



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 409 OF 2018

UNIVERSITY OF NAIROBI.....CLAIMANT

VERSUS

KENYA UNIVERSITIES STAFF UNION.....RESPONDENT

AND

NATIONAL TREASURY.....1ST INTERESTED PARTY

MINISTRY OF LABOUR.....2ND INTERESTED PARTY

MINISTRY OF EDUCATION.....3RD INTERESTED PARTY

SALARIES AND REMUNERATION COMMISSION.....4TH INTERESTED PARTY

RULING

Introduction

1. On 6.4.2018 I rendered a ruling herein declaring the strike called by the respondent as unprotected by dint of section 76 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 9th April 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 21 days from 6.4.2018 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 to be mentioned to confirm compliance on a day to be mutually agreed.

2. The respondent (hereinafter referred to as the applicant) was dissatisfied and she exercised her right of appeal by filing a Notice of Appeal on the same day to challenge the entire ruling. In order to protect that right of appeal, she brought the Notice of motion dated 9.4.2018 seeking stay of execution of the impugned ruling and any further proceedings in the suit 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. Charles G. Mukhwaya, General Secretary for the Applicant, on 9.4.2018. The application is opposed by the Claimant vide the grounds of opposition filed on 11.4.2018

Applicant's Case

3. Mr. Ondego Advocate prosecuted the motion on behalf of the applicant. He submitted that the applicant has already lodged a Notice of Appeal, but urged that the intended appeal will be rendered nugatory if the order of stay sought is withheld. He contended that if the impugned ruling is executed, the substratum of the appeal will be destroyed and the claimant will suffer substantial loss. He further contended that there are already threats to terminate the employees who are on strike, which according to the applicant, is likely to derail

further conciliation process. He submitted that negotiations are supposed to be done in good faith without threat of dismissal of the striking workers.

4. In addition, the counsel submitted that the application for stay has been made without undue delay because it was filed on 9.4.2018, 3 days after the impugned ruling was delivered. He therefore prayed that the same be allowed as prayed contending that the order emanating from the impugned ruling has not yet been served on her.

Claimant's case

5. M/s Kanyiri for the claimant opposed the application and relied on the grounds of opposition and her skeleton submissions filed on 26.3.2018. The counsel submitted that the application has not met the threshold for the grant of stay pending appeal as provided by order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, namely satisfy the court that: substantial loss may result if stay is denied; the application was made without undue delay; and offer of security for costs.

6. In the claimants view staying the impugned ruling would contravene Article 41 of the Constitution of Kenya and ILO convention 98 which provide for the right of the parties to negotiate freely. She submitted that staying the ruling would mean that the claimant will not make a counter proposal to the CBA, the negotiations for the new CBA will not be done and the studies at the university will not resume. She denied the alleged threat to dismiss the striking members of the applicant and attributed the alleged threat to the IPUCCF who is not a party to these proceedings. She however observed that the applicant was represented in court when the impugned ruling was delivered and because she has not complied with the same, disciplinary action can still be taken against the striking employees.

7. In addition to the foregoing the claimant submitted that the applicant has not demonstrated that she has an arguable appeal to warrant granting of the stay order sought. She urged that the dispute before the court is a strike which is unprotected and the applicant has not demonstrated any arguable grounds of the intended appeal. She maintained that the Notice of Appeal does not warrant stay order.

8. Finally the claimant submitted that the applicant has not provided any Security to mitigate loss to the stakeholders including students who have paid their fees but they have been denied studies by the unprotected strike. The claimant cited several precedents to fortify her case.

Analysis and Determination

9. After careful consideration of the application, rival affidavits and the oral submissions by counsel for the two sides, 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

10. Stay of execution is a serious interference with the right of a successful litigant to enjoy the benefit of winning his litigation. That is why the foregoing provision fetters the discretion of 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. According to the said rule and the cited precedents, stay order should only be issued to protect the right of an appellant to enjoy his right of appeal without the fear that his appeal will not be rendered nugatory. In my view, an 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.

11. The orders made by the court on 6.4.2018 were basically a declaration that the strike in issue is unprotected, restrained the applicant from continuing with the same and directed all the parties 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, however, 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.

12. 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. She has also not proved that the court had no jurisdiction to grant the impugned orders. In my view, execution of the impugned orders does not take away the right to resort to strike in future if the appeal succeeds and the conciliation fails. However, if the appeal fails after granting the stay order, the strike will have inflicted irreparable damage to the innocent students and other stakeholders through denial of services that have a direct effect on the studies.

13. Upon careful evaluation of the balance between the interests of the applicant and the impact of continuing the strike I must decline to exercise the discretion sought in favour of the applicant. Granting the stay order would also undermine the statutory policy provided under section 77 of the Labour Relations Act and the constitutional principle in Article 159 (2) (c) that the court should encourage alternative dispute resolution mechanism.

14. Section 77 of the Act 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.”

15. During the hearing of the application that gave rise to the impugned orders, the applicant herein contended that she was willing to amicably negotiate the CBA with the claimant and in deed attended several meetings convened by the claimant but accused the claimant for lack of commitment to the process leading to the current strike. I therefore wonder why she cannot return to the negotiations now that the court has given timelines and directed the C.S Labour to oversee the conciliations.

Undue delay

16. The impugned ruling was delivered on 6.4.2018 and the application for stay was filed on 9.4.2018. I am therefore satisfied the application was made without inordinate delay.

Security

17. The claimant has contended security should be deposited toward the cost of the appeal and for mitigating the loss occasioned to the stakeholders by the unprotected strike. She cited the students as some of the stakeholders to suffer loss because after paying fees, they are not being taught. The applicant has, however, made no submissions on the issue of security. After careful consideration of the concerns raised by the claimant, I agree with her that the unprotected strike is occasioning irreparable loss to stakeholders including the students who have missed the services by the striking members of the applicant. The loss to be suffered is, in my view, enormous when measured in terms of the time lost by the students and the money they will spend for the extra time in the university. The claimant has however not shown that she will suffer any direct loss or damage to warrant depositing of security in her favour.

Disposition

18. In view of my finding herein above, that the court had the jurisdiction to make the impugned orders section 77 of the Labour Relations 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 10th day of May 2018

ONESMUS MAKAU

JUDGE