



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWILU , & OTIENO-ODEK, JJ.A.)**

**CIVIL APPLICATION NO. NAI. 20 of 2015 (UR 20/2015)**

**BETWEEN**

**BANKING INSURANCE AND FINANCE UNION (K) .....APPLICANT**

**AND**

**1. HON. JUSTUS ALOO OGEKA**

**2. OUMA JUMA**

**3. SEBASTIAN NGOR**

**4. RICHARD ONGO**

**5. MARK AMIMO**

**6. MONICA KEND**

**7.NANCY JERUTO (As interim officials of Kenya National Union of Cooperatives Staff) .....1<sup>ST</sup>  
RESPONDENT**

**THE REGISTRAR OF TRADE UNIONS .....2<sup>ND</sup> RESPONDENT**

**KENYA UNION OF COMMERCIAL FINANCE**

**UNION (K).....3<sup>RD</sup> RESPONDENT**

***(An application for stay of proceedings pending the hearing and determination of an intended appeal  
from the ruling and orders of the Industrial Court of Kenya at Nairobi (L. Ndolo, J.) dated 21<sup>st</sup>  
November 2014***

**in**

**IND. APPEAL NO. 'A' OF 2012)**

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**RULING OF THE COURT**

1. The applicant by Notice of Motion dated 28<sup>th</sup> January 2015 has moved this Court under **Sections 3 A & B** of the **Appellant Jurisdiction Act** and **Rules 5 (2) (b), 41 and 47** of the Rules of this Court seeking orders to stay proceedings in Nairobi Industrial Cause Appeal No. 1 “A” of 2012 pending the hearing and determination of an intended appeal against the Ruling/Orders of Ndolo, J. dated 21<sup>st</sup> November 2014.

2. In the impugned ruling at paragraph 7 thereof, the learned judge expressed herself as follows:

**“The issue for determination in this application is whether the 2<sup>nd</sup> Interested Party has made out a case for stay of proceedings in the appeal pending before this Court. For good order, I need to restate that what is pending before this Court is an appeal from the decision of the Registrar of Trade Unions to decline the appellant’s application for registration as a trade union. The decision by the Registrar of Trade Unions was based on the ground that the sector in which the appellants sought registration was well covered by other trade unions. ....The 2<sup>nd</sup> interested party does not raise any point of law upon which they intend to appeal and on this ground alone, I find the application to be without merit and proceed to dismiss it with costs to the appellants.”**

3. The ruling by the trial court dated 21<sup>st</sup> November 2014 is an order refusing to grant stay of proceedings before that court. It is apparent that the applicant’s intended appeal is against an order refusing stay of proceedings - the intended appeal is against a negative order.

4. For the applicant to succeed in the instant application, it must satisfy the twin guiding principles under **Rule 5 (2) (b)** that the intended appeal is arguable; it is not frivolous and that unless stay is granted, the appeal or the intended appeal, if successful, would 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 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.

5. At the hearing of the present application, learned counsel Ms Judy Guserwa appeared for the applicant while learned counsel Mr. G.B. Miyare appeared for the 1<sup>st</sup> respondent and learned counsel Mr. Nyabera Alfred appeared for the 3<sup>rd</sup> respondent.

6. Counsel for the applicant submitted that the application is meritorious and should be allowed. Counsel for the 3<sup>rd</sup> respondent supported the application. Counsel for the 1<sup>st</sup> respondent ardently opposed the application.

7. We have considered submissions by all counsel and the law and hereby restate that the intended appeal upon which the present application is grounded is an appeal against a negative order; it is an intended appeal against the ruling by the trial court refusing to grant orders for stay of proceedings.

8. This Court has often times stated that except for costs, no appeal lies against a negative order. In the case of **Kanwal Sarjit Singh Dhiman -vs- Keshavji Jivraj Shah [2008] eKLR**, this Court while dealing with an application for stay of a negative order, held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”**

9. In **Western College of Arts & Applied Sciences v. Ornaga & Others (1976) KLR 63** this Court held that the Court has no jurisdiction to issue stay pending appeal where there was nothing in the

order of the High Court that can be enforced.

10. We remind ourselves that the decision to grant or not to grant a stay order is a decision made in exercise of discretion by the trial court. In the instant case, the intended appeal is a challenge on the exercise of discretion by a trial court. The Supreme Court in **Teachers Service Commission - v- Kenya National Union of Teachers & 3 others, SC Application No. 15 of 2015** expressed the view that a court lacks jurisdiction to entertain an application challenging the exercise of discretion by another court.
11. Guided by the dicta in **Teachers Service Commission (supra)** and the dicta in **Western College of Arts & Applied Sciences (supra)** and noting that the intended appeal is against a negative order and also an intended appeal challenging the exercise of discretionary power, we are of the considered view that the present application does not disclose that the intended appeal is arguable. The applicant has not proved to our satisfaction one of the two limbs necessary for the grant of stay orders under ***Rule 5 (2) (b)*** of the Rules of this Court.
12. Having found that the intended appeal is not arguable, we see no reason to consider whether the intended appeal shall be rendered nugatory.
13. The upshot is that the Notice of Motion dated 28th January 2015 be and is hereby dismissed with costs.

*Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2015.*

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**