



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 37 OF 2015

BETWEEN

SIMON OTIENO ADEDE.....1ST APPLICANT

SAMSON OMONDI CHILO..... 2ND APPLICANT

MARGARET AWUOR ADHIAMBO3RD APPLICANT

FRANCIS OCHIENG OSURE.....4TH APPLICANT

CHRISPINE PUDO..... 5TH APPLICANT

MEK SACCO SOCIETY LTD.....6TH APPLICANT

AND

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERSRESPONDENT

(An Application for unconditional stay of proceedings and of the court orders of the High Court of Kenya, Industrial Court at Kisumu (Maureen Onyango, J.) dated 1st July, 2015

in

INDUSTRIAL COURT CAUSE NO. 167 OF 2014)

RULING OF THE COURT

1. The applicants have moved the Court under section 3A of the Appellate Jurisdiction Act and rule 5 of the Rules of the Court to stay proceedings in Kisumu Industrial Court Cause No. 167 of 2015, as well as an order given on 1st July 2015 pending the hearing and determination of Civil Appeal No. 56 of 2015.

2. By an application by notice of motion dated 7th May 2015 presented to the Employment and Labour Relations Court at Kisumu in Cause No. 167 of 2014 under sections 12 and 13 of

Employment and Labour Relations Court Act, 2014, and sections 5 and 6 of the Judicature Act, Cap 8, the respondent sought leave to commence contempt of court proceedings against the applicants. Based on that application, the court ordered that contempt proceedings would unnecessarily delay the objective of the court, which is to ensure speedy execution of its orders, and proceeded to direct that the officials of the 6th applicant be summoned to court to explain why they had not complied with the orders issued on 6th November, 2014. When the officials appeared in Court on 1st July, 2015 pursuant to the summons issued, the trial judge questioned them as to whether they were aware of the decision of the Court made on 6th November, 2014 to which they responded they were not. That notwithstanding, the trial court ordered the applicants to re-instate the grievants and pay their salaries and for the matter to be mentioned in two weeks to confirm compliance and that their failure to attend would result in warrants of arrest being issued against them and that a punishment by way of fine would be imposed.

3. The applicants' complaint through learned counsel Mr. Nyawiri was that the orders issued by the court were made without according the applicants a hearing; that the requirements of the law were breached to the extent that the order complained of may result in the arrest and incarceration of the applicants without according them due process; that there is no evidence of the order the applicants are said to be in contempt of having been served on them; that applicants have already filed an appeal being civil appeal no. 56 of 2015 which will be rendered nugatory unless the orders sought are granted.

4. Mr. Atela representing the respondent strenuously opposed the application and referred us to his replying affidavit filed on 24th July 2015 urging that the application is completely devoid of merit; that the applicants were heard before the orders given on 1st July 2015 were issued; that the applicants have failed without good reasons to comply with the orders of the court; that having regard to sections 12 of the Employment and Labour Relations Court Act the court was within its mandate to make orders for enforcement of its orders; that if the court is inclined to grant the orders sought it should be on terms that the amount of Kshs. 568,372.00 and Kshs. 414,004.00 payable to Bernard Ondari and Boniface Ochieng should be deposited into court.

5. We have considered the application, the affidavits and the arguments presented before us. The rationale behind empowering the Court to grant relief under rule 5(2)(b) was captured by Githinji JA in **Equity Bank Limited vs. West Link Mbo Limited Civil Application No Nai 78 of 2011 (Ur. 53/2011)**, where he stated:

"It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance.... It is clear that rule 5(2)(b) is a procedural innovation designed to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals".

In **Ishmael Kagunyi Thande v HFCK Civil Application Nai No. 157 of 2006** this Court 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 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 the appeal will be rendered nugatory".

6. As regards the question whether the applicants have demonstrated an arguable case, we think they have. They say that no leave was sought and obtained prior to the orders complained of being granted; that the orders they are alleged to have violated were not served on them. We do not think those complaints are frivolous. As this Court stated in **Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR:**

"An arguable appeal is not one that must necessarily succeed; it is simply one that is

deserving of the Court's consideration."

7. As to the question whether the intended appeal will be rendered nugatory unless we grant the orders sought, both parties confirmed that the matter is scheduled for mention before the Employment and Labour Relations Court tomorrow 29th July 2015 and that having regard to the orders issued on 1st July 2015, there is a real risk that the applicants will be incarcerated before they have had a chance to canvass their appeal.

We are persuaded that unless we grant the orders sought, and the court orders the arrest and incarceration of the applicants following the mention; the intended appeal will be rendered nugatory.

8. We accordingly allow the applicants' application dated 16th July 2015 and order that the orders of the Employment and Labour Relations Court given on 1st July 2015 Kisumu in Cause No. 167 of 2014 and the proceedings in that case are hereby stayed pending the hearing and determination of Civil Appeal No. 56 of 2015 or until further orders of this Court. We further direct that Civil Appeal No. 56 of 2015 be fixed for hearing on a priority basis during the term of the court commencing September 2015. Costs of the application shall abide by the outcome of the appeal.

Dated and Delivered at Busia this 28th day of July, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR