



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 18 OF 2015

BETWEEN

ENGEN (K) LIMITED.....APPLICANT

AND

KENYA PETROLEUM WORKERS UNION.....1ST RESPONDENT

SARMAN ENERGY LIMITED.....2ND RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Employment

and Labour Relations Court at Mombasa (Makau, J.) dated 23rd March, 2015,

in

ELR. CC. No.94 of 2014)

RULING OF THE COURT

The applicant has filed a notice of appeal, intending to challenge the decision of Makau, J in the **Employment and Labour Relations Court Cause No.94 of 2014** in which the learned Judge found that the applicant, Engen (K) Limited unfairly terminated the services of some thirteen employees (the grievants) and awarded one month salary in lieu of notice plus six months gross salary for unfair termination amounting to **Kshs.1,027,117** “to be shared to the 13 grievants equally” as well costs of the claim.

In the meantime the applicant wishes to have the execution process which has commenced to be stayed in order to give a chance to this Court to consider its complaint in the intended appeal. As is the tradition in such applications brought pursuant to this Court’s **Rule 5(2) (b)**, **Mr.Kongere**, learned counsel for the applicant has identified four (4) grounds which he invites us to find are arguable and relies on the holding in **Printing Industries Limited & Another v Bank of Baroda (K) Ltd**, Civil Application No.40/13.

The four grounds are;

- a. Whether the learned Judge properly applied the definition in **section 2** of the Employment Act, 2007, of the word ‘*redundancy*’.
- b. Whether the court below properly appreciated the import of **section 74 (a) and (b) of the Labour Relations Act, 2007** with regard to the jurisdiction of the Employment and Labour Relations Court.
- c. Whether the learned Judge erred in awarding salary in lieu of notice even after making a finding that a termination notice had been issued to the 13 grievants.
- d. Whether the court could in law properly enter judgment against the applicant alone when in the claim judgment was sought against both the applicant and the 2nd respondent in this application.

We need to clarify at this point that although the 2nd respondent (**Sarman Energy Limited**) was served both with this application and the hearing notice it was not represented when the application was argued before us.

The 1st respondent (**Kenya Petroleum Oil Workers’ Union**) was represented in these proceedings by Mr. Raphael Olala Ouma, not an advocate, but its Coast Branch Secretary, who submitted that the intended appeal is not arguable as the learned Judge made a proper finding regarding the definition of “*redundancy*”, on the jurisdiction of the court, salary in lieu of notice and on the liability of the applicant.

Regarding the nugatory aspect of the appeal should this application fail and the intended appeal succeeds after the decretal sum has been disbursed, the applicant is apprehensive that the 13 grievants may not be capable of restituting the funds as they are unemployed and their other sources of income are unknown. See **Kenya National Union of Teachers v George Wesonga, Civil Application No.92 of 2014.**

The 1st respondent’s representative has confirmed in his affidavit that indeed the 13 grievants are unemployed and lack “*economic muscle*”. We suppose, because of this fact, the 1st respondent has suggested that in the event the motion is allowed, the decretal sum be ordered to be deposited in an interest-earning account in the joint names of itself and counsel representing the applicant.

It cannot be denied that the four (4) grounds set out at the beginning of this ruling raise arguable points to be canvassed in the intended appeal. On the other hand it is not in doubt that the action giving rise to this application and the intended appeal was brought by the 1st respondent on behalf of the 13 grievants. Indeed the judgment of the court below directs that the decretal sum of **Kshs.1, 027,177** be shared equally to the 13 grievants.

The 13 grievants, it is admitted on oath, are unemployed and have no other source of income. The applicant’s apprehension that it may not recover the decretal sum should it be paid over to the 13 and subsequently the appeal was to succeed, is not without justification. The appeal in those circumstances will be rendered nugatory.

The purpose of this Court’s - power under Rule 5(2) (b) is to ensure that no party is occasioned any substantial loss and the status quo preserved if such loss is likely to render the appeal or intended appeal nugatory.

In the matter before us, the 1st respondent has obtained a lawful judgment on behalf of its 13 members, who are presently impecunious having lost employment. The applicant on the other hand has a right to challenge that judgment on appeal to this Court.

Balancing the two sides and confirming that the applicant has satisfied the two conditions for the grant of the orders prayed for, we make the following orders;

- i. The notice of motion dated 12th May 2015 is allowed in terms of prayer 3, that there be an order

temporarily staying execution of the decree issued on 23rd March, 2015 pending the filing, hearing and determination of the intended appeal.

ii. The temporary order of stay in (I) above is granted on condition that the applicant shall, within fourteen (14) days hereof deposit the decretal sum in an interest - earning account in the joint names of the 1st respondent and the applicants' advocates failing which the stay herein granted, shall stand vacated without further orders.

iii. The appeal shall be filed within thirty (30) days from the date of this ruling.

iv. Costs of this application will be in the intended appeal.

Dated and delivered at Malindi this 29th day of May, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR