



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 234 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 7th March, 2019)

BANKING, INSURANCE & FINANCE UNION (K).....CLAIMANT

VERSUS

BANK OF BARODA (K) LTD.....1ST RESPONDENT

KENYA BANKERS ASSOCIATION.....2ND RESPONDENT

RULING

1. The Application before Court is the one dated 17th October, 2018. The Application was filed under a Certificate of Urgency through a Notice of Motion filed under Rule 5 (2) (b), 41 and 47 of the Court of Appeal Rules and Sections 3A and 3B of the Appellate Jurisdiction Act.

2. The Application seeks the following Orders that:-

1. The application herein be certified urgent and be heard expeditiously and ex parte in the first instance.

2. There be stay of execution of the decision of Hon. Justice Hellen S. Wasilwa delivered on 8th October 2018 in Nairobi ELRC NO. 234 of 2018 BANKING INSURANCE AND FINANCE UNION (K) VERSUS BANK OF BARODA (K) LIMITED and KENYA BANKERS ASSOCIATION pending the inter-parties hearing of this application.

3. There be a stay of execution of the decision of Hon. Justice Hellen S. Wasilwa delivered on 8th October 2018 in Nairobi ELRC NO. 234 of 2018 BANKING INSURANCE AND FINANCE UNION (K) VERSUS BANK OF BARODA (K) LIMITED and KENYA BANKERS ASSOCIATION pending the hearing and determination of this application.

4. There be a stay of execution of the decision of Hon. Justice Hellen S. Wasilwa delivered on 8th October 2018 in Nairobi ELRC NO. 234 of 2018 BANKING INSURANCE AND FINANCE UNION (K) VERSUS BANK OF BARODA (K) LIMITED and KENYA BANKERS ASSOCIATION pending the hearing and determination of the intended appeal.

5. This Honourable Court do issue such other directions and/or Orders as the Court may deem just and expedient to grant.

6. Costs of this application be in the cause.

3. This Application is premised on the grounds that:-

a) The 1st Respondent, Bank of Baroda (K) Limited, is one of the 47 members of the Kenya Bankers Association who negotiates Collective Bargaining Agreements with the Claimant as per Parties Recognition Agreement entered into in the year 2000.

b) On 8th October 2018 the Hon. Justice Hellen S. Wasilwa delivered decision in Nairobi ELRC NO. 234 of 2018 BANKING INSURANCE AND FINANCE UNION (K) VERSUS BANK OF BARODA (K) LIMITED and KENYA BANKERS ASSOCIATION.

c) The Learned Judge of the Employment and Labour Relations Court held that the retirement age should be viewed as a

negotiable item as per parties Collective Bargaining Agreement.

d) The Applicant being aggrieved by the aforesaid decision has filed the Notice of Appeal and also applied for typed proceedings to facilitate lodging the main appeal in the Court of Appeal against that part of the decision which reads that “the retirement age should be viewed as a negotiable item as per parties Collective Bargaining Agreement contrary to the parties Recognition Agreement and the Labour Relation Act of 2007.

e) The Applicant's intended appeal has merit and high chances of success on grounds, among others, that:-

i. The Learned Trial Judge of the Employment and Labour Relations Court erred in law by holding that the retirement age should be viewed as a negotiable item as per parties Collective Bargaining Agreement.

ii. The Learned Trial Judge erred in law by deciding that the retirement age is a negotiable item when the matter has not been brought before the Court following the laid down procedure as provided for in the Labour Relations Act and Parties Recognition Agreement on Collective Bargaining Agreement disputes.

f) The Applicant has an arguable appeal with a probability of success and will suffer irreparable damage loss if the orders sought are not granted. Further, the findings and orders of the Employment and Labour Relations Court will affect over 90% of the banks, which are not parties to this suit that is in respect of only one bank.

g) The intended appeal will be rendered nugatory if an order for stay of execution is not granted as the current Collective Bargaining Agreement between the Claimant and the Applicant will lapse in February 2019 and the Parties Collective Bargaining Agreement negotiations are due to commence any time during the pendency of the appeal which will be highly prejudicial to the Applicant and its members.

h) The Applicant has moved in the presentation of this application before this Honourable Court without inordinate delay and it is in the interest of justice and the greater good that the orders sought be granted.

4. The Application is supported by the Affidavit of **HABIL OLAKA** sworn on 17th October, 2018 in which he reiterates the averments made in the Notice of Motion Application.

5. The Claimant opposed this Application vide a Replying Affidavit filed in Court on 26th October, 2018 deponed by **JOSEPH OLE TIPAPE**, the 1st Deputy General Secretary of the Claimant Union, in which he avers that Judgment in this matter was delivered by the Honourable Justice Hellen Wasilwa on 8th October, 2018.

6. He further avers that both the 1st and 2nd Respondents being aggrieved by the said Judgment filed simultaneous notices of Appeal, Memorandum of Appeal together with an Application to the Deputy Registrar for certified copies of the Court proceedings and made Applications for Stay of execution of the Judgment pending hearing and determination of the intended Appeal.

7. The Claimant/Respondent contends that the matter was referred to the Court after parties failed to agree and a certificate of unresolved disputes issued by the Conciliator in line with the Act and final judgment delivered on 8th October, 2018.

8. The Claimant/Respondent further contends that they have a right to enjoy the fruits of the Judgment delivered in their favour. Further, that the 1st and 2nd Respondent's Memorandum of Appeal raises no arguable issue and that the Appeal will not be rendered nugatory if the Orders sought in the instant Application are not granted.

9. In conclusion, the Claimant/Respondent urged the Court to dismiss the instant Application with costs to the Claimant.

10. The Application by the 1st Respondent dated **18th October, 2018**, was dismissed on **13th February, 2019** for want of prosecution.

11. In disposing of the instant Application, the parties agreed to file written submissions.

2nd Respondent's/Applicant's Submissions

12. It is submitted by the 2nd Respondent/Applicant that they have an arguable Appeal which will be rendered nugatory if the Orders sought in the instant Application are not granted.

13. The 2nd Respondent/Applicant submitted that it has satisfied the principles governing the Court's jurisdiction under Rule 5(2) of the Court of Appeal Rules as settled in numerous cases for giving stay.

14. In conclusion, the 2nd Respondent/Applicant urged the Court to allow the instant Application.

15. There are no submissions on Record filed on behalf of the Claimant/Respondent.

16. I have examined all the averments of the parties and submissions filed herein. Order 42 rule 6(2) of the Civil Procedure Rules state as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless:

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

17. The guiding principles for grant of orders of stay of execution are provided as above.

18. The Applicant satisfied the first principle in that they filed this application without delay.

19. The Respondent/Applicant have also submitted that they stand to suffer irreparable harm if the orders are not granted as they will affect over 90% of their staff.

20. In view of the fact that this Court’s primary duty is to do justice and so that the appeal is not rendered nugatory, I find that granting orders of stay pending appeal would tilt in favour of the Applicant and sustain the status quo. This would in effect ensure that the appeal if at all is not rendered nugatory in view of the numbers of employees affected by this Court’s order. I will therefore allow the application for stay pending appeal.

21. Costs to abide the outcome of the appeal.

Dated and delivered in open Court this 7th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Namasake for 2nd Respondent – Present

No appearance for Applicant