



IN THE COURT OF APPEAL

AT NAIROBI

(OKWENGU, SICHALE & KANTAI, J.J.A)

CIVIL APPLICATION NO. NAI. 159 OF 2016 (UR. 123/2016)

BETWEEN

KENYA TEA GROWERS ASSOCIATIONAPPLICANT

AND

**KENYA PLANTATION AND
AGRICULTURAL WORKERS UNION.....RESPONDENT**

(An application for stay of execution pending the hearing and determination of an appeal from the judgement of the Employment and Labour Relations Court at Kericho (M. Mbaru, J.) dated 20th June, 2016

in

ELR CAUSE NO. 1997 OF 2014)

CONSOLIDATED WITH

ELR CAUSE NO. 14 OF 2014)

RULING OF THE COURT

By the motion on notice brought under *section 3A and 3B* of the Appellate Jurisdiction Act and *rules 5 (2)(b) and 103* of the Court of Appeal Rules we are asked in the main to grant an interim order for stay of execution of the judgment delivered on 20th June, 2016 in ELR No. 1997 of 2014 (consolidated with ELR 14 of 2014) pending the hearing and determination of an intended appeal. In the grounds in support of the motion it is stated that the Employment and Labour Relations Court delivered the judgement on 20th June 2016 where the following awards were made:

- "a. Rates of Pay (basic wage/salary) awarded at 15%: 15% for 2014-5 CBA across the board.
- b. Retirement shall be at 60 years with the option to voluntarily retire at 55 years.
- c. On hours of work there shall be 1 rest day with pay in every working week.
- d. Annual leave travelling allowance awarded at 6% increase on the current rates.

e. Medical treatment and sick allowance awarded at Kshs.30,000/-.

f. Baggage allowance awarded at Kshs.30,000/= upon termination of employment: and

g. Parties shall review the CBA 2014/15 and any antecedent policy to accommodate the Union's right to observe their day of worship within reasonable limitations.

h. Annual leave shall remain as under the CBA 2012/2013.

i. Gratuity shall remain as under CBA 2012/2013.”

It is also stated that the applicant intends to appeal against the judgement and that the intended appeal is arguable as a result of *inter alia* the fact that the trial court lacked statutory jurisdiction to impose the various monetary awards; that the court also failed to make a legal analysis of whether the applicant's members would afford or had the ability to pay the pay increase; also that the court had no jurisdiction to impose the terms pertaining to baggage allowance, annual leave travelling allowance, medical treatment and sick allowance and paid rest day. The applicant also says that it would suffer substantial financial losses should the judgement be implemented as it results in a 60% increase in its wage bill. The applicant says that it is a price taker at the auction for tea and is unable to increase and set its prices for tea to cater for this wage increase. Further that *Williamson Tea*, a member of the applicant, has computed that it will suffer a loss of Kshs.578,598,571/= should the judgment be implemented. It is also stated in the grounds that the situation is volatile as over 20,000 employees of the respondent are on strike demanding implementation of the judgement; that the respondents employees have destroyed the applicants property by burning and uprooting tea bushes in various tea estates and there has been no tea processing since 24th June, 2016 and the applicants' members have suffered and continue to suffer substantial losses as a result of no or low tea collected and processed. The grounds also state that the intended appeal would be rendered nugatory if the prayers are not granted as the applicant would not be able to recover the 60% wage increment if it is paid to the employees of the respondent. Thus the funds would be put beyond the reach of the applicant.

There is an affidavit in support of the motion sworn by *Apollo Kiiriri*, the Chief Executive Officer of the applicant sworn on 13th June, 2016 where the matters we have set out in the grounds are repeated. There are also various annexures including the judgement to be appealed.

In a replying affidavit sworn by *Thomas Kipkemboi* the Deputy General Secretary of the respondent it is deponed *inter alia* that the intended appeal has no chance of success, that the trial court had jurisdiction to try and determine the dispute, that employees are back to work, that an offer made by the applicant was not acceptable to the respondent and therefore that the application should be dismissed.

The motion came before us for hearing on 26th July, 2016 when Senior Counsel Fred Ojiambo teaming up with learned counsel Ms. Angela Waweru appeared for the applicant while learned Counsel Mrs. Judith A. Guserwa appeared for the respondent.

Mr. Ojiambo gave a history of the dispute that was before the trial court which led to the judgement. Learned counsel submitted that it was arguable whether the trial court had jurisdiction to impose terms on parties in a Collective Bargain Agreement. Learned counsel further submitted that if the judgement was implemented, it would render the intended appeal nugatory as most if not all affected tea companies would wind up. If the members of the applicant went under, this would be prejudicial even to the respondent's members employees who would have no work to do, concluded learned counsel.

In opposing the motion learned counsel for the respondent submitted that there were three Collective Bargain Agreements in place and that parties who are in a Collective Bargain Agreement are bound by its terms on how to renew it. If such parties do not agree on mode of renewal they go to mediation. Learned counsel further submitted that it was the applicant who moved the trial court seeking various orders. According to learned counsel because the applicant controlled the wage bill the judgement could not be implemented without the applicant's co-operation and therefore the intended appeal could not

be rendered nugatory.

In a brief reply, Mr. Ojiambo conceded that it was the applicant who had moved the trial court and thus had submitted to jurisdiction. But his case was that the relevant statute limited jurisdiction and capped what a trial court could award.

The principles upon which an applicant is entitled to a stay of execution pending appeal are now old hat. An applicant must show that the appeal or intended appeal is arguable and not frivolous. If the applicant manages to establish that principle he has the additional duty to show that, that appeal, or intended appeal, as the case may be, would be rendered nugatory if orders of stay are not granted. In exercising the discretion donated by the relevant law the court exercises that discretionary jurisdiction based on evidence and sound legal principles but has original jurisdiction. These principles have been stated and re-stated in various decisions of this Court such as Patel v Transworld Safaris Ltd [2004] eKLR when the following statement of the law was made:

“In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application.” In Collin Bett t/a C.K. Bett Traders v. Eco Bank Limited & Another [2014] eKLR this Court rendered itself as follows:

“There are two main principles that guide the Court in determining application such as the present one. These are first, that the applicant must demonstrate that the (intended) appeal is arguable, and secondly that the intended appeal would be rendered nugatory should the order of stay sought not be granted.” In addition, in granting orders sought in applications such as this one, this Court exercises original jurisdiction. This is what we said in the Ishamael Kagunyi Thande vs. Housing Finance of Kenya Ltd. Civil Appl. No. Nai. 157 of 2006 (unreported) case:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary.” Applying these principles to the matter before us and having given due consideration to the motion, the affidavits and rival submissions, we take the following view of the matter:

Learned counsel for the applicant submits *inter alia* that although the applicant submitted to the jurisdiction of the trial court that court’s jurisdiction is limited by statute on which orders it can grant and that the awards made may have overshoot what statute law allows that court to grant.

We agree that this is an arguable point. If, indeed, it can be shown on appeal that the trial court has granted orders that it had no power to grant that would have a total effect on the judgement of the trial court. It is also arguable whether the trial court could grant awards without carrying out an analysis of what effect increments to salary and other aspects of employment should have on a sector such as the tea industry.

On the nugatory aspect that the applicant must also satisfy it is argued on behalf of the applicant, that if it complies with the orders granted that would lead to collapse of the tea industry in Kenya as factories would be unable to pay and have to shut down. Mr. Ojiambo further submitted on behalf of the applicant that complying with the orders in the judgement meant paying over to employees colossal sums of money that would then be beyond the reach of the applicant and that the sum would thereafter not be recoverable from the respondents union employees. We have seen a statement made in support of the motion and it is also so deponed by the applicants’ manager that one factory alone, Williamson Tea, upon computing the effect complying with the judgment would suffer a loss of Kshs.578,597,571/=. This, if true, is a colossal sum and the applicant may not be able to recover the same if paid out to the respondents union employees. Learned counsel for the respondent informed us in the course of the argument that negotiations post the judgment had led to an interim agreement where the 15% increment for the year 2014 was being implemented. Mr. Ojiambo confirmed this to be so.

Having considered all aspects of the matter we are of the opinion that the applicant has satisfied both limbs of the principles which must be satisfied for an application for stay of execution to be granted.

In the event we grant a stay of execution of the judgement pending hearing and determination of the intended appeal subject to the parties implementing the 15% increment agreed for the year 2014. Costs of the motion shall abide the intended appeal.

Dated and delivered at Nairobi this 7th day of October, 2016.

H.M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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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