



REPUBLIC OF KENYA
Court of Appeal at Nairobi
Civil Application 112 of 2012

TELKOM KENYA LIMITED..... APPLICANT

VERSUS

**JOHN OCHANDA (suing on his behalf and on behalf of 996 former
employees of Telkom Kenya Ltd)..... RESPONDENTS**

(An Application for stay of proceedings pending the Judgment, hearing and determination of an intended appeal from Ruling of the High Court of Kenya at Nairobi (Waweru, J.) dated 23rd March, 2012

in

H.C.C.C. NO. 216 OF 2007)

RULING OF THE COURT

This is an application under **Rule 5(2) (b)** of the Court of Appeal Rules for an order that all proceedings arising from the ruling and order of **Waweru, J.** delivered on 23rd March, 2012 be stayed pending the hearing and determination of an intended appeal against the ruling.

The respondent **John Ochanda** and the alleged 996 former employees of the applicant who had been retrenched filed three suits in the High Court against the applicant relating to terminal/severance benefits. The three suits – HCCC No. 216 of 2007 as consolidated with HCCC No. 219 of 2007 and 225 of 2007 were heard by **Mwera, J.** (as he then was) who in a judgment delivered on 28th September 2011 granted two reliefs namely, that:

- (a) the plaintiffs be paid severance pay based on 2 ½ months salary for each year of completed service.
- (b) the plaintiffs be paid golden handshake on the same scale as what was paid the retrechees in phase 2.
- (c) plaintiffs to get costs and interest.

The applicant filed a notice of appeal against the judgment. The applicant also filed civil application No. 237 of 2011 in this court seeking stay of execution of the judgment of the High Court pending appeal. The application was allowed on 10th May, 2012 on condition that the applicant deposits Shs.

250,000,000/- in an interest bearing account in the joint names of the lead advocates. The applicant deposited the money as ordered. The applicant has now filed Civil Appeal No. 207 of 2012 which is scheduled for hearing sometime in the month of April 2013.

In the meantime, the respondents started the process of execution of the decree of the High Court to recover Shs. 3,027,453,596/- which sum was based on the respondents' own computation of the amount arising from the decree and judgment. The applicant filed a notice of motion in the High Court seeking a stay of execution pending the determination of the stay of execution application No. 237 of 2011 filed in the High Court and the quashing of the warrants of attachment.

On their part, the respondents filed a notice of motion also in the High Court seeking the amendment of the judgment of Mwera, J. to the extent that the applicant be compelled to calculate the severance pay based on 2½ months salary on the basis of employment records at its disposal; that respondents be paid golden handshake amounting to Shs. 150,000/- each; and that the respondents be paid costs and interest at commercial rates.

The two applications were heard together by Waweru, J. who ultimately ruled that the stay of execution application was premature and ordered it to be held in abeyance until the costs are taxed, and after the directions he gave were met.

The applicant was directed to file and serve within 30 days an affidavit setting out in respect of each respondent the number of completed years of service and their monthly salary at the time they were retrenched to be accompanied by a calculation of the severance pay due to each plaintiff at the rate of 2½ months salary for each completed year of service. The court further directed that in default of complying with the direction, the plaintiffs may file one or several affidavits setting out the facts and details of their own calculations. Lastly, the court further directed that the case be fixed for mention at a future date for further directions.

That ruling and direction were given on 23rd March, 2012. In addition to the application for execution of the decree by attachment of the applicants' goods, the respondents also sought execution through a Winding Up petition to wind up the applicant.

The applicant apparently filed HCCC No. 545 of 2011 at Milimani Commercial Court, and, on 23rd February 2012 **Mutava, J.** granted an interlocutory injunction restraining the respondents from presenting a winding up petition pending the hearing of the suit.

It is the ruling and directions given by Waweru J. on 23rd of March 2012 which are the subject matter of the present application. The applicant filed a notice of appeal dated 2nd April 2012. However the applicant has not filed the appeal, the explanation given being that the High Court has not yet supplied the proceedings.

The applicant has filed a draft memorandum of appeal containing seven proposed grounds of appeal. In essence the applicant avers, *inter alia*, that Waweru, J. had no jurisdiction to re-open the trial to review the judgment of Mwera, J.; that the court shifted the burden of proof by directing the applicant to file particulars to support the respondents' claim and that the court erred in determining the number of the respondents and computing the claim under the limb of golden handshake.

One of the major issues raised by the applicant is the ascertainment of the number of the respondents. In HCCC No. 216 of 2007 only one respondent was named and in each of the other suits namely; HCCC No. 219 of 2007 and 255 of 2007, only three plaintiffs were named. It is apparent that the named respondents who sued on behalf of others did not give a list of the rest of the respondents at the trial. On the whole, we are satisfied that the intended appeal is arguable.

In addition, if the order sought is not granted, the appeal if successful would be rendered futile because the High Court will have exercised jurisdiction that it allegedly does not have and the claim will have

been computed and probably executed against the applicant

Lastly, it would not be an efficient use of judicial resources nor just if the proceedings in the High Court, which in effect are in furtherance of the judgment of Mwera, J. are allowed to continue when the appeal against the main judgment is pending for hearing for if the appeal succeeds, the consequential proceedings directed by Waweru, J. would be futile.

There is no certainty that the intended appeal would be filed before the determination of Civil Appeal No. 207 of 2012. If that appeal succeeds, the appeal against the orders of Waweru, J. would be unnecessary. It is logical in the circumstances to grant an order of stay pending the determination of the existing appeal.

For the foregoing reasons, we allow the application. All the proceedings arising from the ruling and order of Waweru, J. delivered on 23rd March 2012 are stayed until the determination of Civil Appeal No. 207 of 2012.

The costs of the application shall be costs in the appeal.

DATED and DELIVERED at Nairobi this 10th day of May, 2013.

E. M. GITHINJI

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR