



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

Civil Appli 308 of 2005 (189/05 UR)

WILLIAM WAMBUGU WAHOME APPLICANT

AND

THE REGISTRAR OF TRADE UNIONS1ST RESPONDENT

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS,

HOSPITALS AND ALLIED WORKERS2ND
RESPONDENT

*(Application for stay of execution from the Ruling of the High Court of Kenya at
Nairobi (Ibrahim, J) dated 19th September, 2005*

In

H. C. Misc. Appl. No. 847 of 2005)

RULING OF THE COURT

This is an application under **Rule 1(2) and 5 (2) (b)** of the Court of Appeal Rules for the following orders:

“1.

2. **THAT there be an Order of Stay of Execution of the Ruling and the Order of the High Court at Nairobi in H.C. Misc. Application No. 847 of 2005 William Wambugu Wahome v. The Registrar of Trade Unions & 2 others made on 19th September, 2005.**

3. **THAT the Court be at liberty to issue further Orders and/or directions as this Honourable Court may deem fit and just to grant owing to the special circumstances of this case.**

4.”

The applicant being aggrieved by the decision of the superior court (Ibrahim , J) dated 19.9.2005 whereby the superior court on application, set aside an order dated 9.6.2005 granting leave to apply for judicial

review and a concomitant order that the grant of leave do operate as a stay of impugned decision has filed a notice of Appeal dated 28.9.2005.

On 31.7.2004, the applicant was elected the Secretary General of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers** (KUDHEIHA WORKERS) for a term of 5 years. The notice of change of officers to that effect was filed with the Registrar of Trade Unions and duly registered. On 13.5.2005, the National Executive Board of KUDHEIHA WORKERS convened a meeting in which it suspended the applicant as Secretary General and appointed FESTUS N. MUTUNGA to replace him.

In pursuance of that decision another Notice of Change of name of the officer was filed with the Registrar of Trade Unions on 13.5.2005 and Festus N. Mutunga was Registered as the Secretary General in place of the applicant. On 18.5.2005 the applicant filed an application for leave to apply for an order of certiorari to quash the registration of Festus N. Mutunga and an order of mandamus directed to the Registrar of Trade Unions compelling him to reinstate the applicant unconditionally as the Secretary General of KUDHEIHA WORKERS. The applicant further prayed that the grant of leave do operate as a stay of:-

“any change of National Officers and in particular National Executive Board members and Secretary General of the (KUDHEIHA WORKERS) pursuant to elections held on 31.7.2004.”

The superior court granted leave and the order of stay on the same day (i.e. 9.6.2005). The Judicial Review application was subsequently filed on 22.6.2005. The judicial review application was brought on several grounds, inter alia, that the removal of the applicant from office violated the constitution of the Union and the principles of natural justice.

The Union being aggrieved by the grant of leave and stay, filed an application dated 7.7.2005 to set aside the orders. The application was heard by the same Judge (Ibrahim, J) who granted leave and allowed it on the main ground that:-

“the remedy of judicial review is not available to the Applicant as there exists statutory remedies under section 38 of the Act (Trade Disputes Act) specifically enacted for Trade Unions dealing with the issues in this case.”

The learned Judge concluded his Ruling thus:

“I hereby do review my previous orders and set aside the order of leave and stay granted on 9.6.2005. The chamber summons dated 8.6.2005 is hereby struck out with costs to the 1st interested party, the Union”

That is the order which has precipitated the appeal and this application for stay of execution. The respective representatives of the 1st and 2nd respondents did not attend the hearing of the application although they were served with hearing notices. The application is supported by the affidavit of the applicant. The applicant has enumerated 14 arguable grounds in the intended appeal in para. 14 of the affidavit. In paras. 13, 14 and 15 of the affidavit the applicant gives the reasons why the appeal would be rendered nugatory if the execution is not stayed.

By Rule 5(2)(b) of the Rules of this Court the Court may in civil proceedings where a notice of appeal has been given:-

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

The applicant in this application specifically seeks an order of stay of execution of the ruling and order made on 19.9.2005.

According to WORDS AND PHRASES LEGALLY DEFINED VOL. 2 – 2nd Ed. Page 199.

“The word execution in its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice.”

The characteristics of “*execution*” are given therein as:-

- (1) it must have been sued out at the suit of “*a party*.”
- (2) It must be an execution of “*a judgment*”
- (3) The party at whose suit it is sued out must be the one who can aptly be described as “*a plaintiff*.”

The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs.

In **Yagnesh Devani & 4 others vs. Joseph Ngindari & 3 others** Civil Application No. NAI. 136 of 2004 (unreported), this Court in dealing with a similar application said in part:-

“By dismissing the Judicial Review Application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done. It can only do so after the hearing of the appeal.”

In the **Yagnesh Devani’s** case (supra) the application was adjudged grossly incompetent. That decision applies with equal force to the present case.

Like the **Yagnesh Devani** case (supra) the applicant believes, erroneously though, that the stay of execution of the dismissal order will have the effect of reviving the order of stay of the impugned decisions and the holding of any further meetings. The applicant does not seek the stay of execution for the recovery of costs.

For those reasons the application is, in our respectful view, misconceived and grossly incompetent. In the result we do not find it necessary to consider the merits of the application.

Accordingly the application is dismissed with no order as to costs.

Dated and delivered at Nairobi this 10th day of August, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.