



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 257 OF 2018

INTER-PUBLIC UNIVERSITIES' COUNCILS

CONSULTATIVE FORUM OF FEDERATION OF

KENYA EMPLOYERS.....CLAIMANT

VERSUS

UNIVERSITIES' ACADEMIC STAFF UNION.....RESPONDENT

AND

MINISTRY OF EDUCATION1ST INTERESTED PARTY

NATIONAL TREASURY.....2ND INTERESTED PARTY

MINISTRY OF LABOUR.....3RD INTERESTED PARTY

ATTORNEY GENERAL4TH INTERESTED PARTY

SALARIES AND REMUNERATION

COMMISSION.....5TH INTERESTED PARTY

RULING

Introduction

1. On 16.3.2018 I rendered a ruling herein declaring the strike called by the respondent as unprotected by dint of section 76(b) and 78(1) (e) of the Labour Relations Act, and proceeded to make the following directions:

- a) The Respondent to call off the strike forthwith and the employees to resume work on Monday 19th March 2018 at 08.00 hours.
- b) The claimant to present to the C.S Labour her counter proposal for the 2017-2021 CBA and serve the respondent within 30 days from 16.3.2018 for use in the conciliation process.
- c) If respondent complies with the order (a) herein above her members shall not be victimized in any way for participating in the unprotected strike.
- d) Each party to bear his or her own costs.
- e) The suit will be mentioned on 17th April 2018 to confirm compliance.

2. The respondent was dissatisfied and has since exercised her right of appeal by filing a Notice of Appeal. In order to protect that right of appeal, she brought the Notice of motion dated 19.3.2018 seeking stay of execution of the impugned ruling pending the intended appeal. The grounds of the application are set out on the body of the motion and the supporting affidavit sworn by Dr. Constantine Wasonga, General

Secretary for the Applicant, on 19.3.2018. The application is opposed by the Claimant and the 5 interested parties through points of law and the replying affidavit sworn by M/s Ruth Kirwa, an officer and the Legal counsel for the claimant.

Applicant's Case

3. Mr Koceyo Advocate prosecuted the motion on behalf of the applicant. He submitted that the applicant for stay pending appeal is only required to demonstrate two grounds namely, that he has an arguable appeal and secondly, that the appeal will be rendered nugatory if the order of stay is withheld. He relied on the court of Appeal decision in *Wells Fargo Limited vs. Cyrus Kioko & 48 others [2015] eKLR* to fortify the foregoing submission.

4. On the first ground, he submitted that an arguable appeal does not necessarily mean an appeal which must succeed. He contended that the impugned ruling has the effect of prematurely disposing of the suit before hearing the parties. He further contended that the appeal raises constitutional and legal issues on the right of an employee to go on strike. He further contended that the ruling referred the parties to conciliation for the second time yet the conciliator had made a report on his attempted conciliation and referred the dispute to this court. He submitted that the appeal will seek interpretation whether a strike commencing after the conciliation report was unprotected. Finally, he faulted the referral of the dispute for conciliation while at the same time the dispute remained active in court with a mention date on 17.4.2018.

5. On the second ground, the counsel submitted that calling off the strike in compliance with the impugned ruling will defeat the entire appeal because the substratum of the appeal will be destroyed. He further submitted that calling off the strike will also not only scuttle the agreement to negotiate the CBA on the set timelines, but also defeats the constitutional right of an employee to go on strike. He concluded by contending that the application has been made without undue delay and no party will suffer any prejudice by giving the Court of Appeal a chance to pronounce itself on the issues raised by the intended appeal.

Claimant's case

6. M/s Kirwa advocate for the claimant opposed the application and relied on her own replying affidavit and the grounds of opposition filed on 26.3.2018. She submitted that the applicant has engaged in a strike before exhausting all the internal mechanisms. She relied on *Teachers Service Commission vs. KNUT & KUPPET [202] eKLR* where this court faulted the two unions for engaging in strike before complying with conciliation procedures. She submitted that the application is brought in bad faith because the strike herein is unprotected as it was called for without complying with section 76 of the Labour Relations Act. She lamented how the strike is affecting over 600,000 innocent students from 31 public universities in our country.

7. In addition, the counsel denied that the impugned ruling concluded the suit and submitted that it opened an opportunity for the parties to go for conciliation on set timelines. In her view, the application now before the court is likely to delay the finalization of the CBA. She submitted that there are no sufficient grounds for granting stay and prayed for security for the due performance of the impugned orders.

Interested parties' case

8. M/s Chasiyna learned state counsel for the first to fourth interested party opposed the application and submitted that whereas article 41 of the constitution gives the right to strike, the said right is only exercisable under section 76 of the labour Relations Act. She argued that the said right must be exercised in a balance with other peoples' rights, and in this case the rights of 600,000 innocent students. She contended that the strike is unprotected because it is not in compliance with section 76 and 79 of the Act. She observed that the strike notice dated 21.2.2018 was copied to several government officers but there is no evidence that the union held any meetings with the said officers to settle the trade dispute cited in the strike notice.

9. She submitted that industrial relations involves tripartite relation of social partners who should work together. She faulted the applicant for snapping conciliation initiated by the ministry of labour and again she is refusing conciliation initiated by the court. She concluded by urging the court to decline the stay order because the strike is unmerited as there is no dead lock arising from conciliation process.

10. M/s Wafula, advocate for the fifth interested party, associated herself with the submissions by M/s Kirwa and M/s Chasiyna and concurred that the impugned ruling did not conclude the suit as alleged by the applicant. She maintained that the said ruling did not amount to final orders.

Applicant's rejoinder

11. Mr. Koceyo submitted that this case is distinguishable from *Teachers Service Commission vs. KNUT & KUPPET [202] eKLR* because in this case there was conciliation and a report was filed in court. As regards order for security, the counsel submitted that there is no money decree involved herein and as such the requirement for depositing of security does not arise. He denied that the applicant is in contempt of court and submitted that the party who is aggrieved by an order of the court can apply for stay of the order under the rules. He further submitted that the stay order sought will not stop the negotiations or bar the claimant from presenting her counter proposal but he contended that denying it will take away the employees' right to go on strike as a tool of negating better terms of employment. He concluded by observing that the opponents of the application did not contest the contention that the appeal will be rendered nugatory if the stay order is withheld.

Analysis and Determination

12. After careful consideration of the application, rival affidavits and the oral submissions by counsel the only issue for determination is whether the applicant has met the threshold for granting stay pending appeal as provided under order 42 rule 6(1) of the Civil Procedure Rules. The said provision bars the trial court from ordering stay of execution pending appeal unless it is satisfied that:

- (a) Substantial loss may result to the applicant unless the order is made.
- (b) The application is made without inordinate delay.
- (c) The applicant is willing to abide by the security terms as the court may order.

Substantial loss

13. Stay of execution is a serious interference with the right of a successful litigant to enjoy the benefit of winning his litigation. No wonder the foregoing provision bars the trial court from granting stay of execution of its decision except where it is satisfied that the applicant has demonstrated that he will suffer substantial loss. In other words the order should only issue to protect the right of an appellant to enjoy his right of appeal without the fear that his appeal will not be rendered nugatory. The appeal becomes nugatory if the successful appellant is unable to get back the right he was pursuing through the appeal as a result of the execution of the impugned decision.

14. The orders made by the court on 16.3.2018 were basically a declaration that the strike in issue is unprotected, restrain the applicant from continuing with the same and instead to go for conciliation of the trade dispute before a conciliator or a conciliation committee appointed by the Cabinet Secretary labour. The said orders were in line with section 76 and 77 of the Labour Relations Act. The applicant wants the said orders stayed pending his intended appeal. In her view, executing the orders will destroy the substratum of the appeal and render it nugatory. She submits that executing the said orders will take away the constitutional right of the employees to go on strike as a tool for negotiating with their employer.

15. After careful consideration of the material presented to me, I am not satisfied that the applicant has demonstrated that she will suffer substantial loss if the stay is withheld. If in the unlikely event that the applicant succeeds in her appeal, she will be free to continue with the strike if the conciliation fails to resolve the dispute. On the other hand, if the appeal fails, the strike will have inflicted untold suffering on the innocent students and other stakeholders. It is after careful evaluation of the balance between the interests of the applicant and the impact of continuing the strike that I have declined to grant the stay order sought. Granting the stay order would also be breaching the statutory policy provided under section 77 of the Labour Relations Act.

16. The said section provides thus:

“77(1) A party to a dispute that has received notice of a strike or lock-out, may apply to the Industrial court to prohibit the strike or lock-out as a matter of urgency if-

(a) The strike or lock-out is prohibited under this part; or

(b) The party that issued the strike or lock-out notice has failed to participate in conciliation in good faith with a view to resolving the dispute.

(2) A party that failed to attend any conciliation meeting may not seek relief under subsection (1) (b).

(3) The Industrial Court may, in granting relief in respect of an application made under subsection (1) (b), direct the parties to engage in further conciliation in good faith with a view to resolving the dispute.”

17. In his submissions, Mr. Koceyo learned counsel for the applicant conceded that, before the strike commenced on 1.3.2018, the parties were invited to conciliation after which the conciliator made his report. Obviously, the said report was informed by the failure by the applicant to attend the conciliation meeting on 28.2.2018. consequently, I find and hold that the applicant having deliberately failed to attend conciliation meetings to resolve the dispute stated in the strike notice, I decline to grant her the relief she now seeking in line with the provision of section 77 aforesaid.

18. The foregoing position is fortified by the observations made by the conciliator on the goodwill of the parties in resolving the dispute cited in the strike notice. After hearing the management, the conciliator formed the opinion that the management had demonstrated good will towards resolving the trade dispute involved in the strike through conciliation. He therefore advised the Ministry of education to move to court for arbitration if the strike persists. The ministry has not yet acted on the said advice but in the meanwhile, the claimant moved the court under section 77 of the Labour Relations Act on 1.3.2018 and obtained the impugned orders.

Undue delay

19. The impugned ruling was delivered on 16.3.2018 and the application for stay was filed on 19.3.2018. I am therefore satisfied the application was made without inordinate delay.

Security

20. The claimant has not demonstrated why security should be deposited and in what terms. I agree with the applicant that security for performance is not applicable in this case even if the applicant's intended appeal failed in the long run.

Disposition

21. In view of my finding herein above that the applicant is in breach of section 77 of the Act and that the court is not satisfied that the

applicant will not suffer substantial loss if the stay order is withheld, I dismiss the application with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 6th day of April 2018

ONESMUS MAKAU

JUDGE