



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & MWILU, JJ.A)

CIVIL APPLICATION NO. NAI. 29 OF 2015

BETWEEN

RAILWAYS & ALLIED WORKERS UNION..... APPLICANT

AND

RIFT VALLEY RAILWAYS WORKERS UNION..... 1ST RESPONDENT

RIFT VALLEY RAILWAYS (KENYA) LTD..... 2ND RESPONDENT

(An application for a stay of the orders pending the lodging, hearing and determination of an intended appeal from the Ruling and consequential orders of the Industrial Court of Kenya

at Nairobi (Ndolo, J.) dated 24th September, 2014

in

Industrial Cause No. 587 of 2013 consolidated with Causes Nos. 116 & 241 of 2013)

RULING OF THE COURT

The Notice of Motion before us seeks orders, *inter alia* to stay execution of the rulings dated 24th September 2014 and 10th December, 2014 by L. Ndolo J in Industrial Causes No. 587 of 2013 as consolidated with Cause No. 116 & 241 of 2013. At the center of the dispute are two unions: Railways & Allied Workers Union – the applicant and Rift Valley Railways Workers Union – the 1st respondent while Rift Valley Railways, (Kenya) Limited, the 2nd respondent is the employer of the members of both unions. The learned trial judge identified three issues for determination in the ruling of 24th September, 2014 which is the substantive matter that gave rise to the Notice of Appeal and the present Notice of Motion which is brought under the provisions of Rule 5 (2) (b) of this Court’s Rules.

The issues identified by the learned judge for determination were:-

- a. ***Deductions and remittance of union dues to the claimant.***
- b. ***Deductions and remittance of agency fees to the 2nd respondent and***

c. **Recognition of the claimant by the 1st respondent.**

What we can gather from the record of appeal is that the 1st respondent in one of the suits was seeking a Ministerial order directing the employer that is the 2nd respondent to deduct trade union dues from the wages of its members. Under **Section 48 (2) of the Labour Relations Act**, a trade union may, in the prescribed form request the Minister to issue a ministerial order directing an employer of more than 5 employees belonging to a union to deduct union dues from the wages of its members.

The employer was arguing that the 1st respondent had not obtained the Ministerial order for deduction and remittance of unions dues and as such, they were not entitled to them. The matter was first referred to a conciliator, one **R. J. Twanga** who was supposedly to determine the issue of membership of both unions. Upon hearing the parties, the conciliator recommended the 1st respondent to remain with 30 contributing members while the applicant would have 618 members. When the matter went back to court, it is not clear from the scanty records before us what the learned judge made of the conciliator's report. It would seem to us the learned judge considered the whole matter and in respect of each of the issues identified above, and also the conciliator's report as if it was part of the evidence and made the following conclusions:-

“The 1st respondent shall immediately thereafter commence deduction and remittance of union dues to the claimant on account of all the employees whose resignation letters and check off forms will have been received by the 1st respondent. The 1st respondent is directed to allow the claimant access to its premises for the purposes of service of the resignation letters and check off forms...”

...in the instant case, a number of employees have indicated their wish to resign from the 2nd respondent in favour of the claimant. I therefore find that no agency fees is recoverable from these employees. In its submissions, the claimant stated that the 1st respondent had continued to deduct agency fees inspite of the order of this court issued on 11th June 2013. I therefore direct the 1st respondent to file a status report on this particular issue within the next 7 days from the date of this ruling...

...Attainment of a simple majority for purposes of recognition is a matter of evidence. I therefore direct the 1st respondent to file a list of all its unionisable employees as at the date of this ruling. The 2nd respondent and the claimant shall thereafter file a list of their members showing evidence of membership within 14 days of service of the list of the 1st respondent unionisable employees.”

The applicants were not satisfied with the aforesaid orders. They filed an application seeking orders of stay on 9th December, 2014 which was dismissed by a ruling delivered by the same judge on 10th December, 2014. In dismissing the said application, the learned judge clarified that the balloting exercise would proceed as directed in the orders of the 24th September 2014, and the time for carrying out the said orders was to start running from 10th December, 2014.

The aforesaid orders are the ones that provoked this application. In submitting the Notice of Motion meets the required threshold, that (1) the intended appeal is arguable, Mr. Seriani learned counsel for the applicant submitted that if balloting exercise proceeds as ordered, it will contravene the provisions of

Sections 48 (1) and 54 of the Labour Relations Act which clearly spells out how an employee becomes a member of a trade union and also how a recognition of a Trade union happens respectively. Counsel argued that the report by the conciliator indicated that the membership of the 1st respondent were 30 members; moreover the judge concluded that the issue of membership can only be determined through evidence; there is no provision for balloting because a member of trade union pays their required subscription which is a condition precedent for membership. Employees have freedom to choose and a right to organize themselves into a union; the conciliation having resolved the issue of membership, it was

preposterous for the court to order balloting by members.

Mr. Mwenesi learned counsel for the 2nd respondent who is the employer in this case supported the Notice of Motion. He relied on the replying affidavit sworn by **Grace Wamiti**, the Human Resource Partner. According to Mr. Mwenesi, there are matters of law that require to be resolved in the intended appeal. One such issue is the fact that there was recognition of the union which was in force before the impugned orders. Another issue was the fact that the judge did not follow the procedure of receiving and adopting the conciliation report and in this regard a fundamental issue of whether the 2nd respondent was given a fair hearing turns out for determination in the intended appeal. He relied on the dicta in;- **Freight In Time Ltd vs. Rosebell Wambui Muthee 2014 eKLR**. This case involved a contract of employment and after the termination of the services of the respondent, she sued the appellant and she was awarded a total of Kshs. 956,896 as compensation for unfair termination and terminal benefits. In declining to issue an order of stay of execution, this Court, differently constituted, held the applicant had a duty to establish the twin principles that the appeal is arguable and unless stay of execution orders are granted the appeal will be rendered nugatory. The applicant succeeded on the first limb but failed to prove the appeal would be rendered nugatory.

In demonstrating the appeal will be rendered nugatory, Mr. Mwenesi told us that balloting of serving employees as ordered by the trial judge would disrupt the operations of the 2nd respondent. The said employees would have to leave their places of work to attend balloting which is to be conducted without guidelines. Lastly, balloting will involve expenses to bring all the employees to a central place for balloting which expenses cannot be compensated in the event the appeal is successful.

This application was opposed by the 1st respondent. **Mr. Munayi Isaac Opondo**, the Secretary General of the 1st respondent relied on his replying affidavit sworn on 25th February 2015. He submitted that the appeal has no chances of success, because the applicant in collusion with the employer are denying the 1st respondent, a union of choice by employees to conduct balloting so as to put the issue of membership to a complete rest. He told us it is through balloting that genuine members of the union will be determined. Conducting a balloting exercise will provide a most democratic formula for each member to identify openly their preferred union. There is evidence on record to show the number of members who have already re-affirmed their membership whose union dues should be remitted to the 1st respondent. However, the applicants obtained an order of stay of execution on 13th March 2015 and up to date they have not filed an appeal. The applicant has a duty to demonstrate to the satisfaction of the court that the intended appeal is arguable, and that unless the order of stay of execution is granted the intended appeal if successful would be rendered nugatory.

We take note that in considering an application for stay of execution the learned judge properly directed her mind to a well-trodden path of decided cases such as **Reliance Bank Ltd vs. Noriake Investments Limited [2002] 1EA 227 (CAK) 227** and a further dicta by Rika J in **Rosebell Wambui Muthee vs. Freight In Time 213 eKLR** where the judge stated an arguable appeal should be grounded on recognized matters of law, not recycled arguments of facts.

Guided by the aforesaid principles, the applicant as well as the employer have raised the following issues of law which were not challenged by the 1st respondent.

(i) The judge appointed a conciliator who heard both parties and filed a report before court. It is not clear what the judge made of the said report: the said report was also not received according to the provisions of Section 68 of the Labour Relations Act.

(ii) How do employees become members of a union? Can parties be directed by a court order to become members of a union like the judge did by stating:-

“The 1st respondent further claims that no check off forms have been served on it. I therefore direct the claimant to serve the resignation letters and the check off forms within the next 14 days from the date of this ruling.”

(iii) Why was the 1st respondent not issued with the ministerial order in accordance with the provisions of Section 48 (2) of the Labour Relations Act. Are the provisions of Section 48 (2) in contravention of Article 41 (2) of the Constitution and Section 4

(1) of the Labour Relations Act as posted by the judge in the ruling thus:

“The argument by the 1st and 2nd respondents which was supported by the conciliator is that since the claimant has not obtained a ministerial order for deduction and remittance of union dues, then the claimant is not entitled to union dues. In my considered opinion, this view renders a constricted interpretation of the right of employees to subscribe to a trade union of their choice as granted under Article 41 (2) of the Constitution and Section 4 (1) of the

Labour Relations Act.”

The above questions have to be looked at in the context of the provisions of the **Labour Relations Act**. We think all these questions constitute issues that are arguable and the answers lie with the trial court that will interrogate them. For purposes of this application, and to satisfy the test under Rule 5 (2) (b) of this Court Rules, all a party needs to raise is one arguable point to present on appeal.

On the nugatory aspect, counsel for the applicant submitted, and this was supported by Mr. Mwenesi for the 2nd respondent that a balloting exercise is not only an expensive affair but it will disrupt the entire operations of the employer as all the unionisable employees who are over 600 have to be released from work to do balloting. This has to be considered in light of the provisions of **Section 48 (1)** of the **Labour Relations Act** that provides:-

(1) In this part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a consideration for membership”.

The 1st respondent submitted that holding a democratic exercise such as balloting by members to ascertain membership of the unions cannot prejudice anybody. That may very well be so, but unfortunately the law must be followed to the letter to determine membership and if balloting by members is not provided for in the law as there is another procedure as alleged by the applicant, it is entitled to be given their day in Court to present their appeal and in the event that stay of execution is not granted and their appeal is likely to be successful, then it would be rendered nugatory.

For the aforesaid reasons we are satisfied that the Notice of Motion dated 5th February, 2015 has merit, it is hereby allowed in terms of prayer No. 4 pending the hearing and determination of the appeal. The applicant is directed to file and serve the record of appeal within 60 from the date of this ruling (if it is not yet filed). Thereafter the appeal shall be fixed for hearing on priority basis.

The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 4th day of December, 2015.

ALNASHIR VISRAM

..... JUDGE OF APPEAL

MARTHA KOOME

..... JUDGE OF APPEAL

P. MWILU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR