**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: TUNOI & O'KUBASU, JJ.A & ONYANGO OTIENO, AG. J.A)**

**CIVIL APPLICATION NO. NAI. 270 OF 2003**

**KENYA RAILWAYS CORPORATION ………………......…………………..APPLICANT**

**AND**

**THOMAS M. NGUTI …………………………….…………………. 1ST RESPONDENT**

**J.M. MWANGI …..……………………………….………………… 2ND RESPONDENT**

**R.M. MBABU ……………………………………..…...…………… 3RD RESPONDENT**

**J. OMWOYO AHONGA …………………….……………………. 4TH RESPONDENT**

**E. MNJALA ……………………………….……………………... 5TH RESPONDENT**

**CHISSIWA C. KALUME ………………………..………….……. 6TH RESPONDENT**

**J.T. MWMUDENYI……………………………………………...…… 7TH RESPONDENT**

**(suing on behalf of themselves & 190 others)**

**(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi (Hayanga, J.) dated 26.09.2003**

**in**

**H.C.C.C. NO. 398 OF 2003)**
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## RULING OF THE COURT

The motion now before us was lodged in this Court on 2nd October, 2003 and pursuant to a Certificate of Urgency it was listed for hearing on 14th October, 2003 before a different bench of the Court. The application was fully heard and a ruling reserved for 24th October, 2004. However, due to certain events it was not delivered on its due date and the application had to be heard ***de novo*** .

This notice of motion has been taken out by Kenya Railways Corporation (the Corporation) ***under rule 5(2)(b)*** of the Court of Appeal Rules, seeking an order of stay of execution of the ruling and order of Hayanga J given on 26th September, 2003. By that decision the learned Judge ordered the Corporation to implement an award made by the Industrial Court on 4th May, 1998 in favour of members of a trade union called Railways Workers' Union (K) of which the respondents are members.

The respondents represent a group of 197 members who are locomotive drivers. The award by the ***Industrial Court*** covered a wide range of benefits including salaries, allowances and housing. The Corporation was unable to implement the award pleading economic difficulties. Since, as contended by Mr. Kibe Mungai, for the respondents, there is no enforcement mechanism for awards made by the ***Industrial Court*** under the ***Trade Dispute Act (Cap 234)*** the Act, he filed a suit against the Corporation in the superior court on 30th April, 2003 and sought among other reliefs: -

> ***"(a) A mandatory injunction to implement the Industrial Court Award in Cause No. 72 of 1995 dated 4 th May, 1998***
>
> ***. (b) Payment of plaintiffs' salary arrears under the respective contracts of employment as mo dified by the Industrial Court Award with effect from 1 st January, 1996.***
>
> ***(c) An injunction restraining the defendant from hiring reemploying or reengaging retired locomotive drivers etc."***

Simultaneously with the filing of the plaint the respondents made an application unde***r Order XXXIX rule 2*** of the ***Civil Procedure Rules*** and sought, among other orders, a mandatory injunction of implement the Industrial Court Award in Ca***use No. 72 of 199***5 dated 4th May, 1998; payment of arrears of salaries e.t.c. That was the application which Hayanga J. heard and decided and which has given rise to the present application.

In a nutshell, in spite of statutory provisions such as s***ection 17*** of the Act which declare the decisions of the Industrial Court to be final and not subject to question in any court, the learned Judge determined that he had jurisdiction to deal with the matter. The learned Judge granted the orders sought by the respondents including a mandatory injunction. Those orders were, of course, made at interlocutory stage and before the summons and plaint was served on the Corporation.

Mr. Chacha Odera submitted that the Corporation has an arguable appeal and that notwithstanding the position taken by the learned Judge, he had no jurisdiction to hear and determine the application. He also intends to argue that the learned Judge erred in law issuing a mandatory injunction at interlocutory stage which, in effect, finally determined the entire case thereby denying the Corporation the right to enter and defend the action.

Mr. Kibe Mungai on the other hand submitted that contrary to what Mr. Odera said, the learned Judge acted within the jurisdiction and gave what he regards as convincing reasons for his decision. He also submitted that the learned Judge correctly exercised his discretion when he granted the mandatory injunction as, in his view, there was no prejudice caused thereby.

Those are the rival contentions but what we have to decide at this stage is whether the Corporation has an arguable appeal and, secondly, whether the appeal, if successful, would be rendered nugatory, if an order of stay of execution is not granted. Notwithstanding the forceful submissions of Mr. Mungai, we are satisfied that the issue of jurisdiction is an important point which the Corporation should be given an opportunity to canvass during the appeal and we believe that it is not the sort of point we can dispose of in this application.

As regards the second limb, if a stay is not granted, the respondents will take the full benefit of the orders made by the learned Judge which include payment of salaries, allowances and other fringe benefits before the intended appeal is heard and determined. The respondents tried to show that if the appeal succeeds they will be in a position to pay back any sums the Corporation will have paid out. One only needs to

consider the source from which the repayment is to be made to see that they would be in no financial position to do so.

At the end of the day therefore, we are satisfied that the Corporation has an arguable appeal which, if successful, would be rendered nugatory unless a stay is granted. We accordingly allow this application and grant the order sought in prayer (a) of the Notice of Motion dated 2nd October, 2003 pending the hearing of the intended appeal or further order. Costs of the application to be in the appeal. Orders accordingly.

**Dated and delivered at Nairobi this 30th day of April, 2003.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

**.............................**

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

**.............................**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**