



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, ONYANGO OTIENO & VISRAM, JJ.A)

CIVIL APPLICATION NO. NAI. 112 OF 2011 (UR. 73/2011)

BETWEEN

KENYA EDUCATION STAFF INSTITUTE.....APPLICANT

AND

KENYA UNION OF POST PRIMARY TEACHERS.....1ST RESPONDENT

MINISTER FOR EDUCATION.....2ND RESPONDENT

MINISTER FOR STATE FOR PUBLIC SERVICE.....3RD RESPONDENT

(An application for stay of execution pending the lodging, hearing, and determination of an intended appeal from the Award and Decree of the Industrial Court at Nairobi (James Rika, J & Jacob Lokwee and D. K. Siele (members) dated 1st April, 2011

in

Industrial Court Cause No. 224(N) of 2008)

RULING OF THE COURT

In this application, brought under **Rule 5 (2) (b)** of this Court's Rules; **section 27** of the Labour Institutions Act (No. 12 of 2007); and **sections 162 (2) (a)** and **159 (2) (b)** of the Constitution of Kenya, the applicant seeks, in the main, the following order:

“The Honourable Court do grant a stay of execution of the Award of the Honourable Justice James Rika dated and delivered in the Industrial Court of Kenya at Nairobi on the 1st April, 2011 pending the lodgment, hearing and determination of an intended appeal from the Award.”

The facts giving rise to the dispute in the Industrial Court at Nairobi, and to the intended appeal herein, are briefly as follows:

In July 2006, Jane Murunga and Christopher Nyaki (“the Claimants”) who are trained university graduate teachers, were employed by the Teachers Service Commission (TSC) and deployed to teach at the Highridge Teachers Training College (Highridge). Subsequently, Highridge was taken over by the applicant, a semi-autonomous Government agency, created in 1988 under the Education Act (Cap 211). However, the claimants, who now claim that they “became” the employees of the applicant following the take-over of Highridge, had all along been paid by TSC. Finally, in March 2007 TSC

informed the claimants that they had ceased to be on TSC's payroll effective the end of March, 2007, and that they should look to the applicant for payment starting 1st April, 2007. At this time, the applicant wrote to TSC requesting that it continue paying the claimants for a further period of three months during which time the claimants would be "absorbed" within the applicant's pay-roll. This did not happen, and eventually the claimants stopped receiving any salaries from either the applicant or TSC, prompting them to refer this dispute to the Industrial Court.

In an Award handed down on 1st April, 2011, the Industrial Court held that the claimants were indeed employees of the applicant, and ordered as follows:

- “1. The release of the grievants (the claimants) by KESI (the applicant) to TSC on 19th August 2008 amounted to an unfair termination of the grievants' employment by KESI.***
- 2. KESI to immediately re-instate the two grievants to their jobs.***
- 3. The grievants be paid by KESI all the arrears of salary and accrued benefits within 30 days of the reading of this Award, at the rate applicable to their positions in KESI, from June 2008 to-date.***
- 4. KESI to immediately issue the grievants with written letters of appointment.***
- 5. The grievants to continue in occupation of their KESI residential premises on such terms as are currently applicable to the senior staff of KESI.***
- 6. KESI to pay each grievant 12 months' gross salary in compensation within 30 days of the delivery of this Award, for unfair termination, at the rate applicable to KESI senior lecturers in August 2008.***
- 7. Further, KESI to pay the grievants within the same period above, the cumulative difference of salaries if any, between the rate applicable to KESI senior lecturers from September 2006 and the rate actually paid by TSC to the grievants from this date to June 2008 when TSC stopped salary payments.***
- 8. Parties to bear their own costs.”***

In making the above Award, the Industrial Court delivered itself, in part, as follows:

“There is evidence to show TSC continued to pay grievants salaries at least up to June 2008. The payment of the salaries alone cannot lead to a conclusion that TSC was at that time, or in subsequent months an employer with respect to the grievants. We have concluded in the foregoing that this was an arrangement of convenience, a stop-gap step, to which the TSC kept grumbling. We understood the 1st respondent to have used his considerable influence through his PS, to have the grievants kept in the payroll of TSC as central government worked to overcome its self-created bureaucratic hurdle. There are letters from the PS and KESI Director that left no doubt the retention of the grievants in TSC payroll was a stop-gap measure. After all, in the eyes of the 1st respondent, TSC and KESI were agencies under him which hopefully could be manipulated, if only to resolve a seemingly inter-departmental affair that had gone awry. We do not think that payment of a salary by TSC made the grievants employees of TSC. KESI recruited the grievants, issued letters allocating duties, controlled the working conditions and directed the grievants on their daily work. An employee of TSC could not conceivably act as the IN-charge of KESI or be in its governing Council and Procurement Committee. From end of March 2007, TSC issued form GP 33. The understanding of all the parties was that whereas TSC had been paying grievants salaries before, the grievants were no longer in TSC service. The 3rd respondent had the capacity to employ and did employ the grievants.”

It is against that decision that an appeal is intended herein. For now, the applicant seeks stay of execution of the orders by the Industrial Court.

Mr. G. Imende, learned counsel for the applicant, submitted before us that the intended appeal is arguable in that the Industrial Court erred in holding that the claimants were the employees of the applicant when in fact they were hired and fired by TSC, and all along paid by TSC; that the claimants were only on secondment to the applicant by TSC, and that their terms of employment were governed by TSC; and finally that the order to reinstate the claimants as well as pay other damages contravened the Labour Relations Act. Mr. Imende referred us to the case of *Kenyatta University v. Julius Murungi Muriuki (CA No. 329 of 2000)*, among others.

With regard to whether this appeal would be rendered nugatory in the event the order sought is not made, he argued that the Industrial Court's order to issue the claimants letters of appointment would create a relationship of employer/employee, forcing them to pay salaries and other inordinately high damages that they are not obliged to pay. The applicant is apprehensive that such payments may not be recoverable in the event of its success in the intended appeal. Mr. M. Kipkoge, learned counsel representing the Attorney General for the 2nd and 3rd respondents, supported the applicant's submissions.

Mr. Gikunda, learned counsel for the claimants, opposed the application, submitting that the appeal was not arguable; that the conduct of the applicant clearly showed that the claimants were its employees; and that the claimants have been denied income for almost three years.

On our part, we have carefully considered the conflicting claims of both parties, and especially the history of the dispute and the litigation before the Industrial Court. We are prepared to assume, without making any definitive statements, that the intended appeal is arguable, and is not frivolous. We are also of the view that the success of the intended appeal would be rendered nugatory in the event we grant the order sought. This is because of the nature of the Award made, creating a relationship of employer/employee if the Order is enforced, and resulting in fairly huge payments, which might not be recoverable.

Accordingly, we allow the application as prayed. Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 15th day of July, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR