



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 258 OF 2018

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS.....CLAIMANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

RULING

1. The respondent filed application dated 2/7/2020 praying for an Order in the following terms: -

(i) Spent

(ii) Spent

(iii) That the Honourable Court be pleased to stay the execution of the judgment delivered by Hon. Justice Mathews Nduma on 16th April, 2020 in Kisumu **ELRC No. 258 of 2018 – Kenya Union of Sugarcane Plantation and Allied Workers –vs- West Kenya Sugar Company Limited** and subsequent Order issued by the Employment and Labour Relations Court at Kisumu pending the hearing and determination of the Respondent/Applicant's intended Appeal.

(iv) That the costs of the application be provided for.

5. The application is supported on grounds set out on the face of the application numbered 1 to 15 the gravamen of which is that the Court delivered a Ruling on 16/4/2020 in which was ordered *inter alia* that the respondent/applicant do implement backdated salary increments for all casual employees who had worked for the Respondent/Applicant for continuous period of two months in terms of Clause 34 of the Collective Bargaining Agreement RCA and to effect these payments within 30 days of delivery of the aforementioned Ruling.

6. That the Respondents/Applicant's Advocates on record at the time inadvertently failed to apply for stay of the Orders pending the filing of an Appeal.

7. The present Advocates sought to file notice of Appeal and realized that no stay Orders had been granted. That the Ruling was delivered during COVID- 19 period and most employers were in a crisis coming up with the measures to ensure safety of the employees and the Ruling was delivered online.

8. That the applicant intends to proceed with its Appeal from the Ruling and had by a letter dated 1/6/2020 requested the Deputy Registrar for a certified copy of the Ruling and proceedings.

9. The Notice of Appeal dated 20/5/2020 was duly filed on 28/5/2020.

10. The application is further supported by affidavit of Martin Chisaka, the Human Resource Manager of the Respondent/Applicant who deposes *inter alia* that the period of 30 days within which the respondent/Applicant had been directed in the Ruling to seek the payments has since lapsed and the applicant is apprehensive that the claimant may seek to execute against the Respondent.

11. That the business has been adversely affected by COVID- 19 and the applicant, the largest employer in Kakamega town with over 2,000 permanent employees and over 2,500 on fixed term contracts stands to suffer irreparable harm.
12. That the contracts of casuals who by dint of the Ruling were effectively converted to fixed term employment contract, have since lapsed and the employees shall not be able to reimburse the applicants the paid salaries if the Appeal is successful.
13. That the applicant shall suffer substantial loss therefore should the appeal succeed.
14. That the intended Appeal has high chances of success.
15. That the application be granted accordingly.
16. The claimant/respondent filed a replying affidavit sworn by Francis Wangara, the Secretary General of the Claimant on 24/7/2020 who deposes *inter alia* that the Ruling of the Court was delivered online with consent of both parties and no stay of execution was sought by the applicant.
17. That the Ruling emanated from a consent of the parties dated 28/8/2018 filed in Court on 29/8/2018 where the salary increment was agreed upon for the period 2017-2019.
18. That the applicant has not attached draft Memorandum of Appeal demonstrating probability of success of the intended Appeal.
19. That the claimant is entitled to the fruits of the judgment and the applicant has not demonstrated that it would suffer substantial loss if the stay is not granted. That the application be dismissed with costs.
20. In the case of build –vs- Rent Restrictions Tribunal Civil Appeal No. NAI 6 of 1979 the Court of Appeal held: -

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be rendered nugatoryit has been said that the Court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful from being nugatory.”

21. In the present case, the decretal sum in terms of the ruling of the Court is a very large sum of salary arrears to over 770 formerly designated casual workers.
22. The applicant has demonstrated that it would suffer substantial loss if the stay is not granted and the appeal is eventually successful.
23. The Court is inclined to exercise its discretion not to prevent the appeal, if successful from being nugatory.
24. Accordingly, the application is granted in terms of prayer 3 thereof and the following Orders issued:-
 - (a) The Ruling of the Court delivered on 16/4/2020 in Kisumu ELRC No. 258 of 2018 is stayed pending the hearing and determination of intended Appeal noted on 28th May, 2020.
 - (b) Costs in the cause.

Dated and delivered at Nairobi this 11th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

O. & M. Law LLP for the Applicant/Respondent

Secretary General, of the Union

Chrispo: Court clerk.