



Benjamin & 3 others v Kenya Medical Practitioners, Pharmacists and Dentists Union & another; Registrar of Trade Unions & 17 others (Interested Parties) (Petition E080 of 2021) [2022] KEELRC 38 (KLR) (27 April 2022) (Ruling)

Neutral citation: [2022] KEELRC 38 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E080 OF 2021
NZIOKI WA MAKAU, J
APRIL 27, 2022**

BETWEEN

MAGARE GIKENYI J. BENJAMIN & 3 OTHERS PETITIONER

AND

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS
UNION 1ST RESPONDENT**

COMMISSIONER OF LABOUR 2ND RESPONDENT

AND

REGISTRAR OF TRADE UNIONS & 17 OTHERS INTERESTED PARTY

RULING

1. The 1st Respondent/Applicant filed a Notice of Motion dated March 16, 2022 seeking to be heard for Orders that this Court grants conservatory orders preserving the *status quo* as far as the registered leadership of the 1st Respondent is concerned following the elections of May 6, 2021, pending the hearing and determination of the intended appeal. further, that costs of this application to abide the outcome of the intended appeal.
2. The application is made on the grounds that the 1st Respondent is dissatisfied with the Ruling of this Honourable Court delivered on March 15, 2022 and intends to prefer an appeal to the Court of Appeal. That in gist, the Court in its ruling did not consider the relevance or at all of the said new matter of evidence as expected under Section 16 of the [Employment and Labour Relations Court Act](#) - to review its ruling delivered on December 15, 2021 and that the 1st Respondent was thus denied a statutory right and condemned unheard and believes that the intended appeal is arguable and with high probabilities of success. It is the Applicants' assertion that unless this Court intervenes and preserves the status quo pending the appeal, there is likelihood that the result of the appeal even if positive shall



only be of academic value. The Application is supported by the affidavit of the 1st Respondent's legal officer who affirms the grounds of the application.

3. The Application was disposed of by way of written submissions.

Respondent/ Applicant's Submissions

4. The Applicant Union submits that the application is properly made pursuant to Rule 32(2) of the *Employment & Labour Relations Court (Procedure) Rules*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. It further submits that the Court may for sufficient cause order stay of execution of such decree or order and in coming to this decision, the court shall consider: whether substantial loss may result to the applicant unless the order is made; whether the application has been made without unreasonable delay; and whether such security as ordered by the court has been given. That in applications for stay of proceedings pending appeal, the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the Applicant once the matter proceeds and the appeal succeeds. The 1st Respondent/ Applicant submits that it has already filed a Notice of Appeal and requested certified proceedings to enable it file its Record of Appeal. The 1st Respondent submits that once this Court grants a stay as prayed, parties will move to the Appellate Court for determination of the appeal. It argues that this Application intends to properly and/or optimally utilise scarce judicial time of the Appellate Court by having it handle the substantive Appeal as opposed to the preliminary issue of stay. It cites the case of *RE Global Tours & Travel Ltd*, HCWC No. 43 of 2000 (unreported) where Ringera J. (as he then was) cited in *Philip Mutinda v Lady Lori (K) Limited* [2021] eKLR wherein the Court held that whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The Court further held that in considering such matters, the court should bear in mind such factors such as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of whether or not it is arguable, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.
5. It is the Applicant's submission that it filed the present application within 24 hours of the Court's Ruling of March 15, 2022 and thus made the application without unreasonable delay. Secondly, that it has demonstrated prima facie merits of the intended Appeal by annexing to the Application a draft Memorandum of Appeal setting out 8 grounds of appeal. That a "prima facie case" as defined by Ringera J. (as he then was) hereinabove is in the sense of not whether it will probably succeed or not but whether it is an arguable one. Thirdly, that it has demonstrated the substantial and irreparable loss that may occasion to it, in the 2nd Respondent's Annexures to the Affidavit of Hellen A. Opiyo dated January 31, 2022 wherein the 2nd Respondent demonstrates that the 1st Respondent incurred a cost of Kshs. 10,308,550/- to conduct the impugned elections. On this submission it refers the Court to *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 and *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 both cited with approval in *Victory Construction v BM (a minor suing through next friend one PMM)* [2019] eKLR. It further submits that it is willing to comply with conditions set by this Court in granting its Stay Orders pending Appeal. The 1st Respondent/Applicant urges that the prayers in its notice of motion application dated March 16, 2022 being meritorious be granted as prayed.

Petitioners' Submissions

6. In opposition to the stay Application, the Petitioners submit that *Order 42 Rule 6(2) of the Civil Procedure Rules* bars this court from ordering stay of execution pending appeal unless: the application is



brought without inordinate delay; the applicant demonstrates that he will suffer substantial loss unless stay is ordered; and the applicant is willing to give security as the court may order. On this submission they cite the case of *Victory Construction v BM (a minor suing through next friend one PMM* [2019] eKLR quoting the Court of Appeal decision in Application No. Nai. 15 of 1990 – *Visbaram Ravji Halai v Thornton & Turpin* Civil [1990] KLR 365. The Petitioners first argue that the Applicant union cannot appeal the ELRC decision having not got the authority to appeal from members or any other organ of the union and which issue this Court has to first interrogate before looking at merits of the parameters/grounds for stay pending appeal. They submit that whether the conditions for stay pending appeal have been met can only be interrogated if the applicant has filed a notice of appeal. That this means that a right of appeal should first exist before a party asserts the right by filing a notice of appeal and that absence of either the right to appeal or the filed notice is to effect that the court’s jurisdiction or its discretion to stay cannot be invoked. They submit that since the Court has found that the union officials were not validly elected and therefore cannot validly make a decision on behalf of its members going forwards, the said officials cannot purport to appeal this Court’s decision and further seek stay of the decision. That they ought to file such an appeal in their private capacities as affected parties or members of the union and that the only way they would have locus standi is if they had a mandate directly from the members who currently retain the legitimacy of the union in the absence of officials. The Petitioners submit that the 1st Respondent’s application and intended appeal are thus a nullity having found that the union does not have authority to file an appeal on behalf of union members.

7. It is submitted by the Petitioners that the Applicant has not demonstrated that it will suffer substantial loss if the stay is not granted. That the consequence of the order of the Court is that a fresh election is to happen but should this be delayed further, union members will be represented by persons who potentially lack legitimacy and whose decisions will hurt the union irreversibly. That peril suffered by the Applicant union ought not to be occasioned upon the union without the members’ consent and would never be compensated, even by costs nor by the security deposited by the Applicant. That in essence, the Applicant has not made sufficient cause for grant of stay having consistently blocked the verification of elections and having not defended the Application/Petition. The Petitioners submit that in this case the Applicant argues that large sums of money will be wasted in elections if the appeal succeeds but the said amount can be monetarily be compensated if stay is denied and appeal succeeds as similarly found in *Loyd Mugambi Maina & 19 others v Kirumi Kiamujari Water Project (Sued through its Registered Trustees/Officials)* [2022] eKLR. On the issue of an arguable case, the Petitioners submit that the appeal is based upon technicalities as filed by the appellants. That the substantive issue that turned the case at the Court was the inability to produce the ‘ballot boxes’ which were the electronic footprint of the election that was purportedly conducted. That this rendered the case moot because there was nothing to argue about if the election could not even be verified by the court and that therefore the case is unlikely to be argued substantively. They further argue that the right of appeal does not give automatic stay as held by the court in *Jennifer Njuguna & another v Robert Kamiti Gichubi* [2017] eKLR. The Petitioners urge this Court not to grant stay so that elections can be held and legitimate members put in office by the members.
8. It is the Petitioners’ submission that the Applicant is clearly abusing court processes applying for stay pending appeal while at the same time requesting for the same at the Court of Appeal (application COAPPL/E477/2021 of stay pending appeal). They cite the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR wherein the court extensively explained the concept of abuse of court processes and held that “it’s settled law that a litigant has no right to pursue pari passu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both...” It is their submission that granting



the prayers in this application is akin to reviewing for the second time the Ruling of the court and will aid in continuing the illegality and irregularities of the dubious election officials. They urge the court not to accept the invitation.

9. The motion before me must fail. Not because there is no prima facie merits on arguability of a proposed appeal but because, to use the words of the Applicant, the motion in this Court is not an optimal utilisation of scarce judicial time. The Applicant has filed a similar motion before the Court of Appeal being COAPPL/E477/2021 and as such it would be a waste of my time to consider this motion. One cannot simultaneously seek reliefs here and in the Court of Appeal as that is abuse of court process. Application is dismissed with costs to the Petitioners.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2022

NZIOKI WA MAKAU

JUDGE

