



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 144 of 2009 (UR 97/2009)

ATTORNEY GENERAL APPLICANT

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

CENTRAL ORGANIZATION OF TRADE UNIONS 2ND RESPONDENT

(Application for stay of execution of the decision of the High Court of Kenya at Nairobi (Ojwang’ J) dated 4th March, 2009

In

H.C. Petition No. 185 of 2008)

RULING OF THE COURT

The Hon. the Attorney General’s motion before the Court is brought under **Rule 5 (2) (b)** of the Court of Appeal Rules and though the Appellate Jurisdiction Act is also cited as the basis of the motion, we take that to mean no more than that **Rule 5 (2) (b)** is made pursuant to the Act. It is only under **Rule 5 (2) (b)** where the Court is entitled to:-

“--- order a stay of execution, an injunction or a stay of any further proceedings.”,

where a notice of appeal has been lodged by an intending appellant.

At the instance of the Law Society of Kenya, the 1st respondent herein, Ojwang, J. on 4th March, 2009, made orders the effect of which were to nullify a total of nine sections of the Work Injury Benefits Act, 2007, i.e. Act No. 13 of 2007. The learned Judge thought that **sections 4, 7 (1) & (2), 10 (4), 16, 21 (1), 23 (1), 25 (1) and (3), 52 (1) and (2) and 58 (2)** of the said Act:-

“--- are in conflict with the provisions of the Constitution and are hereby declared null and devoid of the status of law.”

The learned Judge then proceeded to order that the Attorney General was to pay the costs of the litigation. We take it that the costs were to be paid only to the 1st respondent and not to the Central

Organization of Trade Unions (Kenya), Cotu, which has been cited before this Court as the 2nd respondent. Before Ojwang', J the 2nd respondent was cited as an interested party. The 2nd respondent was not represented before the Court during the hearing of the motion and we only need to add that the applicant, the Attorney General, intends to appeal against the orders made by the superior court and filed a notice of appeal on 18th March, 2009.

What orders does the applicant seek from the Court? They are four and we set them down hereunder:-

“(a) The Execution or enforcement of the judgment made on 4th day of March, 2009 and all orders thereunder in NAIROBI HIGH COURT PETITION NO. 185 OF 2008 by Honourable Justice J.B. Ojwang’ be stayed pending the determination of the intended appeal.

(b) There be an Injunction or Stay of proceedings in all pending civil suits in the superior and Magistrate’s courts where the cause of action is founded on work accidents (injuries) pending the hearing and determination of the appeal.

(c) Pending the hearing and determination of the Appeal an Order directing that no fresh suit related to Work Injury be filed in the superior court or magistrate’s court.

(d) Pending determination of the appeal that all claims relating to Work Injury be dealt with in accordance to (sic) Work Injury Benefits Act, 2007, with the liberty of the injured to pursue a common law claim if the appeal does not succeed.”

Before we go into the issue of whether the intended appeal is arguable and if so, whether our refusing to grant the orders sought at this stage would have rendered the success of that appeal nugatory, we wish to straight away tell the applicant that under **Rule 5 (2) (b)** of the Rules of the Court, the Court would have no jurisdiction to grant the prayers sought in paragraphs (b), (c) and (d) of the motion. **Rule 5 (2) (b)** confines the Court’s jurisdiction to grant an order of stay of execution, an injunction or a stay of further proceedings only in matters in which the superior court has made a decision and the party aggrieved by that decision wishes to appeal and for that purpose has filed a notice of appeal. With respect to the applicant, the jurisdiction under **Rule 5 (2) (b)** does not extend to,

“all pending civil suits in the superior and magistrate’s courts,”

irrespective of whether a decision has or has not been made in such suits. The suits are themselves unidentified and if such suits existed the applicant would be obliged to serve the parties thereto with the motion before any order can be made by the Court touching on such suits.

Nor does the Court have power under **Rule 5 (2) (b)** to direct people intending to sue on a particular issue that they cannot sue unless and until an appeal to which they are not parties shall have been heard and determined. The same remarks must apply to the prayer in paragraph (d) and with the greatest respect to Mr. Ombwayo, learned counsel for the applicant, the orders sought in the three paragraphs show a total lack of appreciation of the jurisdiction of the Court under **Rule 5 (2) (b)**. We shall say no more with regard to those three prayers.

That leaves only prayer (a) in the notice of motion. Mr. Ngatia, learned counsel for the 1st respondent, did concede that the applicant’s intended appeal may have one or two arguable points. The Court has held many times over that one arguable point is sufficient for the purposes of **Rule 5 (2) (b)** and that an applicant under that rule is not required to show a chain of arguable points. We are satisfied the intended appeal is arguable, i.e. it will not be a frivolous appeal.

On the issue of whether the appeal would be rendered nugatory if we refuse to grant an order staying execution of Ojwang', J’s orders, Mr. Ombwayo’s first submissions were that employers are no longer obliged to obtain insurance for their employees and that cases of those employees who have been injured already cannot be proceeded with under the provisions of the Act which Ojwang', J nullified. When Mr.

Ngatia pointed out to the Court that the only order made by Ojwang', J which is capable of enforcement was that on costs, Mr. Ombwayo's reply was to refer the Court to its decision in **THE COMMISSIONER OF INSURANCE & TWO OTHERS VS. KENSILVER EXPRESS LIMITED & THREE OTHERS**, Civil Application No. NAI. 4 of 2008 (unreported). We do not, with respect, see the applicability of that decision to the present circumstances. There, it was common ground that Kenya Re-Insurance Corporation had been appointed a statutory manager of United Insurance Company Ltd and that Kenya Re-Insurance was proceeding with the winding up of the company. If the orders sought to be stayed therein were not stayed another or a new statutory manager would be appointed and confusion would ensue. Our understanding of the case of the Commissioner of Insurance, supra, is that there was an order capable of immediate enforcement to the detriment of the applicant in that case.

In the motion now before us, Ojwang, J. merely nullified certain provisions of the Act. What Mr. Ombwayo is asking us to do, is, in effect, to stay the nullification and allow the nullified sections to continue to operate as though Ojwang', J had made no order regarding those sections. In the recent decision of this Court made on 9th October, 2008, in **KILELESHWA SERVICE STATION LIMITED VS. KENYA SHELL LIMITED**, Civil Application No. NAI. 84 of 2008, (unreported) the Court, defining the scope of an order for stay of execution, delivered itself as follows:-

“The order of the superior court that the applicant intends to appeal against merely set aside the order requiring the company to compensate the applicant in the sum of Ksh.13,088,000/- for improvements done in the petrol station. It was not a positive order capable of execution by enforcement. It seems that by the stay application the applicant is in effect seeking a restoration of the order for payment of the compensation pending appeal which cannot be done at this stage. As the authors of BLACKS LAW DICTIONARY, sixth Edition, explain at page 1413:-

‘A “stay” does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of the orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.’

The words of Law, V.P in Western College of Arts and Applied Sciences vs. Oranga [1976] KLR 63 at page 66 letters L – D are apt:-

‘In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or restrain by injunction.’

Similarly, the order of the superior court which is the subject matter of the stay application is not capable of execution as it did not order any party to do anything or to refrain from doing anything or to pay any sum. The application for stay of execution is to that extent misconceived.”

These remarks must apply with equal force to the motion presently before the Court. The orders made by Ojwang', J, merely nullified certain sections of the Act. Those orders do not require the applicant to do or refrain from doing anything. We cannot in a motion for stay of execution, restore into operation the nullified sections; the effect of that would be to reverse the decisions of the trial Judge on a motion for stay. That is not permissible. There is no material before us to show that the 1st respondent is or has moved to enforce the order for costs.

That being the view we take of the matter, we now order that the notice of motion dated 20th May, 2009 and lodged in this Court on 27th May, 2009 must be and is hereby dismissed. The costs of the dismissed motion shall be in the intended appeal or shall abide further orders of the Court.

Dated and delivered at Nairobi this 10th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.