IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPLICATION NO. 71 OF 2014 (UR 50/2014)

BETWEEN

ABYSSINIA IRON & STEEL LTD …..... APPELLANT

AND

KENYA ENGINEERING WORKERS UNION .....1st RESPONDENT

JOKALI HANDLING SERVICES LIMITED.....2nd RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu (Hon. Lady Justice Hellen Wasilwa, J) dated 25th February, 2014

in

INDUSTRIAL CASE No. 74 OF 2013

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RULING OF THE COURT

In a judgement delivered on 25th February, 2014 Hellen Wasilwa, J, ordered the appellant to recognize a union of the respondents employees within thirty days of the date of the said judgement in default of which execution was to issue. The appellant was dissatisfied with those orders and filed Kisumu Civil Appeal No. 67 of 2014 which appeal is pending hearing.

In the Notice of Motion brought before us which is stated to be anchored on Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 5 (2) (b) of this Courts Rules it is prayed that we grant an injunction restraining the respondents or their servants or agents from executing the decree in the case appealed from – Kisumu Industrial Court Case No. 74 of 2013 – pending hearing and determination of the said appeal.

We are also asked to order a stay of proceedings in that case.

The grounds set out on the face of the Motion and which are reiterated in an affidavit of Peter Kaguamba, the Personnel Manager of the applicant, state, inter alia that the applicant has an arguable appeal; that there is pending in the Industrial Court an application for stay which has not been heard because that Court decided to first hear an application for committal of the applicants directors to civil jail

for contempt of court; that the respondents insist that the applicants directors do forthwith execute a Recognition Agreement with the respondents or be committed to civil jail; that if such agreement is executed the appeal would be rendered nugatory, and that the applicant would suffer irreparable loss due to an increase in the wage bill and loss of production. The applicant further states that it has been denied a right to a fair hearing contrary to law because the learned judge of the Industrial Court has refused to hear its application ordering that the application for contempt of court must be heard first.

Mr. Prestone Wawire, learned counsel for the applicant, in his submissions before us reiterated the matters already set out and requested us to order temporary stay pending formal Ruling as the application for contempt of Court was coming for hearing at the Industrial Court the next day. We granted a temporary injunction as we were persuaded that circumstances existing called for such orders.

The application was not opposed although it had been served upon counsel for the respondents who did not appear at the hearing when the same was called before us.

The principles upon which this court acts in applications of this nature are now well known – an applicant under Rule 5 (2) (b) must show an arguable appeal which is to say an appeal which is not frivolous and next he must show that if the stay or the injunction sought is not granted, the appeal, or the intended appeal, if it were to be successful, would have been rendered nugatory by the refusal to grant the stay.

Counsel for the applicant contended that the appeal was arguable as the learned judge of the Industrial Court had ordered that a Recognition Agreement be executed within thirty days of the delivery of judgment failing which execution was to issue. According to counsel, execution of such an agreement would render the entire appeal nugatory because there would be nothing left to be determined at the appeal. If, in any event, continued counsel, the officers of the applicant were put to civil jail it would nugate the whole appeal.

Will the appeal be rendered nugatory if we refuse to grant a stay and the appeal were to succeed?

We have perused the Memorandum of Appeal and are persuaded that there are substantial points of law that the applicant should have an opportunity to canvass when the appeal comes for hearing. Whether or not the applicant was using a method of outsourcing employees as a means to avoid legal obligations is an arguable point. Should the applicant comply with the orders of the court by signing a recognition agreement the substratum of the appeal would have been lost. Failure to do so would lead to penal consequences and as was stated by this Court in **Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Anor [2006] e KLR:**

> **"...In cases which are purely civil, this Court hardly grants a stay of proceedings on the basis that even if the proceedings to be stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – See for example Silverstein v Chesoni [2002] KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.."**

For these reasons we allow the application. Costs of the same shall abide the results of the appeal.

Dated and Delivered at Kisumu this 5th day of March, 2015.

D. MARAGA

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR