IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, GATEMBU & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI. 108 OF 2013 (UR 71/2013)

BETWEEN

KENYA KAZI SECURITY SERVICES LIMITED……………..................……APPLICANT

AND

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION…………….RESPONDENT

(Application for stay of execution from the Award of the Industrial Court of Kenya at Nairobi (Rika, J) dated 26th March, 2013

in

INDUSTRIAL COURT CAUSE NO. 1449 OF 2010

****

RULING OF THE COURT

1. Before us is an application dated 28th May 2013 by which the applicant seeks an order that:

> "***There be a Stay of execution of the Award of the Industrial Court of Kenya dated 26th March 2013 pending the hearing and determination of the intended appeal***."

Background

2. The parties entered into a Recognition Agreement under which the applicant accorded recognition to the respondent as the representative body and sole labour organization representing the interest of workers in the employment of the applicant.

3. On the basis of that Recognition Agreement the Industrial Court, in an award dated 6th December 2011 given in Industrial Court of Kenya Cause Number 1449 of 2011, ordered the parties to enter into collective negotiations and conclude a collective bargaining agreement with respect to the unionisable employees working at the United States of America Embassy in Nairobi within 60 days.

4. The parties did not conclude a collective bargaining agreement in accordance with the award dated 6th December 2011. As a result, the Industrial Court, in a second Award dated 26th March 2013, settled the terms and conditions of a collective agreement between the parties with respect to the unionisable

employees working at the United States of America Embassy in Nairobi.

5. Aggrieved by the second Award of the Industrial Court dated 26th March 2013 the applicant filed a notice of appeal on 8th April 2013. Pending the hearing and determination of the intended appeal, the applicant, has now brought the present application, which as stated, seeks a stay of the second award.

Submissions by Counsel

6. Mr. K A Fraser, learned Senior Counsel for the applicant cited decisions of this Court in **Butt v Rent Restriction Tribunal [1982] KLR 417** and **Kenya Shell Limited v Kibiru & Another [1986] KLR 410** with regard to the approach we should adopt in considering the present application.

7. Learned senior counsel submitted that the applicant has satisfied the prerequisites for the grant of an order for stay of execution in that the applicant has an arguable appeal that will be rendered nugatory unless the order of stay is granted.

8. Senior counsel relied on the grounds appearing on the face of the applicant's application and the affidavit of James Ouya Omwando in support of the application. He submitted that the impugned award is erroneous and made without jurisdiction and against Section 57(1) of the Labour Relations Act to the extent that it does not relate to all unionisable employees but to a select group of employees, namely those employees of the applicant who were working for the United States of America Embassy in Nairobi.

9. Senior counsel further submitted that the Industrial Court also erred in backdating the effective date of the collective bargaining agreement to 1st June 2012.

10. On the question whether the appeal will be rendered nugatory unless the orders sought are granted, senior counsel drew our attention to the affidavit of James Ouya Omwando. In that affidavit it is deposed that the effect of the award is that the applicant is required to pay, within 60 days from 26th March, 2013 (the date of the award), an amount of Kshs. 116,792,500.00 which the business of the applicant cannot sustain; that the impact, on a monthly basis, of the allowances granted under the award is to make the contract between the applicant and the United States of America Embassy in Nairobi unprofitable and unsustainable; that the applicant would not be able to continue in loss making business; that unless the order for stay is granted and the appeal is subsequently successful it would be impossible to recover from the employees the amounts that would have been paid to them by the applicant.

11. Mr. D. B. Wati learned counsel for the respondent opposed the application and relied on the replying affidavit sworn by Isaac G. M. Andabwa. He submitted that the applicant has not met the threshold for the grant of the order sought in that the applicant has neither demonstrated nor shown that the intended appeal will be rendered nugatory unless the stay is granted.

12. Mr. Wati further submitted that the award intended to be appealed from is a monetary award which entails adjustment of allowances payable to employees; that in principle, there was agreement between the parties on adjustment of those allowances; that the applicant suggested most of the figures awarded; that the award was the result of a process in which the parties made offers and counter offers regarding the margin of adjustment of the allowances and that the eventual award by the Industrial Court was the result of the adjustments made after taking into consideration those offers and counter offers.

13. Counsel for the respondent went on to say that applicant's argument hinged on ***Section (57) of the Labour Relations Act*** that a collective agreement must involve all employees, and not a section of employees, is not a correct interpretation of that provision and that in any event that matter was not raised in the Industrial Court.

14. Regarding the contention that the learned Judge of the Industrial Court erred in backdating the effective date of the award, Mr. Wati submitted that the award is in accordance with the law and that the second award should be seen as a progression of the first award and in the context of negotiations

between the parties that went back to 2011.

15. With regard to the argument that the appeal will be rendered nugatory because the employees of the applicant would not be able to refund the amount awarded in the event of the appeal succeeding, Mr. Wati submitted that the applicant will recover the same from its employees' future salaries.

Our Decision

16. We have considered the application. The exercise of jurisdiction by this Court, in an application of this nature, is discretionary based on the twin principles of whether the applicant has an arguable appeal and if so, whether the appeal will be rendered nugatory if the orders sought are not granted.

17. Besides the case of **Butt v Rent Restriction Tribunal** to which we were referred, this Court has reiterated these principles in numerous cases. For instance, in **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd** Civil Application No. NAI. 157 of 2006 this court stated:

> **"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 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 the appeal will be rendered nugatory*."**

18. In a recent decision of this Court delivered on 31st May 2013, in **Equity Bank Limited vs. West Link Mbo Limited Civil Application No. NAI 78 of 2011** Githinji JA stated that:

> "***It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. …***
>
> ***It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals***."

19. Has the applicant demonstrated it has an arguable appeal? If so, will the appeal be rendered nugatory if the order sought is not granted?

20. On the first issue, ***Section 57(1) of the Labour Relations Act, 2007*** provides that:

> ***"An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement."***

21. It is common ground that the collective bargaining agreement ensuing from the second Award relates only to a section of the applicant's employees namely those employees of the applicant who are working for the United States of America Embassy in Nairobi. On the face of ***Section 57(1)*** we are, therefore, satisfied that the applicant has demonstrated that it has an arguable appeal.

22. We turn to the question whether the intended appeal will be rendered nugatory if the order sought is not granted. The amount payable under the impugned decision is an important consideration. In the case of **Reliance Bank Limited Vs. Norlake Investments Ltd** **[2002] 1 EA 231** this court stated:

> ***"In the Oraro and Rachier case, the Court took into account the fact that if the law firm was ordered to forthwith deposit the decretal sum the firm itself might well be forced to go out of business and such an eventuality may itself be sufficient to render the success of their appeal nugatory."***

23. In the **Kenya Breweries Limited V. Kiambu General** **Transport Agency Limited**, Civil Application 100 of 2000 (UR 48 of 2000) (UR) this Court stated that*:*

> ***''The sum of money involved amounting to Kshs 241,856,711-58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such large amount of money is involved owing to the damage such refusal may occasion to the Applicant. Indeed the futility of success of the Applicant's appeal to this Court may result from such a refusal, for the damage to the Applicant may be irremediable even if the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful."***

24. The circumstances in the matter before us are not entirely dissimilar. The applicant says, and this was not challenged by the respondent, that it is required, under the impugned award of the Industrial Court, to amongst other things, pay an amount of Kshs.116, 792,500.00 as arrears of allowances and that the effect of the award is to make the contract with the United States of America Embassy in Nairobi unprofitable and unsustainable and that the applicant will not be able to continue in business with such losses. That eventuality would not only be detrimental to the applicant but to the employees.

25. We are persuaded that the applicant has demonstrated that the appeal, if successful, will be rendered nugatory if the orders sought are not granted.

26. The upshot of the foregoing is that we allow the application dated 28th May, 2013. Pending the hearing and determination of the intended appeal there will be a stay of execution of the award of the Industrial Court dated 26th March, 2013. As security for the payment of any amount that may ultimately become payable by the applicant to the employees upon determination of the intended appeal, the applicant shall, within sixty (60) days from the date of delivery of this Ruling, furnish security to the respondent in the form of a bank guarantee for the amount of Kenya Shillings Twenty five Million [Kshs. 25,000,000.00] only.

27. The costs of the application will abide the outcome of the appeal.

Dated and delivered at Nairobi this 14th day of June, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

GATEMBU KAIRU

…………………..

JUDGE OF APPEAL

J. MOHAMMED

………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR