



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.449 OF 2017

CONSOLIDATED WITH

CAUSE NO.13 OF 2018

PLANTATION & AGRICULTURAL WORKERS UNION CLAIMANT

VERSUS

EXPORT FLORICULTURE, HORTICULTURE &

ALLIED WORKERS UNION 1ST RESPONDENT

AGRICULTURAL EMPLOYERS ASSOCIATION 2ND RESPONDENT

RULING

The ruling herein relates to the 1st respondent's application, Export Floriculture Horticulture & Allied Workers Union and dated 15th August, 2019 and seeking for orders in the substratum that;

Court be pleased to issue an order staying the execution/implementation of Orders 'b' 'c' and 'd' in the judgement of the court and all the findings that led to the impugned orders as delivered on 29th July 2019 pending hearing and determination of the intended appeal.

The application is supported by the affidavit of David Omulama, the general secretary of the 1st respondent and on the grounds that in the judgement of the court on 29th July, 2019, the 1st respondent was aggrieved and wish to appeal against the same. The orders made are prejudicial to the 1st respondent as they negate the collective bargaining agreement for the 1st respondent members which is the cornerstone of the freedom of association and article 41 of the constitution on the right to fair labour relations. There are more than 200 members of the 2nd respondent, being employers and for the purpose of collective agreements negotiations the findings of the court shall force them to implement the agreements entered with the claimant only. The court cannot force other employers to implement agreements without their consent. There shall be prejudice suffered hence this application seeking to stay the judgement of the court pending the filing of an appeal.

Mr Omulama avers in his affidavit and Further Affidavit that upon delivery of judgement the respondent moved without delay to make this application, has filed a Notice of Appeal and there shall be great prejudice if there is no stay of execution of the court judgement.

In reply the claimant filed the Replying Affidavit of Henry Omasire and who avers that he is the National Organising Secretary of the claimant and with authority to reply herein. With regard to the orders sought seeking stay of execution of the judgement Mr Omasire avers that the claimant enjoys recognition with 2nd respondent under the provisions of section 54 of the Labour Relations Act (LRA) and has negotiated collective agreements (CBA) therefrom and which relates to the terms and conditions of employment for the employees.

The claimant represents the simple majority of the employees and has been recognised by the 2nd respondent. The 2nd respondent and Equinox Horticulture which the 1st respondent is seeking to engage in CBA negotiations is under the recognition the claimant enjoys with the 2nd respondent and even where an intended appeal is successful, section 57 and 58 of the LRA apply where the claimant has over 80% of the unionisable employees in its membership.

Mr Omasire also avers that the application filed by the 1st respondent is in abuse of court process and should be dismissed.

Wesley Siele in his Replying Affidavit for the 2nd respondent avers that he is the Chief Executive Officer and avers that the 2nd respondent has recognised the claimant as the sole representative of employees in its members employment and has negotiated CBAs in this regard pursuant to recognition granted under the provisions of section 54 of the LRA upon the claimant attaining a simple majority membership. To stay or vacate the judgement of the court will affect the parties as such will be amending the recognition agreement without availing the channels set out in the law for any variations. A stay of the judgement will also mean that the 1st respondent shall be at liberty to negotiate CBAs with the 2nd respondent members in contravention of section 54(2) of the LRA.

Mr Siele also avers that the 2nd respondent is opposed to the application seeking to stay the judgement of the court.

The parties filed written submissions The 1st respondent submitted that there is a draft memorandum of appeal filed and which raise triable issues for determination against the judgement of the court and should be heard before the same can be executed as there was a misapprehension of section 54(1), (2) and (3) of the LRA. There are sufficient grounds for appeal.

There shall be sufficient loss and irreparable loss where execution of the judgement is not allowed as by the judgement of the court there is prejudice against the 1st respondent to the extent that there is recognition by 3 employers and negotiations for CBA cannot proceed thus denying the employees a CBA contrary to the rights to association and fair labour relations.

The 1st respondent has met the conditions for the grant of orders of stay of execution of the judgement as held in the case of **David Benedict Omulama & others versus the Registrar of Trade Union and Kenya Plantation & Agricultural Workers Union, Appeal 7 of 2011**. On the principles that every trade union has the right to engage in collective bargaining the 1st respondent should be allowed to do so as held in **Co-operative Bank Kenya Ltd versus BIF Civil Application No.93 of 2014** and the orders sought seeking stay of execution should be issued.

The claimant submitted that there shall be no prejudice where the orders sought are not allowed as the judgement is premised under the provisions of section 54 of the LRA where the 2nd respondent did not file a defence as held in the case of **Kenya Union of Printing Publishing Paper manufacturers Pulp & Packaging Industries versus Raffia (EA) Limited Cause No.160 of 2013** where the union had not demonstrated having met the threshold for recognition or for collective bargaining.

The principles precedent to the grant of stay of execution pending the hearing of an intended appeal are set out in several case law and in citing a few, in the case of **Amal Hauliers Limited versus Abdunasir Abukar Hassan [2017] eKLR** that;

This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“No order for stay of execution shall be made under sub rule (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.”

And in the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home versus Miriam Maalim Bishar & another [2018] eKLR** it was held that;

It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.

The judgement of the court herein and which the 1st respondent intends to file an appeal against has no quantified monetary value save that by application of section 54 of the LRA which the 1st respondent now wishes to address on appeal, where stay of the judgement is allowed there will be the possibility of engaging in collective agreements with the employers who have allowed recognition and by such address

the terms and conditions of employment. With respect and this being my appreciation of the issue in stake, the alleged substantial loss is not direct save the 1st respondent members shall not have better terms and conditions of employment. On this basis once the issues at appeal are addressed, the issue settled, the employees represented by the 1st respondent shall continue to enjoy the terms and conditions applicable to claimant members who should not suffer prejudice in view of section 26(2) of the Employment Act, 2007 that;

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment and Labour Relations Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of Service shall apply.

Also and in my humble view there being no direct monetary value to the court decree, the requirement for the deposit of security so as to satisfy the principle conditions for the grant of stay of execution of the judgement do not apply.

The right of appeal against the decisions of the court being a right secured under the provisions of section 17 of the Employment and Labour Relations Court Act, 2011 the 1st respondent has the right and liberty to move the appellate court.

The questions of law now addressed by the 1st respondent in the draft memorandum of appeal shall be addressed by the Court of Appeal and not for this court to go into the merits. To stay the judgement of the court to allow the 1st respondent engage in collective agreement negotiations with members the union feels has given recognition is now addressed by this court and to stay the orders issued shall not be in the interests of justice at this instance. The 1st respondent in relying in the case of **David Benedict Omulama & others versus the Registrar of Trade Union and Kenya Plantation & Agricultural Workers Union, Appeal 7 of 2011** is to miss the facts applicable to each case which have different foundations so as for the court to arrive at its ruling. The facts herein and the facts in the referenced matters are different.

Accordingly, the application dated 15th August, 2019 shall not be allowed. Each party shall bear own costs.

Delivered at Nakuru this 17th day of December, 2019.

M. MBARU

JUDGE

In the presence of: