



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MARAGA, MWERA & G. B. M. KARIUKI, J.J.A.)

CIVIL APPLICATION NO. NAI. 343 OF 2013 (UR 153/2013)

BETWEEN

NAKURU WATER SANITATION SERVICES.....APPLICANT

AND

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Onyaya, J.) dated 8th November, 2013

in

Industrial Petition NO.5 of 2013

RULING OF THE COURT

By the notice of motion dated 25th November, 2013 brought under Rule 5(2)(b) of Court of Appeal Rules, the applicant corporation had this main prayer:

- 1. that there be a stay of execution of the decree from the judgment of the Nakuru Industrial Court Petition No.5/2013 pending hearing and determination of an intended appeal.***

From the grounds in the body of the motion, the supporting affidavit thereof and the submissions before us, the background of this matter is that the respondent organization successfully challenged the manner in which the applicant had hired some staff in the Industrial Court at Nakuru as being irregular (***Ongaya, J.***). The learned Judge agreed with the respondent and so found. The recruitment was invalidated and a fresh one ordered. The decree was partially executed when the involved staff were not employed and the applicant was poised to commence the process of recruitment afresh. In the meantime, the respondent filed and served a bill of costs for some Sh.14.9m and was moving to have it taxed. The applicant being apprehensive that the bill, if taxed, would result in a certificate of costs which the respondent would move to execute, proceeded to file the present notice of motion for orders to stay the execution for costs.

Mr. Githui, learned counsel for the applicant firm, submitted that one of the grounds of appeal to be presented is that the Industrial Court at Nakuru lacked jurisdiction to hear and determine the subject of recruitment of staff by the applicant. He added that the respondent did not demonstrate before the Industrial Court that it was a body or anybody in law to commence the subject proceedings, therefore it did not have the *locus standi*. And lastly that if the certified costs, likely to be a substantive sum after taxation, are paid by the applicant, which is a public body, to the respondent, the probability of recovering the same, in the event the appeal succeeds, is slim. The financial capacity of the respondent to refund the paid costs was uncertain, and thus the appeal could be rendered nugatory.

Mr. Kipkoech, learned counsel for the respondent opposed the application on the ground that it was not deponed anywhere in the supporting affidavit that the respondent was impecunious. That costs follow the event and now that the respondent had been successful in the proceedings before the Industrial Court, it was entitled to the costs involved. Counsel added that normally, and authorities have it, execution for costs should not be stayed. In any event costs in this matter were yet to be taxed and thus there was no step to execute for them.

As regards other points raised by **Mr. Githui**, **Mr. Kipkoech** maintained that under Article 41 of the Constitution, the Industrial Court had jurisdiction to deal with the dispute that was before it and under Articles 19, 20, 21, 22 of the Constitution, the parameters of *locus standi* have been so expanded that the respondent had properly and validly come to court under those provisions of the Constitution. And in any event, it had tabled its copy of certificate of incorporation as an NGO. So it had competence to challenge the manner in which the staff had been recruited by the applicant.

It is now well settled that a party approaching this Court under Rule 5(2)(b) of the Court of Appeal Rules has to fulfill two conditions, namely:

(a) to demonstrate that it has an arguable and not a frivolous appeal to present; and

(b) that if the order sought is not granted, the appeal would be rendered nugatory.

On whether the appeal is arguable, it is sufficient even if the applicant raises only one arguable ground (see **Damji Pragji Mandavia vs Sara Lee Household & Body Care TK Ltd Civ. App. No. Nai 345/2004**). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before this Court; one which is not frivolous (see **Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd & Others Civ. App. No.124/2008**). And the term “nugatory” must be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling (see **Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 EA 227.**).

In our view an arguable appeal has been made out on the two grounds. First, the challenge to the jurisdiction of the Industrial Court to entertain the proceedings in issue. That stands to be canvassed before this Court. It is an arguable ground which cannot be considered frivolous at all. Secondly, the applicant has also challenged the legal personality of the respondent and its *locus standi* in the subject proceedings. That too, is an arguable point. So, to us, the applicant has made out a case for an arguable appeal.

On whether the appeal will be rendered nugatory in the event the intended appeal succeeds, we think it will be. Once the process of taxation has started with the filing and serving of the bill of costs, what will follow is its taxation. Whatever the taxed costs will be, with a bill containing a sum of shs.14.9m, the net sum will no doubt be substantial. We hold the view that without demonstrating its financial basis to convince us that it will be capable of refunding the costs if paid, we are of the view that the applicant, a public body will be hard-put to recover the sum paid from the respondent, in the event the appeal succeeds. Such recovery may require further public resources to commence and complete the process of recovery through the civil litigation – a further prejudice to the applicant. As for the respondent, it can wait without prejudice, for the appeal to be finally determined and then proceed to tax and recover its costs, if found in its favour.

In sum, we allow this application. Costs of this application will be in the appeal.

Dated and delivered at Nairobi this 21st day of March, 2014

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc