IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARIUKI, PCA, OUKO, MURGOR JJ.A)

CIVIL APPLICATION NO.85 OF 2013

BETWEEN

NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES........….1ST APPLICANT

RUFUS OLEFA OSOTSI………….......…....…….......………………2ND APPLICANT

PHILEMON OTIENO ATIK…………………................………………3RD APPLICANT

ANNE BURUGU…………………………......……....…….........……….4TH APPLICANT

VERSUS

NAIROBI CITY WATER & SEWERAGE CO. LTD……..........….....…1ST RESPONDENT

NAIROBI CITY COUNCIL…....……………….........……...........……2ND RESPONDENT

KENYA LOCAL GOVERNMENT WORKERS UNION (KLGWU)…3RD RESPONDENT

ASSOCIATION OF LOCAL GOVERNMENT WORKERS…...……..4TH RESPONDENT

(Being an application for a stay of execution an injunction or a stay of any other further proceedings pending the hearing and final determination of Civil Appeal No.18 of 2013, in Ruling of the Industrial Court of Kenya at Nairobi (Nzioki wa Makau, J) dated 13th December, 2012

in

INDUSTRIAL CAUSE NO.823 OF 2012)

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RULING OF THE COURT

The brief facts of the case are that the 1st applicant, **National Union of Water and Sewerage Employees(NUWASE)** was registered as a Trade Union on 30thMarch 2006. On 11th July, 2006, the 1st applicant signed a Recognition Agreement with the 1strespondent,**Nairobi City Water & Sewerage Company Limited (NCWSCL),**a limited liability company, wholly owned by the Nairobi County Government(formally known as the City Council of Nairobi), for a period of three years. The agreement

was thereafter renewed for a further period of 24 months. Arising from disagreements between the 1st applicant and the 1st respondent relating to the renewal terms the two agreements, and competing interests of the 3rd respondent, **Kenya Local Government Workers Union (KLGWU),** most employees of the 1st applicant preferred to enroll or remain as members of the 3rd respondent, instead of with the 1st applicant.

In order to secure the payment of union dues and to stem the transfer of employees to the 3rd respondent, the 1st applicant filed a number of suitsin the Industrial Court. The respondents on the other hand, filed two judicial review suits to stay these rival proceedings in the High Court. The cases for the two opposing sides were later consolidated on 24th October, 2012,to be heard in Industrial Cause No.823 of 2012 as the primary file. The parties framed two issues for determination by the court, namely:

i. *between NUWASE and KLGWU which was the lawful trade union to represent unionisable employees of the 1st respondent, and*
ii. *ii) do the provisions of Article 36(1), 36(2) and 41(c) of the Constitution of Kenya 2010 entitle unionisable employees of the 1strespondent to elect whether to join NUWASE or KLGWU or any other union of their choice.*

The applicants contended before the High Court that, the KLGWU was interfering with the rights of the NUWASE, that the rulings of Kosgei J and Rika J determining that the 1st applicant was the appropriate union for the NCWSCL should be upheld, and that the remittances of union dues to the KLGWU was a violation of the rights of the 1st applicant.

In a ruling delivered on 13thDecember 2012, the learned Judge held on the first issue that the KLGWU, the 3rd respondent was the appropriate union for the employees of the 1st respondent, and on the second issue that, pursuant to Articles 36 and 41 of the Constitution, the employees of the 1st respondent had unfettered freedom to join a union of their choice.

The applicants immediately, filed and obtained an order for stay of execution for a period of 30 days, and a further*exparte* stay order, which was vacated by Nzioki wa Makau J on 12th March, 2013.

In the meantime, having obtained a ruling in their favor, the 1st respondent and 3rd respondent entered into a Recognition Agreement on 18th February, 2013, and a Collective Bargaining Agreement on 18th March 2013.

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 pending the hearing and final determination of Civil Appeal No.18 of 2013.

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

1. *That this application be certified as urgent.*

2. *That there be a stay of execution of the Ruling/Order of Justice Nzioki Wa Makau made on 13th December 2012 pending the hearing and determination of the applicant's Civil Appeal No.18 of 2013 and filed on 31st January, 2013.*

3. *That there be an injunction restraining the 1st respondent Nairobi City Water and Sewerage Company Limited and the 3rd respondent Kenya Local Government Workers Union by themselves, their servants or agents howsoever from making or proceeding with making collective Bargaining Agreement following disputed recognition Agreement signed on 18th February, 2013.*

The application is premised on eleven grounds on its face and on a supporting affidavit sworn by Mary Ndunge Mutuku, National General Secretary of the 1st applicant. In summary, she deposed that the 1st applicant had an arguable appeal with high chances of success, as the Industrial Court had no jurisdiction to review and vacate the orders in Cause No.213 of 2010which, had made way for the two union agreements to be signed between the 1st respondent and the 3rd respondent. Mr. Owuor, legal Counsel for the 1st applicant contended that the appeal would be rendered nugatory if the orders sought were not granted, as the 1st applicant would cease to exist due to the transfer of members to the 3rd respondent, and if the 1strespondent continued to deprive the 1st applicant of union dues amounting to Kshs.300,000 per month.

For their part, the respondents opposed the motion through the replying affidavits sworn by Assumpta Reuben for the 1st respondent and Boniface Munyao for the 3rd respondent.

Mr. Macharia, legal Counsel for the 1st respondent conceded that the 1st applicant's appeal was arguable. As to whether an intended appeal would be rendered nugatory, he contended that, Article 41 of the Constitution, made it a requirement for the 1st respondent to have an enforceable collective bargaining agreement with its unionisable employees, and therefore a valid Recognition and collective bargaining agreement had been entered into between the 1st respondent and the 3rd respondent, which he submitted, was a right that could not be stayed, that the 3rd respondent already represented the majority of the unionisable staff of the 1strespondent,as prescribed by section 54(1) of the Labour Relations Act, and furtherthat the 1st applicant was not entitled to the union dues of the employees of the 1st respondent, as union dues are only payable to the union representing the interests of unionisable employees, this being the 3rd respondent, and not the 1st applicant as claimed, and therefore there was nothing to stay; that no loss or damages would be suffered by the 1st applicant, as in in any event, it would only be entitled to damages should the appeal succeed. Mr. Koceyo for the 2nd respondent and Mr. Mbuvi for the 3rd respondent identified themselves with Mr. Macharia's submissions.

Having considered the arguments, submissions and the obtaining circumstances, and have questioned whether there was indeed anything to stay in this application.

This Court has steadfastly held that, in an application such as the one before us, an applicant must satisfy two requirements: -

i. *That the intended appeal is arguable and not frivolous.* ***J. K. Industries V Kenya Commercial Bank and Another(1182-88) 1KAR 1088*** *and*

ii. *That unless a stay or an injunction or whatever is sought is not granted the intended appeal if successful will be rendered nugatory.*

Do the applicants have an arguable appeal? The grounds of appeal filed by 1stsets out a number of contested issues, including,the matter of the consolidation and determination of the pending industrial suits, the alleged cancellation of the 1st applicant's union agreements, and the validity of the 3rd respondent's union agreements. This Court is minded to avoid going into the merits of the appeal, as this will be the preserve of the bench that will hear the main appeal, however, based on the grounds of appeal specified, we agree with Mr. Macharia that, the applicants have an arguable appeal.

When we turn next to the second limb of the requirements concerning the nugatory aspect, Mr. Macharia, referred us to the affidavit of Asumpta Reuben, Legal Officer of the 1st respondent, where she deposed,

> ***"That as at 30th April, 2013, the 1st applicant represented only 6 of the 1st respondent's unionisable employees, while the 3rd respondent represented 1829 employees. In terms of percentage, the state of the trade union representation is as follows:***

UNION	***MEMBERS***	***PERCENTAGE***
NUWASE	***6***	***0.32%***
KLGWU	***1829***	***99.67%***
TOTAL	***1835"***	

Though the applicants did not, provide us with a clear computation of the number of members that it represented, from the 1st respondent's computation, clearly, almost all unionisable employees, save for 6 members of the 1stapplicant are represented by the 3rd respondent. In the circumstances, what was this Court being asked to stay, given that the employees had already elected for alternative representation? The necessity for a stay of execution in this instance, had most certainlybeen overtaken by events, and as such, we find, that there is nothing to stay.

Regarding the payment of union dues to the 1st applicant, it is clear from the applicants' Amended Memorandum of Claim dated 21st May 2012 that they claim an amount of Kshs. 2,036,333,346.00 in arrears from the 1st respondent, andKshs. 1,399,681,044.00 in arrears from the 2nd respondent dating back to 18th May 2004.Their other complaint is that the 1st respondent has continued to remit the union dues to the 3rd respondent and not to the 1st applicant.

Mr. Macharia referred us again to the replying affidavit of Asumpta Reuben where she deponed:

> ***"That on the contrary, the orders sought by the applicants, if granted are certain to cause immense description to the provision of water services to the residents of Nairobi, since the improved terms of employment negotiated by the respondents for the 1st respondents employees would be reversed in lieu of a benefit in favour of a union that hardly represents any of the said employees. The orders sought by the applicants are thus against the public interest."***

Given the current state of affairs, we do not consider that the stay of execution as prayed is capable of being granted, as, firstly, the payments are in respect the union dues to union members, most of whom are already members of the 3rd respondent, and secondly, the union dues have been and continue to be paid to the 3rd respondent.

Mr. Macharia also cited the case of ***East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board & another*** ***[2007] eklr*** 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 at this stage of the proceedings to stop the ongoing remittances to the 3rd respondent, justso as to bestow benefits on the minority represented by the 1st applicant, at the expense of the majority. Additionally, due consideration must also be taken of the nature of the services in question. We know that the 1st respondent is solely responsible for supplying water and sewerage services in the City of Nairobi. Therefore, as the Court is minded to ensuring that union laws are properly adhered to, the Court must equally take into consideration the welfare of the majority of the employees of such entities, to avoid situations that could give rise to interruption of services, which would inevitably affect the wider public.

We are therefore not persuaded that success in the appeal would be rendered nugatory, and any loss suffered by the 1st applicant would capable of being quantified and are assessable in the event that the appeal succeeds.

Accordingly, we do not find any merit in the application which we hereby dismiss. We order that the costs of this application to be costs in the appeal.

Dated and delivered at Nairobi this 26th day of July, 2013.

P. KIHARA KARIUKI

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PRESIDENT OF THE COURT OF APPEAL

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W. OUKO

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JUDGE OF APPEAL

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A.K. MURGOR

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR

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