REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 748 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENYA CHEMICAL AND ALLIED

WORKERS UNION.....CLAIMANT/RESPONDENT

VERSUS

TATA CHEMICALS MAGADI LIMITED.....RESPONDENT/APPLICANT

RULING

By an application dated 12th April 20167 the respondent seeks the following orders –

1. That service of this application be dispensed with and this application be certified as urgent and the same be heard ex parte in the first instance.

2. That pending the hearing and determination of the application inter partes, there be a stay of execution of the judgment of the Hon. Mr. Justice Mathews Nduma delivered on 1st April 2016.

3. That there be a stay of execution of the judgment of the Hon. Mr. Justice Mathews Nduma delivered on 1st April 2016 pending the lodging, hearing and determination of the applicant's intended appeal against the judgment delivered on 1st April 2016.

4. That the costs of this application be costs in the cause.

The application was filed under certificate of urgency and expressed to be brought under Articles 159 and 162 (2) of the Constitution, Section 12(1)(1), 2, 3(i) and (viii) and 17 of the Employment and Labour Relations Court Act, Rule 31(2) of Industrial Court (Procedure) Rules, 2001, Section 3A of the Civil procedure Act and all other enabling provisions of the law.

The application is supported by the affidavit of SAMMY CHEPKWONY and on grounds that the applicant intends to appeal against the judgment of Justice Mathews Nduma delivered on 1st April 2016.

In the supporting affidavit it is deposed that the judgment was in favour of the claimant and required the respondent to comply at the expiry of 30 days from date of judgment and the respondent/applicant was apprehensive that the claimant would seek to enforce the judgment unless stay was granted.

It is stated that the employees in respect of whom deductions were ordered resigned from the union before any deductions could be effected. It is further deposed that the claim was filed more than three years after the dispute on membership arose. That the court failed to consider these material facts in its judgment compelling the applicant/respondent to make deductions from salaries of employees without authority.

It is deposed that the appeal raises substantive matters of law and fact and has high chances of success, that it is in the interest of justice that the order sought be granted.

The claimant opposes the application and filed a replying affidavit of WERE DIBO OGUTU OGW, the National General Secretary of the claimant union sworn on 28th June 2016. Mr. Ogutu deposes that the application has not been bought in good faith and is a tactic to deny the claimant the fruits of her judgment. He points out that the claimant union underwent immense struggles and objections in recruiting and getting the respondent to sign check off forms.

He states that the averments in the affidavit of SAMMY CHEPKWONY in the affidavit in support of the application are the same grounds raised in the respondent/applicant's defence which were considered by the Judge and taken into account in the judgment. He deposes that the respondent has not advanced any valid reasons for seeking stay and the grounds of appeal in the draft memorandum of appeal do not raise any issues warranting the orders sought in the application.

It is Mr. Ogutu's contention that the respondent connived with 56 employees by writing to them to either confirm or object to deductions of union dues within 72 hours to defeat realisation of the judgment, a clear case of intimidation and arm-twisting the employees to leave membership of the union, that this is a manifestation of bad labour practices in contravention of Article 41 of the Constitution. He deposes that the action of the respondent is also contrary to Section 5(2)(b) and 3) of the Labour Relations Act.

He deposes that in view of the foregoing the respondent has not come to court with clean hands and is not entitled to the orders sought. He deposes that any money paid pursuant to the decree is capable of being refunded should the appeal succeed and there is therefore no prejudice that will be occasioned to the respondent if the orders sought are not granted. It is further Mr. Ogutu's deposition that the money to be deducted pursuant to the decree is from the employees and does not belong to the respondent. The respondent cannot therefore suffer irreparable harm.

Mr. Ogutu deposes that the claimant is a stable union with means to refund any decretal sum in the unlikely event that the intended appeal is successful. He deposes that the application is incompetent, a non-starter and an abuse of court process and should be struck out or dismissed with costs.

Submissions by the respondent/applicant

The application was disposed off by way of written submissions. The respondent/applicant submitted that it has an arguable appeal and relied on the case of **KENYA COMMERCIAL BANK LIMITED -V- NICHOLAS OMBIJA [2009] eKLR** win which the court stated that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before a court.

The respondent further relied on the case of **STANLEY KANGETHE KINYANJUI -V- TONY KETTER & 5 OTHERS [2013] eKLR** where the court held that –

> *"...On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised... An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous... "*

The respondent further relied on the case of **KENYA AIRPORTS AUTHORITY** -V- **MITU-BELL WELFARE SOCIETY & ANOTHER [2014] eKLR** in which the court observed as follows:

> *"An arguable appeal is no more than one that raises a legitimate point or points deserving judicial determination. An appeal need not raise a multiplicity or any number of such points; a single arguable point is sufficient to earn an appeal such appellation...Moreover, an arguable point need not be one that will necessarily succeed when the appeal proper is heard, for it is not the function of the Court at the hearing of such an application to make final determinations on the points to be argued on appeal. "*

It is submitted that the Applicant seeks to invoke this Court's discretion to grant the orders sought and protect its right to appeal.

On the issue of discretion the respondent relied on the decision of the Court in **JOHN MWANGI NDIRITU** V. **JOSEPH NDIRITU WAMATHAI [2016] eKLR** and **NORTHWOOD SERVICE LIMITED -V- MAC & MORE SOLUTION LIMITED [2015] eKLR** cited with approval the case of **BUTT V. RENT RESTRICTION TRIBUNAL [1982] KLR 417** wherein it was held that:

> *"The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal... A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings... "*

The respondent further argued that it will suffer substantial loss and relied on the case of **JOHN MWANGI NDIRITU -V- JOSEPH NDIRITU WAMATHAI** in which the court observed that –

> *"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail; a question that was partly discussed in the case of Silver stein vs. Chesoni ...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*

Further in **KENYA AIRPORTS AUTHORITY V MITU-BELL WELFARE SOCIETY' & ANOTHER** (supra) the court noted that:

> *"The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases."*

The respondent argues that wages are protected and enforcing the deductions ordered by the court would place it in a collision path with its employees who have already objected to the deductions as interested parties in this suit.

The respondent relied on the decision in the case of **HEZEKIEL OIRA T/A H. OIRA ADVOCATES -V- KENYA BROADCASTING CORPORATION [2015] eKLR** where the court held that a court of law must consider all issues raised unless the said issues have been abandoned or compromised.

The respondent further submitted that it filed its application without delay, the application having been filed on 12th April 2016 while the judgment was delivered on 1st April 2016. The applicant further submitted that it is ready and willing to furnish security on such terms as may be directed by the court.

Submissions by the claimant union

It is the claimant union's submissions that the application is baselessly impugning the trial court's findings and raising extrinsic issues about Section 90 of the Employment Act, which was never an issue at the trial. The claimant submits that the application has no arguable issues and has abandoned the issues in the draft memorandum of appeal to dwell on issues not raised during the trial. It is further claimant's argument that the respondent is desperate to defeat the realisation of the judgment by the claimant. The claimant reiterated the grounds in the replying affidavit.

Determination

I have considered the application and the grounds and affidavit in support thereof. I have further considered the grounds and facts in the replying affidavit, the rival arguments in the submissions by the parties and the authorities cited.

The principles governing stay of execution pending appeal are well settled as demonstrated by the wealth of decided cases. Order 42 Rule 6 (2) provides that –

> **Order 42, rule 6 – Stay in case of appeal.**
>
> **(2) No order for stay of execution shall be made under sub rule (1) unless—**
>
> **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**
>
> **(a) 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.**

The principles for grant of stay of execution are therefore in summary that the applicant must demonstrate that it has an arguable appeal, that the court ought to ensure that an appeal if successful will not be rendered nugatory or substantial loss suffered by the appellant.

In the judgment delivered on 1st April 2016 the court ordered the respondent to deduct and remit union dues from 116 employees who had by signing check-off forms signified their membership to the union. The court further ordered that the demarcation of level of employees eligible or not eligible to join union membership is for negotiation in a collective bargaining agreement. The respondent has applied for stay of these orders.

There is no doubt that the application was timeously filed on the 12th day following the delivery of judgment. This means that delay is not an issue in these proceedings.

The respondent has submitted that it has an arguable appeal while the claimant argues that the appeal is frivolous and is intended to delay the enjoyment of the fruits of the judgment by the claimant. In my opinion this is a factor that perhaps this court should not concern itself so much with as it is more appropriate for consideration by the court to which the appeal is filed. I believe this is why this ground is not provided for under Order 42, Rule 6(2).

The issue of security also in my opinion will turn on whether or not stay has been granted and is not relevant where stay has not been granted. It is in my opinion a matter to be considered by the court after finding that the orders for stay are merited.

In the present case I think the issue upon which this application turns is whether or not the applicant will suffer irreparable or substantial loss should the application be denied. As was stated in the case of JOHN MWANGI NDIRITU cited by the respondent, the applicant must establish other factors which show that the execution of the decree will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.

The respondent has argued that its employees disowned membership of the claimant, that wages are protected and that deductions would place the respondents on a collision path with its employees.

The judgment refers to 116 employees while the respondent has only made reference to 56 employees having disowned the claimant union. They have not stated why they have not implemented check-off in respect of those employees who have not disowned the claimant union.

Further the respondent has not denied the contention by the claimant that it demanded from each employee to signify whether or not it approves of the deduction. Unless an employee on his own intimates to an employer that he did not sign the check off form, it is none of the business of the employer to ask the employee whether or not the union deductions should be effected. The Labour Relations Act makes sufficient provisions for employees to join and leave the membership of the union freely and any employer who asks an employee who has

signed a check-off form to confirm whether or not union deductions should be effected can only be doing so in a bid to intimidate the employee.

The union dues do not come from the funds of an employer. They are deductions from wages of an employee. The law is clear that the employer must not try to meddle into the manner in which an employee expends his wages. The law is further clear that the employer is authorised to make deductions of union dues as well as deductions ordered by a court. In this case the deductions are union dues and have further been ordered by the court.

Section 19 of the Employment Act is explicit about authorised deductions. Section 48 of the Labour Relations Act is also categorical on union deductions. Section 49(6) provides that the employer may only stop deductions where an employee has notified it that it has resigned from the union and not for the employer to solicit for such resignations.

I find that the respondent has miserably failed to demonstrate how it would suffer substantial loss or any loss at all by deducting wages of an employee and remitting it to the union. I further find no basis for the respondent's argument that such deductions would be a source of collision with its employees who have voluntarily joined the membership of a union. The respondent has or should have no interest at all in the issue of deduction or union dues.

On the contrary it is the claimant and the employees who are suffering due to the refusal of the respondent to comply with the court orders to effect union deduction. This is because when the deductions are effected, they cannot be backdated. This means that for every month that the respondent fails to deduct union dues it is denying the claimant funding which it needs to run its affairs and organise the employees as a union's only source of funding is subscriptions from its members. It further means that the employees are denied the right to membership and association, rights that are protected under the Bill of Rights in the Constitution. This is because an employee cannot participate in activities of a trade union unless it is a member by payment of subscriptions. It further denies employees the right to be represented by the union and the right to have better terms of service negotiated on the employees behalf by the union.

Having found that the respondent stands to suffer no harm, further having found that it is the union and employees who stand to suffer and further having found that the respondent has not demonstrated good faith by remitting union dues from those employees who have not expressed the wish not to pay union dues, I find no merit in the application for stay of execution and dismiss it with costs to the claimant. I further direct that the respondent complies with the orders of the court as directed in the judgment of 1st April 2016 forthwith.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE