



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (P), GITHINJI & OUKO JJ.A)

CIVIL APPLICATION NO. 180 OF 2013 (UR 127/2013)

IN THE MATTER OF INTENDED APPEAL

BETWEEN

DR. MARANGU RUCHA1ST APPLICANT

DR. WALTER KONYA2ND APPLICANT

AND

ATTORNEY GENERAL & 9 OTHERSRESPONDENTS

ST. MARY'S MISSION HOSPITALINTERESTED PARTY

(An application for stay pending the judgment, hearing and determination of the intended appeal from the judgment and consequential orders of the Industrial Court of Kenya at Nairobi of Nduma J. dated 8th July 2013

in

INDUSTRIAL COURT PETITION NO. 20 OF 2012)

RULING OF THE COURT

The 3rd to 10th respondents were employees of St. Mary's Mission Hospital, the interested party. Following their dismissal from their employment, they instituted Cause No. 538 of 2011 at the Industrial Court against the hospital and the two applicants herein who are the administrators of the hospital. Mukunya, J. in his award rendered on 27th April 2012 found that the dismissal was wrongful and ordered the interested party (the Hospital) to reinstate the 3rd to the 10th respondents without loss of any benefit.

The applicants were, on the other hand, restrained by an order of permanent injunction from interfering with the reinstatement and employment of the 3rd to the 10th respondents or their rights to remain in occupation of the houses provided by the hospital.

It would appear that there was non-compliance with those orders as the 3rd to the 10th respondents returned to the Industrial Court seeking to have the two applicants punished for committing contempt of the orders issued on 27th April 2012 by Mukunya, J. The two were, pursuant to that application which was granted by Makau, J., arrested and committed to the Industrial Area Remand Prison to serve the sentence of one month imprisonment. The applicants, being aggrieved by that order expressed their intention to challenge it in an appeal by timeously lodging in the Industrial Court a notice of appeal on 14th August 2012 through the firm of Mindo & Co. Advocates.

What became of that intended appeal is not clear to us. Instead on 10th August 2012, through their newly engaged firm of Macharia – Mwangi & Njeru Advocates, the applicants petitioned the Industrial Court in petition No. 337 of 2012 to:-

- i. find that the order of committal to civil jail was unconstitutional
- ii. declare that the Industrial Court had no jurisdiction to punish for contempt of court.
- iii. quash by *certiorari* the decision of the Industrial Court made on 31st July 2012 in so far as it purported to commit the applicants to civil jail.
- iv. issue an order of *mandamus* to compel the Industrial Area Remand Prison to forthwith release the applicants from prison custody, and
- v. issue an order of prohibition to restrain the respondents in that application from causing the imprisonment of the applicants to civil jail.

Mwilu, J. (as she then was) granted a conservatory order releasing the applicants from jail subject to each posting a cash bail of Kshs. 1million, pending the hearing and determination of the petition.

Nduma, J. heard the arguments in the petition and on 8th July 2013 dismissed it stating, *inter alia*, that the Industrial Court (Makau J) had jurisdiction to entertain application for committal for contempt of court; that the orders of *certiorari* and *mandamus* were not available to the applicants for the reason that those reliefs could only be granted in a judicial review application and not in a constitutional petition, the vehicle used by the applicants.

We have observed earlier that the dismissal of the petition aggrieved the applicants who intend to challenge it on appeal to this Court, and in terms of **Rule 75** of the Court of Appeal Rules has lodged a notice of appeal. Meanwhile, they have brought this notice of motion that there be an order to stay the decision of Nduma, J. made on 8th July 2013 pending the hearing and final determination of the intended appeal.

The combined effect of the respondents' and the interested party's replying affidavits is that the application is an abuse of the court process and is only intended at delaying the conclusion of the matter; that it does not meet the requirements of **Rule 5 (2) (b)** of the Court of Appeal Rules; that while this application was pending the applicants made a similar application to the Industrial Court, which was allowed by Ndolo, J; that in the meantime, the applicants have continued to violate the order reinstating the 3rd to the 10th respondents; and that the orders dismissing the petition are incapable of being stayed.

The motion is expressed to be brought under **Sections 3A** and **3B** of the Appellate Jurisdiction Act, **Rules 5 (2) (b)** and **42** of the Court of Appeal Rules. We reiterate that the applicants pray, in the main that:-

“2.pending the hearing and final determination of the intended appeal this Honourable Court be pleased to grant a stay of execution of the decision of the Industrial Court delivered by the Honourable Justice Nduma in Petition No. 20 of 2012 on 8/7/2013 in so far as it permits the respondents to pursue the arrest and committal to jail of the applicants on the strength of the order of the Industrial Court in Cause No. 518 of 2011 dated

31/07/2012.”

The prayer makes reference to the ruling of Makau, J. made on 31st July 2012 even though that ruling will not be subject of the intended appeal as is clearly demonstrated by the notice of appeal lodged in respect of the intended appeal against the decision of 8th July 2013. It reads in relevant part as follows:-

“.....the 1st and the 2nd petitioners herein, being dissatisfied with the ruling of the Honourable Justice Nduma Nduma given at Nairobi on the 8th day of July 2013 intends to appeal to the Court of Appeal against the whole ruling.”

There is no relevance in making reference in the application to orders made on 31st July 2012 in Industrial Court Cause No. 518 of 2011 except perhaps to make it appear as if there was a positive order capable of being stayed. It cannot be said, as the applicants appear to imply, that the decision dismissing the petition “permitted” the respondents to pursue the arrest and committal of the applicants to jail. The orders committing the applicants to jail was an earlier distinct order from that dismissing the petition. The applicants had also expressed their intention to appeal against the former and filed a notice of appeal on 27th August 2012 but appear to have abandoned the bid.

It follows that the applicants themselves having expressed their intention to appeal against the entire decision of Nduma, J, it is that decision and not that of Makau, J. that is sought by this application to be stayed.

In dismissing the applicants’ petition Nduma, J. concluded with regard to the applicants’ committal to civil jail for contempt as follows:-

“The Court therefore had jurisdiction to entertain contempt of court proceedings in terms of Section 5 of the Judicature Act; Cap 8 of the Laws of Kenya at the time leave to commence contempt proceedings was granted.....This means that the only avenue available to the petitioners was to appeal against the decision of the Industrial Court of 31st July 2012 committing them to jail for one month for contempt of court. To this extent, the petition is misconceived and the same is dismissed with costs to the respondents.”

The above, in our view, does not constitute an order directing any party to do or restrain from doing anything. We can do no better than to reproduce a statement made recently by this Court in **F & S. Scientific Ltd. V. Kenya Revenue Authority & Another**, Civil Application No. 260 of 2012. The court said:-

“Asking for “stay of implementation” of a decision by the respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law it is not possible to grant an order of stay of “execution” or “implementation” where the action has been dismissed. This is the view of this Court as expressed in many decisions. For instance, in the case of Republic V. Kenya Wildlife Services & 2 others, Civil Application No. Nai. 12 of 2007 the Court said in part:-

‘The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the Superior Court which can be the subject matter of the application for injunction or stay.....’

That perhaps explains the curious manner in which the prayer in this application is framed.”

So that even though we may be satisfied that the intended appeal will be raising arguable questions such as whether the predecessor of the current Industrial Court had jurisdiction to punish for contempt, we do not think that the appeal will be rendered nugatory by dismissing this application.

In other words and strictly speaking **Rule 5 (2) (b)** aforesaid would have only applied to the order committing the applicants to prison as that was a positive order.

Accordingly, this application fails and is dismissed with costs being in the intended appeal.

Dated at Nairobi this 24th day of January 2014.

P. KIHARA KARIUKI

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PRESIDENT, COURT OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR