



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, OUKO & KIAGE, JJ.A)**

**CIVIL APPLICATION NAI NO. 309 OF 2014 (UR 231/14)**

**BETWEEN**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> APPLICANT**

**DR. (ENG) KARANJA KIBICHO .....2<sup>ND</sup> APPLICANT**

**AND**

**MARGARET AYUMA KATUNGU ..... RESPONDENT**

*(Application for orders of stay of execution and enforcement of warrants of arrest issued on 17<sup>th</sup> November, 2014 against Dr. (Eng) Karanja Kibicho pending the lodging, hearing and determination of an intended appeal from the ruling and order of the Industrial Court of Kenya (Makau, J.) dated 17<sup>th</sup> November, 2014*

*in*

***H.C. INDUSTRIAL CAUSE NO. 2142 OF 2012)***

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**RULING OF THE COURT**

Dr. (Eng) Karanja Kibicho, the 1<sup>st</sup> applicant is the Principal Secretary (P.S) and the Accounting Officer/Authorized Officer in the Ministry of Foreign Affairs and International Trade, while the respondent, Margaret Ayuma Katungu was the Financial Attaché in the Kenya Embassy in Harare, Zimbabwe.

Some time in the year 2010, the latter was interdicted from the performance of her duties on account of loss of Kshs. 12 m in the Embassy during her tenure.

Following that interdiction, the respondent instituted a claim in Nairobi Industrial Court Cause No. 2142 of 2012 for the lifting of her interdiction. The 1<sup>st</sup> applicant responded by filing a Memorandum of Response. Subsequently, the respondent brought a motion for a temporary order of injunction to restrain the applicant, agents, servants or employees from continuing with the process of her interdiction and for a temporary mandatory order of injunction to lift the interdiction and thereby reinstate her pending the hearing and determination of the action.

Upon considering this application, *ex parte*, the learned Judge (Nzioki wa Makau, J.) at interlocutory stage ordered on 27<sup>th</sup> June 2013;

- “1. THAT the respondent by itself, its agents, servants and/or employees be and are hereby restrained by temporary injunction from continuing with the interdiction of the applicant/claimant pending the hearing and determination of this suit.**
- 2. THAT the respondent by itself, its agents, servants and/or employees be and are hereby directed by way of a temporary mandatory injunction to forthwith lift the applicant’s/claimant’s interdiction from duty pending the hearing and determination of this suit.**
- 3. THAT the respondent shall pay the costs of this application to the applicant/claimant.”**

The applicant’s application to set aside the above order was rejected. The applicant then decided to comply with the *ex parte* order of 27<sup>th</sup> June 2013 by reinstating the respondent to her duties. As these events were unfolding, the investigations on the loss of Kshs. 12m drew to a close and the respondent was charged in the Chief Magistrate Court Criminal Case No. 91 of 2013 with stealing US \$10,000 by a person employed as the financial attaché in the public service contrary to **section 280** of the Penal Code.

Following this change of fortunes for the respondent and in accordance with the applicable Government Code of Regulations, the applicant once again suspended the respondent on account of the criminal charge. The respondent, not relenting, once more returned to court claiming that the applicant was in breach of a court order issued on 27<sup>th</sup> June 2013, restraining the applicant from proceeding with the disciplinary process and directing him to lift the interdiction. Ruling on this application on **27<sup>th</sup> October, 2014**, Nzioki wa Makau, J. found that:

**“9. The alleged contemnor was served with the Court order and partly complied with the court order by a cosmetic reinstatement. The respondent and the contemnor did not properly address their minds to the orders of the Court. The purported reinstatement was negated by the prompt arraignment in the Chief Magistrate’s Court to suggest that the respondent and the alleged contemnor were desirous of not giving effect to the court order. It is clear the alleged contemnor did not wish to obey the court orders.**

**11. I find that the alleged contemnor is guilty of contempt of court and I fine him Kshs. 200,000/= or in default of payment of the fine to serve 6 months imprisonment for contempt of court. The fine to be paid personally by the contemnor and not out of public coffers.”**

Again, in the absence of the 1<sup>st</sup> applicant, the Court, on **17<sup>th</sup> November, 2014** issued a warrant for the arrest of the 1<sup>st</sup> applicant. It is this warrant of arrest that is the subject of the application giving rise to this ruling. In the application, the 1<sup>st</sup> applicant prays, pursuant to **Article 159** of the Constitution, **sections 3A** and **3B** of the Appellate Jurisdiction Act and **Rules 5 (2) (a)** and **42 (1)** of the Court of Appeal Rules,

**“2. THAT the court be pleased to grant stay of execution of the warrants of arrest issued by Hon. Mr. Justice Nzioki wa Makau on 17<sup>th</sup> November, 2014 in Nairobi Industrial Cause No. 2142 of 2012 against Dr. (Eng) Karanja Kibicho (the 2<sup>nd</sup> applicant herein) pending the lodging, hearing and determination of the intended appeal.**

.....

- 3. THAT the court be pleased to grant stay of all execution proceedings and orders consequent upon the orders of 17<sup>th</sup> November, 2014 by the Hon. Court in Nairobi Industrial Cause No. 2142 of 2012 pending the lodging, hearing and determination of the intended appeal.”** (Our

emphasis)

The respondent, through Mr. Nzamba Kitonga, S.C. has raised a preliminary objection to the application arguing that the application together with the notice of appeal are incompetent as there can be no appeal to this Court against the issuance of a warrant of arrest in terms of **section 75** of the Civil Procedure Act and the Appellate Jurisdiction Act; and that the warrant was issued in the process and as a consequence of execution proceedings.

Two dates in this dispute up to this point are critical. First on **27<sup>th</sup> October 2014**, the learned Judge found the 1<sup>st</sup> appellant guilty of contempt of court and fined him Kshs. 200,000/=. Secondly, on **17<sup>th</sup> November, 2014**, there was a warrant of arrest issued for the arrest of the 1<sup>st</sup> applicant. The application before us relates only to the second order.

In our view, all the provisions cited as the basis of this application do not vest in us the jurisdiction to grant the orders sought. The jurisdiction of this Court to grant an order of stay of execution, injunction or stay of further proceedings is found in **Rule 5 (2) (b)** of the Court of Appeal Rules. There are two well-known principles to be satisfied before the jurisdiction can be exercised. The applicant, however, relies on **Rule 5 (2) (a)** which provides as follows:

**“5. (1) No sentence of death shall be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given until the appeal has been determined.**

**2. Subject to sub-rule (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 notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”**

The application of this provision was explained as follows by this Court in

**Jayendra Khimji Malde & 2 others Vs. R.** Criminal Application No. NAI. 14 of 2010.

**“It is apparent from the wording of Rule 5 (2) (a) as read with Rule 59 that the rule applies to cases where the applicant has already been convicted and sentenced either by the subordinate court, or by the High Court.”**

Apart from this explanation, we are ourselves not persuaded that what is pending before the Employment and Labour Relations Court are criminal proceedings.

Inherent power of the Court is only invocable for the purpose of making orders that may be necessary for the ends of justice. It is a residual source of power which the court may draw upon as necessary whenever it is just and equitable to do so in the absence of specific or alternative remedy.

We find no justification for resorting to this residual power when clearly there was a specific remedy for the applicant. The warrant sought to be stayed draws its legitimacy from the ruling of 27<sup>th</sup> October, 2014 where the applicant was found guilty of violating a court order. It is futile to challenge the warrant in isolation of the order from which it emanated.

It is not for us to tell counsel how to approach their work but here the approach adopted was misconceived. We reiterate that had the applicant sought to stay the orders issued on 27<sup>th</sup> October 2014 perhaps the outcome of this application would have been different taking into consideration the impending warrant for the arrest of the applicant.

In the circumstances, we uphold the notice of preliminary objection and find that both the application

dated 24<sup>th</sup> November, 2014 and the notice appeal filed on 21<sup>st</sup> November, 2014 are incompetent. Both are struck out with costs to the respondent.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of March 2015.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**