IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, J. MOHAMMED & OTIENO-ODEK JJ.A)

CIVIL APPLICATION NO. NAI. 102 OF 2015 (UR 83/2015)

BETWEEN

NATION MEDIA GROUP LIMITED …….....….APPLICANT

AND

ONESMUS KILONZO ……..….....RESPONDENT

(An application for stay of further proceedings pending the hearing and determination of the intended appeal from the Ruling and Order of the Employment & Labour Relations Court at Nairobi(Nzioki wa Makau, J.) dated 24th March 2014

in

IND. C.C. No. 2355 of 2012)

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RULING OF THE COURT

1. By Notice of Motion dated 16th April 2015, the applicant seeks orders to stay further proceedings before the Employment and Labour Relations Court in ***Nairobi Industrial Cause No. 2355 of 2012*** between **Onesmus Kilonzo -v- Nation Media Group Limited.**

2. The applicant urges that one of the arguable questions in the intended appeal is whether a statutory provision that has been declared unconstitutional by the High Court ceases to exist in statute law by virtue of the court's declaration of unconstitutionality or whether legislative action is required to implement the court's declaration of unconstitutionality. The other arguable point is whether a court can declare a statutory provision unconstitutional thereby denying a litigant equal protection of law as provided in ***Article 27 (1)*** of the Constitution.

3. The relevant background facts are that respondent is a former employee of the applicant who was hired on a six (6) months' contract. On 30th January 2012, two (2) months into the contract, the respondent's contract of employment was terminated allegedly due to his poor performance. Aggrieved by the decision to terminate his employment, the respondent filed a claim at the Employment and Labour Relations Court being ***Industrial Cause No. 2355 of 2012*** citing unfair termination.

4. In response to the claim for unfair termination, the applicant filed a Notice of Preliminary Objection

dated 12th March 2012 founded on ***Section 45 (3)*** of the Employment Act averring that the claim was non-suited. The Section precludes an employee who has been employed for less than thirteen (13) months from making a claim based on unfair termination. ***Section 45 (3)*** of the Employment Act reads as follows:

"An employee who has been continuously employed by his employer <u>for a period not less than thirteen months</u> immediately before the date of termination shall have the right to complain that he has been unfairly terminated."

5. Subsequent to the applicant raising the preliminary objection and in an entirely different suit, the High Court (Lenaola, J.) in the case of **<u>Samuel Momanyi - v- SDV Transami & Another</u>** ***(2012) eKLR)*** declared ***Section 45 (3)*** of the Employment Act to be unconstitutional.

6. As stated above, the applicant's preliminary objection was founded on ***Section 45 (3)*** of the Employment Act. In the instant case, the learned judge Nzioki wa Makau, J. in a Ruling dated 24th March 2014 dismissed the preliminary objection citing the High Court decision of Lenaola, J. in **<u>Samuel Momanyi - v- SDV Transami & Another</u> (2012) eKLR** that declared ***Section 45 (3)*** of the Employment Act unconstitutional. The learned judge Nzioki wa Makau, J. in dismissing the preliminary objection expressed as follows:

*"It is not lost on the court that the real dispute revolves around Section 45 (3) of the Employment Act. In **Momanyi -v- SDV Transami & another (2012) eKLR** Lenaola J. held that Section 45 (3) of the Employment Act is unconstitutional. When a court declares a part of statute unconstitutional, the effect is that that particular section or part ceases to be law. In short Miss Ngige has predicated her entire preliminary objection on a non-existent provision of law. Section 45 (3) of the Employment Act is no longer part of the law in Kenya."*

7. Aggrieved by the Ruling delivered on 24th March 2014, the applicant filed a Notice of Appeal and has filed the present application seeking stay of further proceedings at the Employment & Labour Relations Court in **Nairobi Industrial Cause No. 2355 of 2012** between **Onesmus Kilonzo -v- Nation Media Group Limited.**

8. The applicant raised the following grounds in support of its application for stay of further proceedings.

> *"(i) That the learned judge erred in law and fact in following the decision in **Samuel Momanyi -v- SDV Transami & another (2012) eKLR** which was made on 18th May 2012 that declared Section 45 (3) of the Employment Act unconstitutional.*
>
> ii. *The judge erred in holding that a decision made on 18th May 2012 in **Samuel Momanyi – v- SDV Transami & Another (2012) eKLR** had retrospective application and was to apply retrospectively to the termination of employment which occurred on 30th January 2012.*
>
> iii. *The learned judge erred in law in holding that a declaration by a court that a part of a statute is unconstitutional has the effect of striking out that portion of the law from statute without any legislative process.*
>
> iv. *The learned judge erred by denying the applicant the benefit of equal protection of law as envisaged by Section 45 (3) of the Employment Act and as provided for by Article 27 (1) of the Constitution.*
>
> v. *The learned judge erred in law by finding that the Employment & Labour Relations Court had jurisdiction to hear and determine the claim before it despite the express provision of Section 45 (3) of the Employment Act."*

9. In the supporting affidavit deposed by Messrs Sekou Owino, the applicant submits that it has an arguable appeal with prospects of success. The gist of the applicant's submission on arguability is that at

the time the applicant terminated the employment of the respondent on 30th January 2012, ***Section 45 (3)*** of the Employment Act had not been declared unconstitutional and the applicant relied upon it as the law; that as an employer, the applicant is entitled to equal protection of the law under ***Article 27 (1)*** of the Constitution and ***Section 45 (3)*** of the Employment Act; that the learned Lenaola, J. in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR** did not hear the perspective of the entities that contributed to the inclusion of ***Section 45 (3)*** in the Employment Act; that the learned judge Lenaola, J. neither heard the Attorney General nor the Federation of Kenya Employers; that the Honourable judges of the Employment & Labour court have expressed contrary opinions and are not bound by the decisions of the High Court which is a court of equal status; that as a result of the decision in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR**; it is important that the Court of Appeal should resolve the question of constitutionality of ***Section 45 (3)*** of the Employment Act before any further decisions are made on it.

10. The respondent filed a replying affidavit dated 9th June 2015; it is stated that the applicant made a similar application for stay of proceedings at the Labour Court which application was dismissed on 25th June 2014; that there has been inordinate delay in bringing the instant application and no explanation for the delay has been given; that the respondent's claim before the Employment and Labour Relations Court was heard on 14th May 2015 whereby the respondent testified and was cross-examined and what remains is the applicant's defence case to be heard; that the instant application has been overtaken by events since hearing before the Labour court has commenced; that the applicant's intended appeal does not raise any serious point of law worthy of this Court's attention; that the decision of Lenaola, J. in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR** has not been appealed against and it remains unchallenged as the correct legal position; that ***Section 45 (3)*** of the Employment Act is null and void for being unconstitutional; that the applicant has not demonstrated it has an arguable appeal with any probability of success; that the argument the applicant is advancing on the effective date of the declaration of ***Section 45 (3)*** as unconstitutional does not arise since the Industrial Court case was filed on 21st November 2012 after the judgment in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR** had been delivered on 18th May 2012; that the instant application is meant to delay the respondent from quick prosecution of his case; that fairness and justice demands that the respondent should be given an opportunity to proceed with his claim before the Labour Court and obtain his terminal dues.

11. At the hearing of this application, learned counsel Ms Wanjiru Ngigi appeared for the applicant while learned counsel Mr. Alfred Nyabera acted for the respondent.

12. Counsel for the applicant submitted that the intended appeal had been filed as Civil Appeal No. 108 of 2015; that the appeal is arguable and the core argument relates to the constitutionality of ***Section 45 (3)*** of the Employment Act and the retrospective application of the High Court's judgment declaring the section unconstitutional. Counsel submitted that the failure by the learned judge Nzioki wa Makau to uphold ***Section 45 (3)*** of the Employment Act denied the applicant, as an employer, equal protection of the law provided in ***Article 27 (1***) of the Constitution; that the learned judge erred in failing to find that the rights of an employee under a contract of employment only crystallizes after the qualifying period as stated in ***Section 45 (3)*** of the Employment Act. Counsel cited various decisions from the Labour Court and submitted that several judges of the Employment and Labour Relations Court do not concur with the decision made in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR** and as such, stay of further proceedings should be granted to enable this Court to consider and determine constitutionality of ***Section 45 (3)*** of the Employment Act.

13. Counsel submitted that the appeal as filed will be rendered nugatory if the Employment Court is allowed to proceed and hear the matter when a constitutional issue that determines the jurisdictional competence of the court and the rights of the parties has not been considered by this Court.

