



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
IN NAIROBI

CORAM: GITHINJI, MWERA & MURGOR JJ.A.

CIVIL APPLICATION NO. NAI. 92 OF 2014

BETWEEN

KENYA NATIONAL UNION OF TEACHERS (KNUT).....APPLICANT

AND

GEORGE WESONGA OJWANG'RESPONDENT

(Being an application for stay of execution and all further proceedings pending hearing and in an Intended appeal from the judgment and orders of the High Court of Kenya at Nairobi (Rika J.) delivered on 20th December 2013

in

Industrial Court Cause No. 282 of 2012)

RULING OF THE COURT

The Notice of Motion dated 25th April 2014 which is before us arises from the judgment and orders of Rika, J, made on 20th December 2013, where the respondent was awarded a sum of Kshs. 16,616,209.70 as the balance of his terminal dues payable by the applicant within 30 days from the date of judgment of the Court, and from which the applicant seeks a stay of execution and a stay of further proceedings pending the hearing and determination of the applicant's Intended Appeal.

The brief facts are that the respondent was employed by the applicant in April 1986 as Executive Secretary, Busia Branch. In January 2004, he was elected to the position of 1st National Vice Chairman of the applicant, and subsequently to the position of National Chairman in 2007, a position from which he retired on 31st July 2011. Prior to his retirement, he was placed on terminal leave. Whilst computing his retirement package the parties were unable to agree on the sums due. According to the respondent, an agreement dated 2nd February 2011 was entered into between himself and David Okuta Osieny the then Acting National Chairman of the applicant and Albanus Mutisya the then Acting Treasurer, where it was agreed that he would be paid a total of Kshs.22,347,606 as terminal dues, and that following a payment of Ksh.5,711,396.90, there remained a balance of Kshs. 16,616,209.70 due to him. As a consequence, the respondent filed a suit in the Industrial Court to recover the balance from the applicant together with interest and costs.

In response, the applicant contended that the respondent's terminal dues were governed by the provisions of the applicant's Constitution and Retirement Benefits Scheme Rules, from which the computation of the respondent's terminal dues of Kshs. 4,674,494.30 were correctly computed and paid to him, together with

a gratuity of Kshs. 2,182,294.60. Out of this, a sum of Kshs 1,874,617 in respect of an advance payment, and a sum of Kshs. 5,711,396 that was transferred to the respondent's account in Bungoma was deducted, thus leaving a sum of Kshs. 270,000 as the balance due to the respondent.

The applicant further contended that when the respondent relinquished his position as the Executive Secretary of the applicant's, Busia Branch to take up the position of National Chairman, he was paid his terminal dues up to that period, following a suit he filed to recover such dues.

In the judgment, the learned Judge concluded that the terms of the agreement of 2nd February 2011 between the applicant and the respondent were binding and superseded all the terms of retirement, and awarded the respondent the remaining balance of the terminal dues of a sum of Kshs. 16,616,209.70 together with costs.

Immediately thereafter, the applicant made a formal application for stay of execution pending appeal, on 17th January 2014 which the Industrial Court declined to grant. As a consequence, the respondent commenced garnishee proceedings in an application dated 16th April 2014 seeking to attach the applicant's bank account numbers 1136400152, 1107218993 and 1233500096 held at Kenya Commercial Bank and account number 0350295014161 held at Equity Bank Limited.

Being aggrieved by the decision of the court, the applicant filed this application which is before us, for stay of execution of the orders of the High Court and stay of proceedings pending the hearing and final determination of an intended appeal.

This application is brought under **Rule 5(2)(b)** of the **Court of Appeal Rules**, where the following orders were sought: -

1. *That the application be certified urgent and be heard on a priority basis;*
2. *That there be a stay of execution of the Judgment and order of the Industrial Court made on 20th December 2013 in ICC No. 282 of 2012 pending the hearing and determination of the applicant's intended appeal;*
3. *That all further proceedings in ICC No. 282 be stayed pending the hearing and determination of the applicant's intended appeal against the said judgment and orders;*
4. *That costs of and incidental to this application be provided for.*

The application is premised on four grounds and a supporting affidavit sworn by **Wilson Sossion**, Secretary General of the applicant. In summary, he deposed that the applicant had an arguable appeal with high chances of success, for reasons that the Industrial Court had taken into account documents that were not tendered in evidence and which the applicant did not have an opportunity to examine. Further, that the court had relied on an agreement that was ultra vires the applicant's constitution and arrived at an award which was not supported by the provisions of the constitution or any rules or regulations. Finally that the court failed to take into account the *ex facie* evidence that, the respondent was a fiduciary of the applicant who had exploited his position as chairman for personal benefit, to the detriment of and not in the interest of the applicant and the applicant's membership. Mr. Sossion further deposed that the applicant is a nonprofit making organization, dependent on the fixed contributions of its members, which contributions are for the purposes of payment of recurrent and long term expenditure of the applicant. Additionally, from the *ex facie* evidence of the applicant's National Treasurer Mr. Albanus Mutisya, the applicant is currently facing financial constraints, and is not in a position to satisfy the award within the timeframe provided. Mr. Sossion's concluded by stating that the respondent's source of income and financial assets are unknown, and in the event the success of the appeal, there is no certainty that the respondent will be in a position to refund the amounts paid to him.

In his replying affidavit sworn on 19th September 2014, the respondent deposed that the application for

stay of execution is an abuse of the court process and an afterthought aimed at frustrating his enjoyment of the fruits of his award. The respondent stated that he retired from the service of the applicant in July 2011 after 25 years of dedicated service, and that upon his retirement, as his terminal dues had been agreed upon, he proceeded on terminal leave. Despite the agreement, the applicant failed to pay him, which resulted in the claim filed in the Industrial Court where he was awarded Kshs.16,616,207/- being his terminal benefits. It was following the refusal by the court to issue a stay of execution that the applicant entered into an agreement for the payment of his terminal dues by way of monthly installments. The respondent contended that it was agreed that the applicant would pay an initial sum of Kshs. 8 million, which would be followed by eight equal instalments of Kshs. 1,077,025 per month, which payments the applicant has continued to honour upto September 2014. The respondent concluded that, in the circumstances, there is nothing further to litigate, that the applicant had no valid grounds upon which to base it's application for stay of execution and therefore the matter should be brought to a close, and the application dismissed.

When the application came up for hearing before us, **Mr. Amoko** learned counsel for the applicant submitted that there was an arguable appeal on matters of law in the intended appeal. The main issue was the basis upon which the respondent's terminal dues were to be computed, and whether the respondent could be considered to have been in continuous and uninterrupted employment considering that he had been paid his terminal dues after he left the position of Executive Secretary, Busia branch. According to rule 3.5 of the Staff Terminal Benefits Retirement Rules 2003 a ***"employee has to be in continuous uninterrupted employment of the union, at branch, national or both, prior to the date on which the lump sum is due, including months of terminal leave."*** After payment of his terminal dues at that time, a fresh employment period commenced when he took up the position of National Chairman. Counsel submitted that, it is arguable that this amounted to an interruption during the course of his employment with the applicant. In support of his argument counsel cited ***Kenya Union of Food & Allied Workers vs Hebatullah Brothers [2002] eKLR*** on the meaning of continuous service or employment, which is ***"....service not broken or interrupted by the termination of the contract of employment by either the employer of the employee or by operation of law."***

Counsel further argued that, the agreement of 2nd February 2011 on payment of the terminal dues was illegal and in violation of the applicant's constitution and scheme rules. The respondent and other officials had wrongfully, and in an unauthorized manner sought to amend provisions of the applicant's constitution which was the preserve of the applicant's National Executive Council, which was a public policy question for the consideration of the court. The learned Judge had addressed this as an employment issue, where it was considered that the minimum standards of retirement could be varied or waived by the parties.

On whether the appeal would be rendered nugatory if the stay of execution was not granted, and the appeal was successful, counsel submitted that so far a sum of over Kshs. 10 million had already been paid to the respondent. The applicant had been served with garnishee proceedings when the stay of execution application in the Industrial Court had failed. Counsel pointed out that the applicant was currently faced with financial constraints, and any further payments to the respondent would be to the prejudice and detriment of the majority members. On the balance of convenience, a significant part of the amount ordered by the court had already been paid to the respondent, and consequently, a security for the balance was not necessary in the circumstances. Counsel concluded that the respondent had since retired and has no known assets, and it is not known whether he is engaged in any meaningful employment.

On her part **Ms. Kamar** learned counsel for the respondent submitted that, appeals to this Court from the Industrial Court are on matters of law only, and that the issues raised by the applicant do not relate to matters of law. The issues raised are with respect to an agreement for terminal dues and minutes of a meeting held on 7th July 2007 of the National Executive Council that seek to amend the constitution to specify a calculation of the retirement benefits commutation, which was revised to provide for 25 years of continuous service. It was on this basis that the agreement with the respondent was signed. The respondent was a branch chairman from 1986 he was then elected to the position of the National Chairman in 2007 and eventually retired in 2011. Regarding the issue of uninterrupted service, counsel explained from the bar that this did not arise as, the applicant's terms of service permitted the payment of

terminal dues in the course of employment. On the nugatory aspect, counsel submitted that when the application for stay of execution was declined, by the Industrial Court, the parties entered into an agreement where the applicant agreed to pay monthly installments of Kshs 1,077,025/- million to the respondent, which amounts the applicant has paid to date. As a consequence, counsel submitted that, the motion before Court was overtaken by the terms of the agreement. Counsel concluded that the respondent is capable for refunding the amounts in the event that the appeal is successful.

In his response, Mr. Amoko reiterated that the agreement to pay the respondent Kshs 22 million was unlawful, and was contrary to the applicant's constitution. A strict application of the pension rules would disentitle the respondent from the amounts ordered, the payment of which the applicant is unable to sustain together with its other obligations.

The principles applicable to the determination of applications under **rule 5 (2) (b)** of the Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006** in **Ishmael Kagunyi Thande vs 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)].”

We will also bear in mind that, we are not considering the appeal itself, or whether the appeal will or will not succeed. All we need to decide is whether it is arguable and, only one arguable point is sufficient.

The applicant's complaint is that the amount ordered to be paid to the respondent as terminal dues was wrongful because, the method of computation was contrary to the provisions of the applicant's constitution and its retirement benefits scheme, which required that, ***“the employee has to be in continuous uninterrupted employment of the union, at branch, national or both, prior to the date on which the lump sum is due”*** for a continuous period of 25 years for an employee to be entitled to retirement benefits. Since the respondent had received his terminal dues in 2007, when he retired in 2011, he could not be considered to have been in continuous and uninterrupted service for a period of 25 years, and so, was not entitled to the terminal dues as ordered. Though Ms. Kamar sought to explain the unique nature of the applicant's terms of service, it was her view that this issue was not a matter of law and consequently, was not an arguable issue. Needless to say, we find that there is an arguable issue of interpretation of the relevant provisions of the applicant's constitution, regulations and bylaws to determine whether the applicant is entitled in law to the terminal benefits still to be ventilated before this Court at the appropriate time by another bench.

With respect to whether the appeal would be rendered nugatory in the event it is successful, it is apparent that so far the respondent has already been paid a sum of over Kshs. 10 million, which amounts the applicant has emphasized it can ill afford to pay at this time. Additionally, it has not been demonstrated to us that, if the decretal sum was paid to the respondent in its entirety, the respondent would be in a position to refund the amounts, as he is unemployed and his financial capability is unknown. In our view, when considering whether the success of the intended appeal would be rendered nugatory, we recognise that this is a money decree, and courts have been of the view that the success of the appeal would not be rendered nugatory if the decree is a money decree, provided the court ascertains that the respondent is not a *“man of straw”*, but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. See **Civil Application No. Nai. 322 of 2006 (ur 178/06) Kenya Hotel Properties Limited vs Willesden Investments Limited** . There is a need to weigh the claims of both sides, as this Court did in the cases of **Trust Bank Limited and another vs. Investech Bank Limited and 3 others – Civil Application Nos. Nai. 258 and 315 of 1999** and also in the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd. – Civil Application No. Nai. 358 of 1999**.

The dispute concerns the payment of terminal dues to the respondent, and whether or not the respondent

is entitled in law to receive the amount ordered by the court. It is evident that there still remains the question of whether the respondent is entitled in law to the terminal dues computed as his entitlement yet to be determined in the intended Appeal. The applicant has so far paid significant sums which is acknowledged by the respondent. But it has not been demonstrated to us how or in what manner, in the event the sums are paid in full, whether the respondent would be in a position to refund such sums should the appeal be successful. In trying to balance the parties' respective concerns, without doubt, the applicant has already paid a large amount to the respondent, relative to the amount that it considers is actually due, at the expense, and to the detriment of its membership.

On the balance of convenience, given, the applicant's current financial predicament, we think the case of *East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board & another* [2007] eKLR appropriately addressed these circumstances, wherein this court stated thus :

"We think that in the particular circumstances of this case, if we allow the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that the advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action, and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

We concur with the views outlined, and consider that, it would be unethical to place the applicant in a position where the services to the majority of its members would be jeopardized, should we refuse to grant the reliefs sought.

Accordingly, the motion dated 25th April 2014 is allowed, we forestall further payment of the decretal sums, and order a stay of execution of the judgment and decree and a stay of proceedings, in Industrial Cause Number 282 of 2012 pending the hearing and determination of the intended appeal.

It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of OCTOBER, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR