



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & OKWENGU, JJ.A.)

CIVIL APPLICATION NO. NAI 252 OF 2014 (UR 193/2014)

**THE CABINET SECRETARY MINISTRY OF LABOUR NATIONAL SOCIAL
SECURITY AND SERVICES.....APPLICANT**

VERSUS

CENTRAL ORGANISATION OF TRADE UNIONS (K)...1ST RESPONDENT

FRANCIS ATWOLI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(An application for stay of proceedings pending the hearing and determination of an intended appeal against the Ruling/Order of the Industrial Court of Kenya at Nairobi (Monicah Mbaru, J) dated and delivered on 16th September, 2013 In Industrial Cause No. 1213 of 2014)

RULING OF THE COURT

Francis Atwoli (2nd respondent) is the Secretary General of **Central Organisation of Trade Unions (K) (COTU)** (1st respondent), a large and powerful Workers' Trade Union. He had represented the 1st respondent in the NSSF Board of Trustees for many years prior to July 2014. On 18th July, 2014, the applicant t vide Gazette Notice No. 4880 purported to revoke the 1st respondent's appointment to the said Board. This did not go well with the 1st and 2nd respondents who consequently moved to the Employment and Labour Relations Court (**Labour Court**) on 21st July, 2014 under a certificate of urgency, seeking leave to apply for orders of certiorari to quash the decision of the applicant dated 9th July, 2010 and Gazette Notice No. 4880 of 18th July, 2014. The 1st and 2nd respondents also sought leave to apply for an order of mandamus directing the 1st respondent to restore and or re-gazette the appointment of the 1st respondent's nominee being the 2nd respondent to the NSSF Board of Trustees.

In objection, the applicant filed an application dated 22nd July, 2014 that questioned the jurisdiction of the Court to hear and determine the suit filed by the 1st and 2nd Respondent. The learned Judge consolidated these applications, with another one filed on 25th July, 2014 by Federation of Kenya Public Service Trade Unions of Kenya (**PUSETU (K)**), which was seeking to be joined as an interested party.

After hearing all the parties, Mbaru J, came to the conclusion that the Employment and Labour Relations Court is seised of jurisdiction to hear and deal with matters of employment under the National Social Security Fund Act, with regard to employment benefits such as their contributions to the Fund, representation, and appointments of persons serving under the NSSF Board of Trustees. She opined that such matters cannot be divorced from employment, which is an issue that the Court has exclusive jurisdiction over. The Judge stated;

“The Court is also the appropriate forum for the parties to address the cause of action as outlined by the Applicants being a matter with regard to employees’ benefits which are inclusive of employers by the Board of Trustees of NSSF.

That is the ruling that provoked this application which is pronounced to be brought under **Rule 5(2)(b), 41 and 47 of the Court of Appeal Rules**, seeking *inter-alia* an Order to stay all further proceedings in Nairobi Industrial Cause No. 1213 of 2014, pending the hearing and determination of an intended appeal.

The application is supported by the affidavit of **Hon. Samwel K. Kambi**, the Cabinet Secretary, Labour Social Security and Services, sworn on 26th September, 2014. It is opposed by the 1st and 2nd respondents vide the replying affidavit of **Francis Atwoli** sworn on 14th October, 2014.

When the application came up before us for hearing the parties consented that the matter proceeds by way of written submissions. The parties did not observe the timelines set by the court for filing the submissions, and so the ruling could not be delivered as scheduled. Submissions on behalf of the appellant by the firm of **Ahmednasir Abdikadir & Company Advocates** were filed on 11th June, 2015. It was counsel’s submission that the term ‘labour relations’ refers to the system in which employers, workers and their representatives and the government interact to set the ground rules for the governance of work relationships. The core elements of industrial relations consist of trade unionism, collective bargaining and labour management relations, he submitted. Learned counsel further urged that the present dispute did not touch on labour relations as such. According to him, the matter in question related to the restructuring of the NSSF Board of Trustees, which was outside the purview of the Labour Court.

By virtue of **Section 5 of the National Social Security Fund Act, 2013**, the NSSF Board of Trustees is established as a body corporate and is vested with the responsibility of directing and managing the Fund.. In learned counsel’s opinion, the learned Judge attempted to overstretch the jurisdiction of the Employment and Labour Relations Court, in order to entertain any matter which pertains to any of the persons set out under **Section 12(2) of the Employment and Labour Relations Act**. Citing the Supreme Court decision in **Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 Others [2012] eKLR.**, learned counsel equated the Judge’s action with assuming jurisdiction through judicial craft or innovation, which the Supreme Court deprecated in the **Macharia case** (supra).

He further contended that the mere fact that the matter relates to actions taken by the Cabinet Secretary of the Ministry of Labour and Social Security cannot trigger the jurisdiction of the Employment and Labour Relations Court. He submitted that the said Court was only set up to deal with matters on employment and labour relations. Moreover, the matter revolves around a corporate restructuring of the NSSF Board of Trustees, as opposed to employee benefits.

On her part, learned counsel for the 1st and 2nd Respondents, **J. A. Guserwa**, by written submissions filed on 26th June, 2015, defended the learned Judge’s decision.

She urged that the dispute before the Employment and Labour Relations Court is defined by the applicant’s unlawful revocation of appointment of the 1st respondent who is the 2nd respondent’s nominee to the NSSF Board of Trustees in his capacity as the workers representative as envisaged by **Section 6 (d) (ii) of the NSSF Act 2013** which provides as follows;

“Two persons, one of whom shall be of opposite gender, nominated by the most representative workers organisation by virtue of their knowledge and experience in matters relating to

employees to represent employees in Kenya.”

She urged that the dispute touches on the tripartite relationship between the employers, workers and the government which relationship is grounded on labour relations and cannot be better described than that. She contended that the act of degazetting the nomination of the employers and employees nominees/representatives to the NSSF Board of Trustees was within the jurisdiction of the Employment and Labour Relations Court.

In conclusion, learned counsel urged us to find that the learned Judge did not err in her findings on the Court’s jurisdiction and consequently, the application was misconceived and frivolous, and is for dismissal.

We have considered these able submissions of counsel, along with the cases cited to us. The principles applicable for the determination of an application under **rule 5 (2) (b) of this Court’s Rules** are well settled as enunciated by this Court in

Civil Application No. Nai. 157 of 2006 in Ishmael Kagunyi Thande v. Housing Finance of Kenya Ltd (unreported) in these terms:

“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 (1982-88) KLR}.”

A notice of appeal having been filed, all that is required of us at this stage is to consider the material laid before us, *vis a vis* these twin principles and make a determination as to whether this application ought to be allowed or not i.e whether there is an arguable appeal and whether the intended appeal would be rendered nugatory if the stay of proceedings is not granted. For the order of stay to be granted, both questions must be answered in the affirmative.

On the limb of arguability, there is no doubt that the entire appeal revolves around the issue of jurisdiction. This undoubtedly is an important point of law, on which the life of the suit before the Labour Court hinges. This is a very important point whose application will transcend the specific parties herein, as it will determine the scope of the jurisdiction of the labour Court in similar disputes in future. That singular point would qualify to establish the first limb. As we have pronounced in several of our decisions on this subject, even one arguable point is sufficient to establish the first limb.

As stated by this Court in **Kenya Medical Lab Technicians & Technologists Boards v. Prime Communications Limited [2014] eKLR:-**

“In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the Court...And besides, an appeal is considered arguable even if it raises a single bonafide point only....”

The provisions of the **Article 162(2) of the Constitution** and **section 12(1) (2) of the Employment and Labour Relations Act** clearly provide for the jurisdiction of the Court. Whether the revocation of gazettelement of a person to a Board of Trustees falls within the jurisdiction of the Employment and Labour Relations Court is arguable and not frivolous, especially because it is not expressly provided for in the Employment and Labour Relations Act. As stated earlier on however, establishing one of the limbs is not sufficient as the twin limbs are conjunctive and not disjunctive.

Has the applicant established the second limb on the nugatory aspect? As stated earlier, it is incumbent

upon the applicant to establish that if the order of stay of proceedings sought is not granted, then , the intended appeal were it to succeed would be rendered nugatory. (See **Reliance Bank Ltd (In Liquidation) vs Norlake Investment Ltd [2002]1EA 227**).

As observed when this matter came up for hearing, this application had already been overtaken by events, as the 2nd respondent was reappointed to the same Board. Moreover, even if that was not the case, the appeal would not have been rendered nugatory if the proceedings before the Labour Court are not stayed, because the issue of jurisdiction would still be determined in the appeal itself. It is a subject which in our view would not dissipate even if the order of stay is not granted.

For these reasons, our finding is that the applicant has failed to satisfy the requirements necessary for his application to succeed. The application therefore fails. The same is hereby dismissed with costs in the appeal.

Dated and delivered at Nairobi this 18th day of December, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR