen and salaried employees. The respondent is a trade union representing all the unionisable employees in banking, Sacco's, insurance companies and financial organizations. The parties had at the relevant time a **Collective Bargaining Agreement (CBA)** signed on 18<sup>th</sup> December 2006 for a period of 24 months commencing on 1<sup>st</sup> January 2006 and ending on 31<sup>st</sup>

December 2007. Clause 12 of the CBA provided for retrenchment and voluntary early retirement of the employees. The clause provided *inter alia*, that in case of retrenchment, the retrenched employee was entitled to twenty three days salary for every completed year plus one month salary in lieu of notice. The clause further provided that in case of voluntary early retirement, the exercise would be purely voluntary. Clause 9 of the CBA provided, *inter alia*, that in case an employee whose services have been terminated resigned or wrongly dismissed, should be paid gratuity calculated at the rate of two (2) months basic salary for each completed year of service at the time of termination.

[3] By a letter dated 18<sup>th</sup> May 2007, the applicant terminated the services of ninety three (93) of its employees under clause 12 of the CBA and paid each of them one month salary in lieu of notice under clause 9. The respondent filed a memorandum of claim in the Industrial Court alleging that the termination was wrongful as the termination was without consultation and without following the procedure stipulated in clause 12 of CBA. The remedy sought in the claim was reinstatement or alternatively compensation for wrongful loss of employment at the rate of twelve months salary or wages and gratuity as per clause 9 of CBA calculated at the rate of two (2) months basic salary for each completed year of service.

The applicant filed a reply to the memorandum of claim in the Industrial Court alleging that termination was not wrongful and the reason for termination of employees' service was due to computerization of services which necessitated the reduction of staff; that the employees were paid their terminal dues including one month salary in lieu of notice and severance pay at the rate of 23 days salary for each year worked.

As regards the payment of gratuity, the applicant averred that it established retirement benefits scheme in 1996 for its pensionable employees when there was no CBA in existence and later, deposited in respect of each staff member an amount equal to two months' salary for each completed year of service based on the gratuity clause in CBA on the understanding that the benefits under the clause would replace gratuity in clause 9(a) of the CBA and that the gratuity clause was redundant as the benefits under the clause had been converted into a retirement benefits scheme.

Clause 9 of the CBA provided the modalities to be followed in case of retrenchment, which, in addition to payment of 23 days salary for every completed year and one month salary in lieu of notice, required seminars/training to be offered, application of a just and fair selection of employees and advance information to employees.

[4] The trial court made a finding that there was no evidence of compliance with the statutory process and the termination was thus wrongful.

However, the claim for reinstatement was rejected primarily on the ground that it was being sought seven years after the termination. The trial court also made a finding that the employees were only entitled to payment for one month in lieu of notice which was paid and that there was no basis for payment for two months salary in lieu of notice. The court further awarded three months of gross salary to each employee as damages for wrongful termination which the applicant has computed to be shs. 4,859,032/50.

Lastly, the court awarded to each employee gratuity at the rate of two months basic salary for each completed year in terms of clause 9 (a) of the CBA which the applicant has computed at shs. 38,048,477/70 resulting in a total liability under the judgment of shs. 42,907,510/20.

[5] The notice of appeal dated 13<sup>th</sup> October, 2014 indicates that the applicant intends to appeal against the whole of the decision.

The principles upon which the court exercises its discretion under Rule 5(2) (b) are now firmly established. In this case, the applicant must demonstrate that the intended appeal or the appeal is arguable and that unless stay of execution is granted the appeal would be rendered nugatory.

[6] An appeal now lies to this Court from the decision of the Employment and Labour Relations Court on

both points of law and questions of facts. Section 17(2) of the Industrial Court Act which restricted appeals to only matters of law has been deleted by Act No. 18 of 2014 meaning that the Court of Appeal entertains appeals on both matters of fact and law.

[7] Although the applicant has not filed a draft memorandum of appeal indicating the grounds of appeal, it has identified the grounds of the intended appeal on the body of the application, in the supporting affidavit and in its counsel's submissions. Three broad grounds of appeal emerge, namely; the lawfulness or otherwise of the termination, the legality of the award of 3 months salary as general damages for wrongful termination, and the legality of the award of gratuity of 2 months basic salary for each year worked.

We have considered the contents of the respective affidavits, the rival submissions and the case law cited.

[8] In so far as the award for general damages was based on the finding that the termination was wrongful, which fact was, and is still contested, coupled with the fact that neither the CBA nor the operative statute – the Employment Act, Chapter 226 (now repealed) did not specifically provide for an award of damages for wrongful termination, the legality of the award of general damages is an arguable point of law which is not frivolous.

[9] As regards the issue of gratuity, the trial court gave effect to clause 9(a) of CBA which provided for gratuity as a terminal benefit at the rate of two months' salary for each completed year of service. However, the applicants' case was that by mutual agreement between it and Kenya Union of Commercial, Food and Allied Workers Union (**KULFAW**), the predecessor of the respondent, to which the employees belonged, the applicant established a retirement benefits scheme by the name of **Murata Sacco Limited Provident Fund** and deposited into the fund an amount equal to two months' salary for each completed year in respect of each member of the staff, with the understanding that the deposit of a lump sum would replace the gratuity referred to in Clause 9(a) of the CBA. The applicant further contended that the replacement of gratuity with retirement benefits scheme was eventually effected in the next CBA covering the period from 1<sup>st</sup> January 2008 to 31<sup>st</sup> December 2009.

The applicant contended that the payment in respect of Clause 9(a) of the CBA were made through the provident fund scheme. The trial judge rejected the applicant submission that paying gratuity as stipulated in clause 9(a) of the CBA would double payment reasoning that the pension and gratuity are different.

[10] It was not disputed that the applicant had established a retirement benefits scheme covering all employees including the 93 employee and that the applicant had paid a lump sum into the fund equal to two months salary for each year of service. The applicant submitted in the Industrial Court that the employees whose benefit the claim was brought had been receiving additional payments under the scheme as the scheme rules have changed.

[11] From the foregoing, the question whether the gratuity awarded had been converted into a retirement benefits scheme and already paid into the scheme by the applicant is an arguable ground which is not frivolous.

Accordingly, we are satisfied that the intended appeal is arguable.

[12] The applicant contends that unless stay is granted, the appeal will be rendered nugatory as its business will be crippled by execution considering that it has suffered losses in years 2013 and 2014. The applicant relies on its audited accounts showing the magnitude of losses in the two years. Those accounts have not been disputed. The applicant has offered to deposit Shs. 5,000,000 as security for the performance of the decree.

[13] The respondent contends, *inter alia*, that the business of the applicant will not collapse as substantial amount from the decree will be retained by the applicant after deducting staff loan liabilities; that the applicant has not tendered any proof that it would not recover the money if the appeal succeeds; that inability to pay is not a ground for granting stay and that the amount offered as security is negligible.

[14] The Court is required to exercise its discretion in a manner which ensures that an appeal, if successful, would not be rendered nugatory, (**Butt v Rent Restriction Tribunal [1982] KLR 417**). Although the averment that the business of the applicant would collapse if execution takes place may be an exaggeration, the averment by the applicant, that it suffered trading loss of Shs. 90,197,363/- and Shs. 108,415, 875/- in the years 2013 and 2014 respectively has not been disputed. The decretal amount in this case is relatively large considering that the applicant is apparently a medium sized financial institution. The payment of the decretal amount would probably cause liquidity problems which may adversely affect its operations. The assertion by the respondent that the applicant would retain a large part of the decretal sum through loan deductions is a bare statement which is not supported by any concrete evidence. The 93 former employees of the applicant were retrenched. The respondent has not said that any of them has the ability to refund part of the decretal sum payable to each.

The applicant has shown good faith by offering to deposit shs. 5,000,000/- as partial security for performance of the decree. In the premises, we are satisfied that unless the stay is granted, the applicant would suffer substantial loss which would render the appeal, if successful, nugatory.

[15] Accordingly, the application is allowed and execution of the decree is stayed in terms of the application on condition that the applicant deposits Shs.5,000,000/- in an interest bearing bank account in a bank to be agreed upon by the respective advocates for the parties within 45 days from the date hereof.

Cost of this application to be costs in the appeal.

***DATED and delivered at Nairobi this 22<sup>nd</sup> day of July, 2016.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

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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**

