



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MUSINGA & KIAGE, JJA)**

**CIVIL APPLICATION NO. NAI 187 OF 2014 (UR.146/2014)**

**BETWEEN**

**KENYA EXPORT FLORICULTURE, HORTICULTURE &  
ALLIED WORKERS UNION (KEPHAU).....APPLICANT**

**AND**

**KENYA PLANTATION & AGRICULTURAL  
WORKERS UNION ..... 1<sup>ST</sup> RESPONDENT  
THE REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT**

**(Application for stay of the orders of the Industrial Court of Kenya**

**at Nairobi (Mbaru, J) Dated 4<sup>th</sup> July, 2014**

**in**

**Industrial Court Appeal No. 7 of 2011)**

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**RULING OF THE COURT**

Before us is an application by way of Notice of Motion dated the 17<sup>th</sup> day of July, 2014 and lodged in the registry of this Court on the 12<sup>th</sup> day of August, 2014. It is predicated on rule 5 (2) (b) of this Court's rules. It substantially seeks an order of stay of the orders of the Industrial Court made on 4<sup>th</sup> July, 2014 pending the hearing and determination of the application in the first instance and pending the hearing and determination of the main appeal in the second instance.

The application is founded on the grounds in the body of the application and the content of the supporting and supplementary affidavit of *David Benedict Omulama*. It has been opposed by the first Respondent's replying affidavit deposited by *Francis C. Atwoli* on the 12<sup>th</sup> day of August, 2010 and lodged herein on the 18<sup>th</sup> day of August, 2014.

The brief background to this application is that, the applicant, **Kenya Export Floriculture Horticulture and Allied Workers Union** (Kephau) intended to be a splinter Union from the first Respondent, **Kenya Plantation & Agricultural Workers Union**. It moved to seek registration by the Registrar of Trade Unions which the registrar declined vide the letter Ref.MCHRD/TV/R dated the 30<sup>th</sup> August, 2011, on the grounds that there was already registered a Trade Union sufficiently representative of the whole or a substantial proportion of the interests in respect of which the applicant sought registration, namely the 1<sup>st</sup> respondent.

The applicant was aggrieved by that response and moved to the Industrial Court of Kenya at Nairobi and filed Appeal No.7 of 2011. The complaint was against the Registrar of Trade Union and the General Secretary (Kenya Plantation & Agricultural Union) as the first and second respondents respectively. From the citation of the cause, **David Benedict Omulama, Andrew Makwaga, Benard Amuchizi Mukaizi, Adriano Mukalo, Whyliffe sore, Severio Masika, Zilian Ingutia, Efeli A. Nandi and Juma Amatonye** were cited as the promoters of the applicant.

The merit determination of that appeal resulted in the judgment of the Industrial Court dated the 11<sup>th</sup> day of February, 2014. In it, **Mbaru, J. delivered herself thus:-**

**“36 This Court finds that the refusal by the respondent to register the appellant is not justified or reasonable in the circumstances of this case as the interest to be addressed by the proposed Kenya Export Floriculture, Horticulture and Allied Workers Union is clearly defined. The membership will be from the Floriculture and Horticulture Sector and thus not interfering with the Plantation and Agricultural sectors represented by the interested party. I therefore enter judgment in favour of the appellant in the following terms.**

**(a) The decision of the Registrar of Trade Unions (made) on 30<sup>th</sup> August, 2011 is hereby reversed.**

**b. The Kenya Export Floriculture, Horticulture and Allied Workers Union is hereby registered as a trade Union.**

**c. The Registrar of Trade Unions (Respondent) to immediately issue the appellants as in (ii) above with its registration certificate;**

**d. Each party to bear their own costs.”**

On 17<sup>th</sup> February, 2014 the 2<sup>nd</sup> respondent vide its letter MC/TU/173/15 addressed **David Benedict Omulama** in his capacity as the secretary General of **Kenya Export Floriculture , Horticulture & Allied Workers Union** in the following terms:-

**“Pursuant to the Industrial Court’s Lady Justice Monica Mbaru’s) judgment in the above appeal delivered on 11<sup>th</sup> February, 2014, I wish to inform you that Kenya Export Floriculture, Horticulture and Allied Workers Union (KEPHAU) has been registered as a Trade Union under the Provisions of the Labour Relations Act. Enclosed herewith is the certificate of registration and I should be grateful if you would acknowledge safe receipt of the same.”**

On the 25<sup>th</sup> April, 2014 vide her letter Ref. No. MCITU/173/25 the Registrar of Trade Unions, **E.N. Gichecha (Mrs.)**, informed the Branch Manager Co-Operative Bank Naivasha Branch of the above registration and who the registered officials of the applicant were. It read in part:-

**“I wish to inform you that the above trade Union was registered on 17<sup>th</sup> February, 2014 under certificate No.TU/173. The officials of the Union are as per the attached extract namely Francis J. Wanyange Mwangi (National Chairman, 20.12.2009). Peter Wanjala Palang’a (National Vice Chairman 20-12-2009,) David Benedict Omulama (General Secretary- 20-12-2004), Ann Mugane-Deputy General Secretary 20-12-2009), Benard A. Mukaisi (National Treasurer- 01-4-**

2014), James A. Okeyo- Organizing Secretary -01-4-2014), James Amatonye – 1<sup>st</sup> National Trustee- 20-12-2009); Severio Masika- (2<sup>nd</sup> National trustee- 20-12-2009), Efeli Nandi- (3<sup>rd</sup> National trustee- 20-12-2009).”

The first respondent then moved to industrial Court and obtained an order of stay of the orders of that Court of 11<sup>th</sup> February, 2014 through the hand of **Makau, J.** This gave rise to the 2<sup>nd</sup> Respondent’s letter under the hand of **W.H. Lang’at** dated 20<sup>th</sup> February, 2014 addressed to **Mr. David Benedict Omalama** Secretary Kenya Export Floriculture, Horticulture And Allied Workers Union. It reads in part:-

**“Pursuant to the Industrial Court’s orders issued on 19<sup>th</sup> February, 2014 by Hon. Justice Nzioka wa Makau staying orders of the Court made on 11<sup>th</sup> February, 2014 until hearing inter partes on 5<sup>th</sup> March, 2014, I wish to inform you that the registration of Kenya Export Floriculture, Horticulture and Allied Workers Union (KEPHAU) is equally stayed until further orders of the Court.”**

On the 29<sup>th</sup> April, 2014 **Mbaru, J.** delivered a ruling staying the orders under her hand made on the 11<sup>th</sup> February, 2014.

The first respondent moved the same court vide an application by way of notice of motion dated the 12<sup>th</sup> day of June, 2014 seeking, *inter alia* the deregistration of the applicant as a trade Union, cancellation of the certificate of registration of the applicant, an order prohibiting the cabinet secretary, Ministry of Labour and Social Services and Security from gazeting the applicant as a Trade Union and cancellation of the Bank A/C No. 01120119455200 in the name of the applicant and an order prohibiting the promoters of the applicant from carrying out any Trade Union activities.

The application of 12<sup>th</sup> June, 2014 came up before **Mbaru, J.** on the 20<sup>th</sup> day of June, 2014. Upon hearing **Mr. Meshack Khisa** for the 1<sup>st</sup> respondent but in the absence of the applicant and the Registrar of the Trade Unions, the following orders were made:-

**“(1) That an interim stay be and is hereby issued of all proceedings and directions to the parties by maintaining the status quo/state of affairs as at the date of judgment on 11<sup>th</sup> February, 2014.**

**2. That the Registrar of Trade Unions E.N. Gicheha (Mrs) be and is hereby directed to guide the parties herein with regard to (1) above to avoid creating industrial unrest and to personally appear in Court to confirm compliance and the hearing of the application dated 12<sup>th</sup> June, 2014.**

**3. That all the parties to appear in Court for hearing on 4<sup>th</sup> July, 2014 at 9.00 a.m.**

**4. That interested party to effect personal service upon the appellant union, the Registrar of Trade Unions and also together with such service to send registered mails to the Appellant and respondent herein.**

On the 4<sup>th</sup> of July, 2014, the same Industrial Court made an order extracted on the 8<sup>th</sup> day of July, 2014 along the following lines.

**“(1) That the parties to maintain status quo as per the court ruling on the day of judgment and all the consequential orders herein pending the appeal.”**

The applicant was aggrieved by the orders issued on 4<sup>th</sup> July, 2014. He filed a notice of appeal dated the 7<sup>th</sup> day of July, 2014 and lodged in the High Court on the 8<sup>th</sup> July, 2014. The grievances intended to be raised against those orders are contained in a draft memorandum of Appeal annexed to the application. It is on this same notice of appeal that the applicant has anchored the application under review.

In summary, **Mr. Omulama** has argued that his intended appeal is arguable on the grounds that the applicant was registered as a Trade Union and since that registration status has not been interfered with it was erroneous on the part of the Industrial Court Judge to attempt to stay that which had already taken place;

**Mr. Omulama** went on further to argue that following the registration of the applicant, officials were installed, recruitment drive for members launched which was still ongoing, a bank account to receive members dues was opened and it was receiving the members dues to date; the applicant had already started representing its members in matters affecting the union and the orders sought to be stayed if not stayed would be prejudicial not only to the applicant but also to its members. Some of the prejudice mentioned by the applicant relate to uncertainty amongst the applicant's members as to whether to continue paying their dues to the applicant or not; the applicant losing out on revenue collection from its members, and inability of the applicant to represent its members in ongoing litigation in matters relating to the mandate of the union. Lastly, that the orders sought to be impugned are unconstitutional in so far as they purport to curtail the applicant's members freedom both to have and belong to a union of their choice.

In response to the application, **Ms Guserwa**, learned counsel for the respondent, while reiterating the contents of the replying affidavit and the annexures annexed thereto, urged us to dismiss the same on the grounds that it has not met the threshold for the grant of a relief under rule 5 (2) (b) of this Court's Rules; the 1<sup>st</sup> respondent was aggrieved by the orders made by the Industrial Court on 11<sup>th</sup> February, 2014 okaying the registration of the applicant as a Trade Union and lodged in this Court, appeal number 141 of 2014; the first respondent then moved the Industrial Court and sought an order to stay the orders granted on 11<sup>th</sup> February, 2014; the applicants were duly notified of the application for stay in the Industrial Court but they chose not to attend court and *ex parte* orders were made; the learned trial Judge fixed the matter for mention on 4<sup>th</sup> July, 2014 for further orders on which day the applicants also never attended court; giving rise to the order of status quo that was made in the said file. It is this same order that the applicant purports to be appealing against.

It is Ms Guserwa's argument that the applicant's appeal is a non-starter as there is nothing to appeal against a status quo order. If anything, the applicant should have applied for review and the setting aside of that order. Further, that even if a setting aside of the orders of 4<sup>th</sup> July, 2014 would have been made, that too would not have assisted the applicant much in view of the presence on the record of the orders made by the same court on the 20<sup>th</sup> day of June, 2014 suspending the applicant's registration as a Trade Union against which the applicant has never appealed.

Our jurisdiction under rule 5(2) (b) is original, independent and discretionary (see **Githunguri versus Jumba Credit Corporation Ltd No.(2) [1988] KLR 88**). It is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended (see the case of **Equity Bank Ltd versus West Link NBO Civil Application No.78 of 2011 (UR)**). The jurisdiction under rule 5(2) (b) only arises where the applicant has lodged a notice of appeal. ( see the **Safaricom Ltd versus Ocean View Beach Hotel Ltd & 2 others Civil Application No. 327 of 2009 UR**)

The conditions to be met before a party can obtain relief under rule 5 (2) (b) have been crystallized by case law. The applicant has to demonstrate that the appeal or intended appeal is arguable on the one hand and on the other hand that if the stay sought is not granted the appeal/intended appeal, as the case may be will be rendered nugatory. See the **Githunguri case (supra)**. By arguable, is not meant an appeal or intended appeal which must succeed but one which raises a bonafide issue worth of consideration by the Court ( see **Kenya Tea Growers Association & another versus Kenya Planters Agricultural Workers Union, Civil Application No. Nai 72 of 2001 (UR)**). An appeal need not raise a multiplicity or any number of such points. A single arguable point is sufficient to earn an applicant such a relief (**Damji Praji Mandavia versus Sara Lee Household & Body Care (K) Ltd** Civil Application No. Nai 345 of 2005 (UR). It is trite too that demonstration of the existence of even one arguable point will suffice. ( see **Kenya Railways corporation versus Edernan Properties Ltd, Civil Appeal No. Nai 176 of 2012 and**

**Ahmed Musa Ismael versus Kimba Ole Ntamorua & 4 others civil Appeal No. Nai 256 of 2013).**

As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible (See the case of **Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others, CA No. 31 of 2012** wherein this Court stated, *inter alia*, thus:

***“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”***

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). See **Republic versus Kenya Anti Corruption Commission & 2 others [2009] KLR31**, and **Reliance Bank Ltd Versus Norlake Investments Ltd [2012] 1EA227** and **Githunguri versus Jumba Credit Corporation (supra)**

We have applied the above principles to the rival arguments herein. With regard to the first prerequisite, we have considered the grounds that the applicant intends to canvass in the intended appeal as contained in their draft memorandum of appeal and we are satisfied that the applicant’s arguments as to whether the stay orders granted in CA 7/2014 could hold after these were issued after the applicant had already been registered as a Trade Union on the one hand, and secondly these having been issued before the said registration was purportedly cancelled and or reversed is arguable. As we have pointed out above, only one bonafide arguable point suffices. We are therefore satisfied that the applicant has satisfied the first ingredient.

As for the second ingredient, we are in agreement that this has not been satisfied because the reasons advanced by the applicant in support of this ingredient were because the applicant needs to continue collecting dues from its members who have already been brought on board; it will affect the ongoing recruitment for new members and lastly that the members already on board will miss representation by the applicant in both pending litigation as well as any intended litigation affecting the affected members and would be members. To us indeed the registration of the applicant is still intact and has not either been cancelled or otherwise reversed. However, the stay orders in the manner framed as long as these remain in force operate to curtail the applicant’s activities such as continued recruitment of member and receipt of membership dues, be they from past or intended members. These can be put on hold until the determination of the intended appeal and thereafter resulting arrears recovered.

As for representation of the members already on board and intended members, since it is on record that the applicant was simply splinting from the first respondent which move the first respondent is resisting, the affected members have an option either to be represented by the first respondent until the status of the applicant is finally determined in the intended appeal or otherwise seek alternative representation. The second ingredient therefore fails.

In the result, since the applicant has not met the threshold, we have no alternative but to decline the relief sought. The applicant’s application dated 17<sup>th</sup> day of July, 2014 and lodged herein on 12<sup>th</sup> August, 2014 be and is hereby dismissed with costs.

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of March, 2015.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**D. MUSINGA**

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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**