



**REPUBLIC OF KENYA**

**Court of Appeal at Nairobi**

**Civil Application 287 of 2011**

**NAIROBI CLUB REGISTERED TRUSTEES.....APPLICANT**

**AND**

**THE INDUSTRIAL COURT.....1<sup>ST</sup> RESPONDENT**

**THE KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL  
INSTITUTIONS,**

**HOSPITALS AND ALLIED WORKERS (KUDHEIHA.....2<sup>ND</sup> RESPONDENT**

**SERVANTHOOD & LIGHT DEVELOPMENT FOUNDATION.....3<sup>RD</sup>  
RESPONDENT**

**EX PARTE**

**(An application for stay of execution of the award delivered by the Industrial Court (Mr. Justice Charles P. Chemuttut, sitting with members, O. A. Wafula and J. M. Kilonzo) on 24<sup>th</sup> September 2009 in Industrial Court Cause Number 77(N) of 2009 involving Kenya Union of Domestic Hotels, Educational Institutions, Hospitals & Allied Workers versus Nairobi Club pending the determination of the Intended appeal against the order of the Superior Court, Warsame, J) delivered on 24<sup>th</sup> November, 2011 in Nairobi in High Court Misc. Application No.605 of 2009)**

**RULING OF THE COURT**

**1.** The Applicant, Nairobi Club Registered Trustees, seeks, in its Notice of Motion dated 19<sup>th</sup> December 2011 pursuant to Rule 5(2)(b) of the Rules of this Court an order for stay in the following terms:

*“execution of the award delivered by the Industrial Court (Mr. Justice Chemuttut sitting with members of O A Wafula and J M Kilonzo) on 24<sup>th</sup> September 2009 in the Industrial Court Cause Number 77 (N) of 2009 – Kenya Union of Domestic Hotel, Educational Institutions, Hospitals & Allied Workers versus Nairobi Club be stayed pending the determination of the intended appeal against the order of the superior court, delivered on 24<sup>th</sup> November 2011 in High Court Misc. Application No.605 of 2009 by the Honourable Mr.Justice Warsame.”*

**2.** The salient and germane facts relating to the Notice of Motion application are that the applicant instituted judicial review proceedings in the Superior Court seeking an order of Certiorari to remove into the Superior Court and quash the award delivered by the Industrial Court (Mr. Justice Charles P. Chemmutt sitting with members O. A. Wafula and J. M. Kilonzo) on 24<sup>th</sup> September 2009 in Industrial Court cause Number 77(N) of 2009 involving Kenya Union of Domestic Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) versus Nairobi Club, the Applicant herein.

**3.** The dispute in the Industrial Court was between 85 employees of Nairobi Club, the Applicant, and Nairobi Club as an employer and it related to demand for reinstatement of the 85 employees back to employment following their summary dismissal by the Applicant. The

Industrial Court found in favour of the 85 employees and ordered the Applicant to reinstate the 85 employees to their former employment with all back wages or salaries, privileges and other benefits within thirty (30) days from the date of the Award on 24.09.2009.

**4.** The judicial review proceedings were heard and determined on 24<sup>th</sup> November 2011 by the Honourable Mr. Justice M. Warsame J, as he then was who in his decision dismissed the Applicant's application with costs to the Respondents and interested parties for the reasons given.

**5.** The Applicant filed Notice of Appeal in this Court on 28.11.2011 against the decision of the Superior Court dismissing the judicial review application.

**6.** On 4<sup>th</sup> July 2012, the Applicant's counsel informed the court that after the decision of Industrial Court ordering the reinstatement of the 85 employees, the Applicant complied with the award and reinstated the former employees.

**7.** The Notice of Motion application was argued before us on 28.1.2013. Advocate Mr. Gitonga Murugaru appeared for the Applicant, Nairobi Club Registered Trustees, and advocate Ben Denis Mosota appeared for the 3<sup>rd</sup> Respondent, Humphrey M. Kariuki & 85 others and Advocate Gideon Kiage Deya appeared for the 1<sup>st</sup> Respondent the Industrial Court. No counsel appeared for KUDHEIHA, the 2<sup>nd</sup> Respondent and the court being satisfied that they had due notice of the hearing date allowed parties present to proceed with the hearing.

**8.** Mr. Murugaru urged the court to grant stay pending the hearing of the appeal and submitted that the Applicant had attempted to comply with the order of the Industrial Court and had re-employed 50 of the 85 employees and that 35 of the former employees had declined to be re-employed. It was Mr. Murugaru's submission that the Applicant's intended appeal was arguable and that if stay was not granted, the appeal would become nugatory. He invited the court to peruse the intended grounds of appeal reflected in the (Notice of Motion) application seeking stay which, he said, show that the Appeal is arguable. As regards the issue whether the Appeal would become nugatory if stay was not granted, Mr. Murugaru opined that the back salaries ordered were a colossal sum notwithstanding that 50 of the 85 employees had been re-employed. The Applicant, he contended, is a member's club and reinstatement of the remaining 35 employees whose whereabouts was unknown to the Applicant would place great hardship on the Applicant in terms of back salaries.

**9.** Mr. Mosota, the learned counsel for the 3<sup>rd</sup> Respondent, opposed the application and while conceding that some of the employees had been re-employed, pointed out that this was done eight (8) months after the decision of the Industrial Court and therefore it can hardly be said that there was compliance with the order which required reinstatement and payment of back salaries to be within 30 days. No appeal had been lodged yet, pointed Mr. Mosota, and no steps had been taken to obtain the proceedings necessary for compiling the appeal. To show good faith, he said, the Applicant could have deposited the back salaries in a joint account but did not. In his submission, the appeal was not arguable and consequently the Respondent should be allowed to proceed with execution of the Judgement of the Industrial Court.

**10.** On his part, Mr. Kiage Deya, the learned counsel for the 1<sup>st</sup> Respondent, contended that stay could not

be granted where there is no appeal or intention to appeal which is manifested by filing of Notice of Appeal and as there was no appeal against the decision of the Industrial Court, or a Notice of Appeal, the application for stay on the basis of the Notice of Appeal against the decision of the Honourable Mr. Justice M. Warsame (dismissing the judicial review proceedings seeking to quash the Industrial Court Award) was misplaced.

11. The parties through their counsel relied on the Affidavits they have filed.

12. We have duly perused and considered the application and the rival affidavits filed by the parties. We have also duly considered the rival submissions of the learned counsel for the parties. For starters, we observe that if we were to grant the stay sought by the Applicant, the order for stay would undoubtedly affect all the 85 employees who would include the 50 employees who have been reinstated for the simple reason that the Applicant would no longer be obliged to retain them.

13. But more importantly, and as correctly pointed out by Advocate Mosota, the appeal that the Applicant is pursuing in respect of which Notice of Appeal was lodged on 28.11.2011 is against the decision of the Honourable Mr. Justice M. Warsame J, as he then was, given on 24.09.2011 dismissing the Applicant's application for judicial review orders. There is no appeal, and certainly no Notice of Appeal has been lodged, in respect of the Award of the Industrial Court dated 24.9.2009 made in Industrial Court Cause No.77 of 2009. In the absence of an appeal or intention to appeal manifested by a Notice of Appeal against the decision of the industrial court foresaid, an application for stay cannot be sustained in relation to the said Industrial Court award for the simple reason that it is the filing of the Notice of Appeal which confers on this court jurisdiction to grant an order of stay, an injunction, or a stay of further proceedings. In **John N. Libuyi versus The Board of Governors, St. John College**, CA Civil Application No.138 of 2009 (UR 92/2009) (Omolo, Aganyanya and Visram, JJA) this court stated with regard to this point.

*“The Applicant did not file any notice of appeal against the orders made by Khamoni, J. Mr. Ochieng’, learned counsel for the applicant, told us that no notice of appeal could have been filed because it was not possible to lodge a direct appeal against the orders of Khamoni, J. We will not quarrel with the wisdom of Mr. Ochieng’ on that point, though for our part we do not quite appreciate the reason as to why no direct appeal from the orders was not possible.....”*

*“Whatever may be the correct position, there is no pending appeal against the orders of Khamoni, J. The only notice of appeal before us is that dated 17<sup>th</sup> February, 2009 and lodged in the superior court on 18<sup>th</sup> February, 2009. That notice simply states:-*

*TAKE NOTICE that JOHN N. LIBOI, being dissatisfied with the Ruling of the Honorable Mr. (sic) Justice Lessit delivered at Nairobi Milimani Commercial Court on the 6<sup>th</sup> day of February, 2009 intends to appeal to the Court of Appeal against the said decision dismissing the application to set aside the judgment herein.”*

*“There is no mention of the orders of Khamoni, J in the notice of appeal and Lessit, J did not enter any judgment against the Applicant.”*

*“Rule 5 (2) (b) of the Court of Appeal Rules under which this motion is brought is in the following terms:*

*“Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may:-*

*(b) in any civil proceedings, where notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”*

*“The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the jurisdiction to grant an order of stay, an injunction or a stay of*

*further proceedings. That is clear enough from the wording of the rule. There is no notice of appeal against the orders made by Khamoni, J. and that being so, we have no jurisdiction to grant to the applicant the order for stay of execution.*

*“... of the Judgment/Decree of the High Court,*

*Khamoni, J.....,”*

*We pointed out these matters to Mr. Ochieng’ at the very beginning of the hearing of the motion but he took no heed. As we lack jurisdiction to make the order the applicant seeks, we order that the notice of motion filed by the applicant is incompetent and must be and is hereby struck out.”*

As regards the decision of the Hon. Mr. Justice M. Warsame dismissing the Applicant’s judicial review application, there is nothing to stay! We further observe that prayer No.2 of the Applicant’s Notice of Motion is ambiguous not least because it seeks stay in relation to the Industrial Court Award while no Notice of Appeal against the Award has been filed in accordance with the rules of this Court yet it avers that stay is sought pending determination of the intended appeal against the decision of the Hon. Mr. Justice M. Warsame!

**14.** While the appeal against the decision of the Hon. Mr. Justice Warsame may be arguable, there is nothing to show that if stay is not granted, the appeal will become nugatory and this is especially so considering that all that the Superior Court did was to dismiss the judicial review proceedings which had sought Certiorari to quash the award which has not been challenged on appeal and in respect of which an order for stay cannot be sustained in absence of an appeal.

**15.** For these reasons, we decline to grant stay. We dismiss the Notice of Motion dated 19.12.2011 with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

**Dated and delivered at Nairobi on this 15<sup>th</sup> day of March 2013.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**G. B. M. KARIUKI, SC**

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**JUDGE OF APPEAL**

**J. O. ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**