14. Counsel for the respondent in opposing the application for stay relied on the replying affidavit urging that the intended appeal does not raise any point of law; that the applicant is seeking an equitable discretionary order from this Court yet it is guilty of inordinate delay in bringing forth the instant application; that the ruling being challenged was delivered on 24th March 2014 and the present application was filed on 21st April 2015 which was more than a year after the ruling was delivered;

whereas counsel conceded that a Notice of Appeal was filed within time, he submitted that the inordinate delay of more than one year disentitled the applicant from any discretionary order that this Court could grant; it was submitted that allowing the present application would prejudice the respondent since the case before the Labour Court had commenced and the respondent had testified and closed his case; that substantial loss would be suffered if stay is granted; counsel submitted that once a provision of statute has been declared unconstitutional it is not part of the laws of the land; that the fact that the applicant's case is founded on an unconstitutional ***Section 45 (3)*** of the Employment Act means that there is no arguable appeal; there can be no arguable appeal founded on an unconstitutional provision. Counsel urged this court to strike a balance of convenience between the competing claims of the parties; that it would be unfair to order stay of proceedings when the respondent had already been heard and closed his case; that the applicant should proceed and tender its defence evidence and appeal after a judgment on merit had been delivered.

15. In brief reply to the respondent's submission, counsel for the applicant reiterated that as an employer, the applicant was entitled to protection under ***Section 45 (3)*** of the Employment Act and that the decision of Lenaola, J. in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR** is erroneous and not binding on a court of equal status.

16. We have considered the application before us, submissions by counsel and the judicial decisions cited to us. This being a motion asking the Court for an order of stay of proceedings under ***Rule 5 (2) (b)*** of the Rules of this Court, the applicant is required to satisfy this Court that its appeal, which has already been filed as Civil Appeal No. 108 of 2015, is arguable and that unless we grant the stay order, the appeal shall be rendered nugatory.

17. The applicant has raised two issues on arguability of the appeal. The first relates to constitutionality of ***Section 45 (3)*** of the Employment Act in light of the decision by Lenaola, J. in **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR**; it is the applicant's contention that the learned judge Nzioki wa Makau erred in law in following the decision in ***Samuel Momanyi case*** **(supra).** It is the applicant's further contention that as an employer it is entitled to equal protection of the law under ***Article 27 (1***) of the Constitution and the decision in ***Samuel Momanyi case*** **(supra)** as followed by the learned judge is not binding on the Employment & Labour Relations Court and the said decision is wrong in law.

18. Having considered submission by both counsel, we are satisfied that the intended appeal raises an arguable point of law as to whether ***Section 45 (3)*** of the Employment Act is unconstitutional. We hasten to add that we are alive to the fact that the applicant is not directly appealing against the decision of Lenaola, J. in the case of ***Samuel Momanyi case*** **(supra)** but rather the intended appeal is against the decision of Makau, J. who concurred and also made a finding that ***Section 45 (3)*** of the Employment Act is unconstitutional. It is our considered view that the constitutionality of ***Section 45 (3)*** of the Employment Act and by extension, the decision in ***Samuel Momanyi case*** **(supra)** has been put at the core and heart of the intended appeal. We find this aspect of the intended appeal as arguable. A further arguable point is whether the High Court can declare a statutory provision unconstitutional and consequently confer upon the Employment & Labour Relations Court jurisdiction to hear and determine a matter that is expressly excluded by the statutory provision declared unconstitutional.

19. From the case law cited by the applicant, there is *prima facie* differing perspectives from decisions of the Employment & Labour Relations Court on constitutionality of ***Section 45 (3)*** of the Employment Act. For instance, in the case of **Danish Jalango & another -v- Amicabre Travel Services Limited Industrial Cause No. 1068 of 2012**, Rika, J. critics the decision in ***Samuel Momanyi case*** **(supra)** stating that "it blurs the intention of Parliament in creating qualifying periods for employees to access certain rights and obligations; that employees are not normally recruited at face value and parties must be allowed a period of learning each other**."** Radido, J. on constitutionality of ***Section 45 (3)*** of the Employment Act in **Mercy Njoki Karingithi -v- Emerald Hotels Resorts & Lodges Limited 2014 eKLR**

expressed himself as follows:

"Before discussing appropriate remedies, I must confess that I may have reached a different conclusion were it not for the decision of Lenaola J in ***Samuel G. Momanyi -v- Attorney General & Another (2012) eKLR****, declaring that Section 45 (3) of the Employment Act was inconsistent with Articles 28, 41 (1), 47, 48 and 50 (1) of the Constitution and therefore invalid. … I have my doubts whether the declaration presents the correct legal position as to whether the termination of an employment contract is subject to Article 47 of the Constitution (right to fair administrative action). I must also note that statutory qualifying period of 13 months to allege unfair termination are replete in statutes in many jurisdictions but since the declaration was made by a court with concurrent jurisdiction and this court has similar status with the High*

Court… there would be no utility in me reaching a contrary conclusion or discussing the issue any further here. Lenaola J. sat as a primary court (court of first instance) and this court is similarly determining the present case as a primary court. The challenge may need to await the decision of a higher court."

20. Given the *prima facie* diverse pronouncements from the Labour court, we are of the considered view that the applicant has demonstrated that the intended appeal herein discloses an arguable point of law.

21. The applicant has taken issue with the retrospective application the High Court's declaration of ***Section 45 (3)*** to be unconstitutional. In order not to pre-empt the outcome of the intended appeal, we are reluctant to address the merits or otherwise of this submission. We however quote in extenso the decision of the Supreme Court in the case of **Mary Wambui Munene - v- Peter Gichuki Kingara & two others, *Supreme Court Petition No. 7 of 2014.*** On retroactivity of unconstitutional provisions, the Supreme Court expressed itself as follows:

Paragraph 84:

[84] In ***Joho***, this Court had been silent on the effect of its declaration of invalidity of a statute and therefore unequivocal about the invalidity of any action emanating from Section 76(1)(a) of the Elections Act. However, in appropriate cases, this Court may exercise its jurisdiction to give its constitutional interpretations retrospective or prospective effect. This derives from the broad mandate accorded this Court by Article 1, 10, 163, 159 and 259 of the Constitution, and Section 3 of the Supreme Court Act, 2011. Indeed, this Court has exercised this jurisdiction in ***Re Senate Advisory Opinion Reference No. 2 of 2013***.

[85] In the South African case of ***Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler (****for the majority****) held:***

"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution."

"Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."

The withholding of prospective effect for the declaration of invalidity, was despite a specific provision in the South African Constitution [Section 172(1)] allowing the Court to make an order limiting the retrospective effect of a declaration of invalidity, or suspending the declaration of invalidity.

[86] In India, Mahajan J, in ***Keshavan Madhava Menon v. The State of Bombay [1951] INSC*** held that:

"If a statute is void from its very birth then anything done under it, whether closed, completed, or

inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law."

This is also in line with the holding of Lord Denning in ***Macfoy's*** *case* **(supra)**, which has been cited widely andwith approval.

[87] However, while we have pronounced ourselves on the issue of invalidity of Section 76(1)(a) of the Elections Act, in line with the Constitution, this Court is not precluded from considering the application of the principles of retroactivity or proactivity on a case-by-case basis. As such, in the instant matter, the issue of invalidity of Section 76(1) (a) of the Elections Act is bound to the issue of time. Time, as a principle, is comprehensively addressed through the attribute of accuracy, and emphasized by Article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in ***Joho*** was guided by this consideration.

[88] For the purposes of this case, we apply the precedent in ***Joho,*** taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion.

1. From the analysis above, and from a review of the principles in the ***Joho*** case as regards the settlement of electoral disputes, we are convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act, i.e. 2nd December 2011.

1. We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action. A relevant case in this regard is ***A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88***, (at paragraph 36) where Murray CJ, stated as follows:

*"**Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position"**.*

[91] We are of the view that the above principles are sound in law and applicable in this case."

22. The final issue for our determination in the instant application is whether the intended appeal shall be rendered nugatory if stay orders are not granted. It is the applicant's contention that if stay is not granted, its appeal shall be nugatory to the extent that it shall be denied equal protection of the law under **Article 27 (1)** of the Constitution and ***Section 45 (3)*** of the Employment Act. Conversely, the respondent contends that the intended appeal shall not be rendered nugatory since the case before the Labour court has commenced and the applicant should put forth its defence and witnesses.

23. In our view, the foundation and substratum of the applicant's defence is ***Section 45 (3)*** of the Employment Act. Its defence stands and falls depending on the constitutionality of ***Section 45 (3)*** of the Employment Act. The legal effect of the declaration that ***Section 45 (3)*** of the Employment Act is unconstitutional is to take away the applicant's defence and arguably its equal protection of law. We are satisfied that the applicant's defence and intended appeal shall be rendered nugatory if the constitutionality of ***Section 45 (3)*** is not heard and determined by an appellate court. The constitutionality of the aforesaid section should be interrogated and determined; a constitutional issue that has the potential

to abridge the right or entitlement of an individual must generally be given precedence in hearing and determination.

24. Accordingly, we find that the Notice of Motion dated 16th April 2015 has merit and we hereby order that there be a stay of further proceedings in the Employment & Labour Relations Court **Cause No. 2355 of 2012 Onesmus Musyoki Kilonzo versus Nation Media Group Limited** pending the hearing and determination of **Civil Appeal No. 108 of 2015 Nation Media Group Limited versus Onesmus Musyoki Kilonzo**. Costs of this application shall abide by the outcome of **Civil Appeal No. 108 of 2015.**

Dated and delivered at Nairobi this 17th day of July, 2015

G.B.M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR