



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 391 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA NATIONAL UNION OF NURSES PETITIONER

-Versus-

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

HON. WYCLIFF AMBETSA OPARANYA2ND RESPONDENT

KISUMU COUNTY PUBLIC SERVICE BOARD3RD RESPONDENT

R U L I N G

By an application dated and filed on 28th September, 2016 under Certificate of Urgency, the Applicants (who are the Respondents in the suit) seek the following orders -

- 1.**THAT** this application be certified as urgent and that the same be heard ex-parte in the first instance.
- 2.**THAT** this Honourable Court be pleased to order a stay of execution of the judgement of Lady Justice Maureen Onyango in this suit made on 15th September, 2016 and all consequential orders arising therefrom pending the inter partes hearing and the final determination of this application.
- 3.**THAT** this Honourable Court be pleased to order a stay of execution of the judgement of Lady Justice Maureen Onyango in this suit made on 15th September 2016 and all consequential orders arising therefrom pending the and the final determination of the lodged appeal.
- 4.**THAT** costs of this application be in the cause.

The application is supported by the grounds on the face thereof and the affidavit of LUKALE M. SANDE, the County Legal Attorney of the County Government of Kakamega sworn on 28th September 2016 in which he deposes that the 1st and 2nd Respondents are aggrieved by the Judgement of this court delivered on 15th September, 2016 and have preferred an appeal against the judgement on grounds that -

- a) The court declined to hear and make a determination on the 1st and 2nd Respondent's application filed on 29th February 2016 to amend the Statement of Response, which would have demonstrated that the 2nd Respondent had paid a total sum of Kshs.1,588,287.60 to the Claimant in union dues with effect from March 2014.
- b) The judgement therefore, that the 2nd Respondent shall pay union dues to the Claimant with

effect from 1st January 2014 to the date of the judgement is erroneous.

c) The 1st and 2nd Respondents also lost an opportunity to demonstrate that the Claimant had diverted payment of union dues into an designated account No.0112030951200 at Cooperative Bank, which account had not been designated by the Cabinet Secretary for Labour, Social Security and Services as required by section 48 of the Labour Relations Act. The discovery of this fact precipitated the 1st and 2nd Respondents' reluctance to pay union dues in the undesignated account. Annexed hereto and exhibited is a copy of the 1st and 2nd Respondents' filed application for amendment of their Statement of Response marked LMS 3.

d) The 1st and 2nd Respondents disagreed that Section 33 of the Transition and consequential Provisions of the Constitution of Kenya 2010 has any application to the facts and circumstances of this case because the recognition agreement relied upon was made on 26th June 2013 allegedly between the Public Service Commission and the Claimant long after the County Governments had come into operation on 9th March 2013, upon the declaration of the 1st election results under the new constitution and when the 1st Respondent was already under existence.

e) The transition clauses in the constitution were not intended to operate in perpetuity, but were predicated upon specific transition periods when new arrangements and agreements ought to have been made to reflect the new relations and institutions created by the new constitution.

f) At the moment, and after devolution of certain health services to the counties, and with the Public Service Commission continuing to be in place and the employer of another category of nurses in the country, it is imperative that the Claimants should get recognition by the County Public Service Boards or the County Governments, the current employers of nurses under their employment.

g) The recognition Agreement was not executed by the Public Service Commission or a person authorized by the Public Service Commission.

h) The 1st and 2nd Respondents will contest the holding that "there was no dispute that the Claimant recruited members from the eligible nurses among the employees of the 1st Respondent", when that fact had actually been controverted by the 1st and 2nd Respondent.

He depones that the 1st and 2nd Respondents will be prejudiced should the application not be granted, that the appeal raises triable issues and that the applicants are willing to make an undertaking for security of costs.

The Claimant filed a replying affidavit of DAVID OMULAMA, its Industrial Relations Officer and Grounds of Opposition.

In the Grounds of opposition the Claimant raises the following grounds -

1. **THAT** the Notice of Motion dated 28th September, 2016 does not meet the conditions for grant of interlocutory order under order 42 Rule 6(2)(a)(b)(4)(5) of the Civil Procedure Rules, 2010.

2. **THAT**, the Notice of Motion does not meet the conditions for grant of a stay set out in Rule 5(2) (b) of the Court of Appeal Rules, 2010.

3. **THAT**, the Notice of Motion offends the mandatory provisions of Section 73(3) of the Labour Relations Act as the deponent in the supporting affidavit is not the employer, Chief Executive officer of the employer not duly appointed by the authorized officer to carry out the functions of the authorized officer in bringing this dispute to the Court.

4. **THAT**, the Notice of Motion further offends the provisions of Section 2(b)(c)(d)(e) of the Labour Relations Act as the deponent does not fit in the description of Authorized officer as in this law.

5. **THAT**, the Notice of Motion as supported by Lukale M. Sande offends the mandatory provisions of Section 86(1)(2) of the County Government Act as the deponent does not represent the 1st Respondent within the meaning of this law.

6. **THAT**, based on the above grounds, the Notice of Motion dated 28th September, 2016 lacks merit and the same should be dismissed with costs to the Claimant/Respondent.

In the replying Affidavit Mr. Omulama depones that appeal cannot operate as a stay of execution of a lawful order, that union dues do not constitute funds of the Applicants and therefore no loss will be suffered by the implementation of the judgment. Mr. Omulama further depones that the application is frivolous, vexatious and an abuse of court process, that the application amounts to a retrial and that the same has no merit.

When the application came up for hearing on 26th October, 2016 Mr. Ong'anda for the applicant stated that he will rely entirely on the documents filed in court and did not wish to make any submissions. Mr. Panyako, the Secretary General of the Claimant Union who appeared on the union's behalf however stated that he would like to make written submissions.

In the Claimant's written submissions filed on 2nd November 2016, the Claimant submits that Mr. Sande who swore the affidavit in support of the application has no locus standi and is not authorised to file the application. He further submits that the application does not meet the conditions for grant of stay orders under order 42 Rule 6(2) (a) & (b), (4) and (5) of the Civil Procedure Rules which provides that -

(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.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

He further submitted that the application further does not meet the conditions for grant of stay of execution under Rule 5(2)(b) of the Court of Appeal Rules, 2020.

He relied on the decision of the Court of Appeal in *CHRIS MUNGA N. BICHAGE v RICHARD NYAGAKE TONGI & 2 OTHERS* (2013) eKLR in which the court stated that -

*"The principles upon which this court is to entertain applications for stay pending appeal or intended appeal are not well settled. An applicant must satisfy the court that his intended appeal is arguable which is the same as saying that the appeal or intended appeal is not frivolous, and also satisfy the court that unless the order for stay is granted the intended appeal or the appeal if successful, would be rendered nugatory. Both requirements must be proved before an order for stay can be granted - see for instance, the holdings of this court in *SILVERSTEIN V CHESONI* [2002] I EA 296 and *RELIANCE BANK LIMITED V NORLAKE INVESTMENTS LIMITED* [2002] I EA 227"*

The Claimant submitted that the application should be dismissed for reasons that it is filed by a stranger and secondly that there is no arguable appeal.

Determination

I have considered the application by the Applicants (1st and 2nd Respondents) herein. As has been submitted by the Claimant, stay of appeal is governed by order 42 Rule 6(2) of the Civil Procedure Rules 2010 and Rule 5(2) (b) of the Court of Appeal Rules 2010.

6(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.

5(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Since this application has been made in this court the applicable procedure is that provided in order 42 Rule 6(2) of the Civil Procedure Act.

In the present application there is no danger of imminent substantial loss to the applicant. This is because in the judgment and decree herein the 1st and 2nd Respondents who are the applicants herein were directed to meet with the Claimant (Respondent in this application) before the Kakamega Labour Officer for purposes of agreeing on moneys due to the Claimant from the 1st Respondent and report to this court for final judgment on the amount due. The court further ordered that the case be mentioned in 30 days for purposes of final judgment on the amount due.

This means that before the parties meet and agree on the amount due, there is no threat of the claimant executing the decree which as stated by the applicant "dates back to, and covers a period to when the 1st Respondent had in fact, paid union dues to the Claimant, although under contentious circumstances."

It is further this court's opinion that staying the other orders in the decree would be tantamount to granting the applicant licence to disobey the law as the provisions of the Labour Relations Act on deduction and remittance of union dues are express and unambiguous. What the court did was to order the applicant to comply with the law.

For the foregoing reasons, I find no merit in the application and dismiss the same with costs.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF FEBRUARY, 2017

MAUREEN ONYANGO

JUDGE