



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NAI. NO. 83 OF 2015

BETWEEN

COMMUNICATION WORKERS UNION.....1ST APPELLANT/APPLICANT

BENSON OKWARO OKUMU.....2ND APPELLANT/APPLICANT

AND

COMMUNICATION AUTHORITY OF KENYA.....RESPONDENT

(Being an application for injunction pending the lodgment, hearing and determination

of an appeal from the Ruling made by the Employment and Labour Relations

Court at Nairobi (the Hon. Justice Nzioki wa Makau) dated 23rd day of

January, 2015 in Employment And Labour Relations Court At Nairobi

in

PETITION NO. 72 OF 2014

RULING OF THE COURT

This application is brought by way of Notice of Motion dated 20th March, 2015 under Rule 5(2)(b) of the Court of Appeal Rules (the Rules), for stay of execution pending the hearing and determination of an intended appeal. The appeal intended herein arises from the decision of the Industrial Court (Nzioki wa Makau, J) dated 23rd January 2015. Briefly, the material facts are as follows:-

The applicants **COMMUNICATION WORKERS UNION** and **BENSON OKWARO OKUMU** (the then Claimants) filed a Statement of Claim on 22nd December 2014 the same being Industrial Court Cause No. 72 of 2014. In the main, the Claimants complaints were that the respondent, Communication Authority of Kenya had unlawfully and unfairly declared the positions of Directors and Assistant Directors redundant. They also complained that the respondent was practicing unfair labour practices contrary to the Provisions of Article 41(1) of the 2010 Constitution.

The respondent filed a preliminary objection dated 8th January 2015 which was urged before Nzioki wa Makau J. On 23rd January 2015 the learned judge upheld the preliminary objection and struck out the applicant's petition. The applicants filed the Notice of Appeal on 4th February 2015. The orders sought in the Motion are for the duration of the pendency of the appeal.

The application came before us for hearing on 15th June 2015 with Mr. Faraji urging the applicant's case and Mr. Ahmednassir, Senior Counsel urging the respondent's case.

It was Mr. Faraji's submission that the ruling of Makau, J, had the underlying effect of change of office holders based on advertisement made pursuant to a decision of the Board taken on 3rd December, 2014 and 16th December; 2014, that the Board's resolution in essence renamed the position of Directors as Chief Managers and that of Assistant Directors as Senior Directors; that the resolutions of the Board was contrary to the provisions of section 40 of the **Employment Act & Article 14** of the **International Labour Organisation**; that the learned judge erred in dismissing the applicants' constitutional petition contrary to **Articles 3(1), 22 and 258** of the Constitution; that in a letter to the Ministry of Labour dated 6th May 2015 the respondent had rescinded its letter of 19th December 2005; and that Odunga J had on 29th May 2015 quashed gazette Notices No. 29/15 and 35/85 which had appointed the members of the Board of Directors who made the resolutions on 3rd December 2014 and 16th December 2014 and no appeal had been filed against that decision.

In response, Mr. Ahmednassir Senior Counsel opposed the Motion. He was of the view that the Industrial Court having made a determination that the applicants had no *locus standi* is still unresolved and an inhibition to the extent that the applicants cannot make the present application until the issue is overturned in a substantive appeal; that the Communication Workers Union could not represent the management but the lower cadre of employees in job groups K, I and J as labour cannot represent the owners of capital. Counsel further urged us to find that the Union can only represent its members, and that the top management of the respondent are not such members. On the nugatory aspect the learned Senior Counsel maintained that this was not established as the affected employees could still file suits in their own capacities; that indeed they have now moved the court vide Industrial Court Cause No. 128 of 2015 filed on 4th February 2015 and that on the same day they obtained interim orders restraining the respondent from advertising, renaming or taking any steps to recruit persons for the position of Chief Managers, Human Capital & Administration, Licensing & Standards and Compliance & Enforcement vide an order dated 4th February, 2015. He concluded his submissions by contending that the Motion was an abuse of the process of the court.

We have considered the application, the affidavits, the rival submissions and the law. The exercise of jurisdiction under **Rule 5(2) (b)** of the Rules by this Court is discretionary based on the twin principles of whether the application has an arguable appeal and if so, whether the appeal will be rendered nugatory if the orders sought are not granted. In Civil Application No. Nai. 157 of 2006 in **Ishmael Kegunyi Thande Vs Housing Finance of Kenya Ltd** (unreported) it was stated:-

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” (See Githunguri vs Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-1988).”

Therefore in determining whether the applicant is deserving of an order for stay, we have to apply the twin principles to the circumstances of the case. The applicant has contended that unless an order for stay is granted, its intended appeal would be rendered nugatory. The applicant sought to restrain the respondent from recruiting new personnel and from renaming and/or scraping certain positions.

In the ruling of 23rd January 2015 the learned judge struck out the petition on the basis that the applicants

being a Workers Union had no *locus standi*. It further proceeded to hold that ***“The aggrieved parties are more than free to make suitable efforts to safeguard their interest in person.”*** On their part the respondents demonstrated that the persons whose benefit the petition was brought by the applicants herein had moved the Industrial Court in Employment and Labour Relations Cause No. 128 of 2015 dated 4th February, 2015 and Juma Kiprono Kemei, the Director, Human Resource and Administration as well as Christopher Kemei, the Director, Licensing, Compliance & Standards had obtained conservatory orders on the same date. It is our considered view that the appeal will not be rendered nugatory as there are already orders in force that protect the aggrieved parties interest which is indirectly the interest of the applicants. However, we do not wish to say anything more at this stage but suffice to state that having come to the above conclusion, we do not consider it necessary to delve into the arguability of the appeal.

The Motion fails and is dismissed with costs.

Dated and delivered at Nairobi this 31st day of July, 2015.

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