



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 32 OF 2014

(Before D. K. N. Marete)

**KENYA PLANTATION & AGRICULTURAL WORKERS
UNION....CLAIMANT/RESPONDENT**

VERSUS

UNILEVER TEA (K) LIMITED.....RESPONDENT/APPLICANT

RULING

This is an application by way of Notice of Motion dated 17th December, 2014 by the Respondent/Applicant and seeks the following orders of court;

1. *That on grounds contained in the Certificate of Urgency, this Application be certified urgent and be heard ex parte in the first instance.*
2. *That pending the hearing of this Application inter parties and determination thereof, this Honourable Court be pleased to grant an Order of Stay of Execution of the Ruling given by the Honourable Justice Stephen Radido on 5th December, 2014.*
3. *That pending the hearing and determination of the Intended Appeal by the Applicant herein, this Honourable Court be pleased to grant order of Stay of Execution of the Ruling given by the Honourable Justice Stephen Radido on 5th December, 2014.*
4. *That pending the hearing and determination of the Intended Appeal by the Applicant herein, this Honourable Court be pleased to grant a Stay of Proceedings of the suit herein.*
5. *That the costs of this application be costs in the cause.*

and is grounded as follows;

1. *The Honourable Judge in his ruling held that the Central Planning and Monitoring Unit (CPMU) is to prepare a report on the disputed items arising out of the CBA negotiations between the Claimant and the Respondent. The Court also ordered the Respondent to furnish the CPMU with its financial records within the next seven (7) days.*
2. *The said order is premature as the Ministry of Labour had already appointed a conciliator pursuant to the provisions of the Labour Relations Act whose duty is to assist parties to resolve*

the trade dispute amicably. The ruling therefore contravenes the provisions of the Labour Relations Act which provides that the Industrial Court can intervene in such trade disputes only after the conciliation process has failed.

- 3. The Respondent is greatly prejudiced by the said ruling as it defeats the purpose of conciliation which is to enable the parties independently negotiate and settle the dispute. The CPMU report will not enhance the conciliation process.*
- 4. The Court also decided on the issue of appointment of the CPMU substantively without giving the Respondent an opportunity to respond substantively on its objection to the appointment of the CPMU. The Respondent merely raised a preliminary point that the appointment was premature at this stage and the court decided on issues which were not pleaded.*
- 5. Further the CPMU officials, who are largely economists, do not have the requisite experience and knowledge to assess and provide advice on non-monetary labour disputes. The Labour Relations Act does not provide that CPMU officials can advise on non-monetary aspects.*
- 6. The Applicant has filed and served its Notice of Appeal filed dated 9th December, 2014 (sic) and has requested for the typed proceedings, following the issuance of which, it will formally lodge its appeal.*
- 7. The Applicant's intended appeal has reasonable chances of success as illustrated in the Draft Memorandum of Appeal Attached hereto.*
- 8. Since the delivery of this ruling, the Respondent has failed to attend the conciliation meetings and it is likely that the conciliation process will collapse as a result of the Court's decision.*
- 9. If a stay of execution pending the hearing and determination of the Appeal is not granted, the Applicant's Intended Appeal, if successful, will be rendered nugatory, in that the CPMU will continue to prepare a report on the various items in dispute, which report will be premature and contrary to the provisions of the Labour Relations Act. The report will also negate the purpose of the conciliation process.*
- 10. The Applicant undertakes to expeditiously file the Intended Appeal within such period as this Honourable Court may order upon receipt of the typed copies of the proceedings of the Industrial Court. No delay has occurred in instituting this Application.*

The Application was placed in court on 17th December, 2014 whereby the following orders were made;

- (i) That this application be and is hereby certified as urgent and be heard ex parte in the first instance.*
- (ii) That the application be served onto the respondent forthwith but no later than the close of the day on 19th December, 2014.*
- (iii) That the respondent be and is hereby awarded seven days from the date of service to make, file and serve a response to this application.*
- (iv) That this application be heard inter parties on 19th January, 2015 at 900 hours.*

Thereafter the matter was variously heard in court until 23rd March, 2015 when the parties were awarded leave to file their written submissions which were highlighted on 12th May, 2015 as a preamble for today's ruling.

The Claimant/Respondent opposes the application vide a Replying Affidavit sworn on 10th February, 2015 and prays that the same be dismissed.

The Respondent's/Applicant's case as demonstrated in her written submissions dated 29th April, 2015 is that on 29th September, 2014, she reported the Collective Bargaining Agreement dispute to the Ministry of Labour in accordance with Section 62 of the Labour Relations Act. The Minister appointed a conciliator on 20th October, 2014 who convened a meeting on 27th October, 2014. The Respondent union declined to attend the meeting and even a further one scheduled on 3rd December, 2014.

Despite receiving the applicants letter setting in motion conciliation, the respondent union filed an application seeking the appointment of Central & Planning Monitoring Unit (CPMU) to prepare a report. This application was allowed by this Court despite the pending conciliation proceedings. The court further provided that the CPMU report could be used during conciliation proceedings despite the fact that this had not been pleaded by the union. It is also the applicant's case that a simultaneous compiling of a CPMU report and conciliation proceedings is not provided for under the law or Labour Relations Act.

The Applicant, being dissatisfied with the ruling of court has now filed a Notice of Appeal and furnished a draft Memorandum of Appeal as annexed to supporting affidavit in her application and now seeks a stay of execution of the orders of court made on 5th December, 2014 and also a stay of proceedings.

The Applicant submits that the fundamentals for stay of execution are twofold: whether there is an arguable appeal and secondly, whether the intended appeal will be rendered nugatory if stay of proceedings is not granted. She further submits that;

“In applications for stay of execution and proceedings, all an applicant has to illustrate is that he has an arguable appeal i.e there are triable issues of either law or facts on appeal. It is not necessary to show that the intended appeal will be successful or delve into the merits of the appeal at this stage as the Court would be sitting on appeal of its own decision. See the Court of appeal decision of KCB vs. Hon. Nicholas Ombija (2009) ekr, page 113. It should be clear that the Respondent is not seeking for a pronouncement on the points of appeal but only to illustrate that there are issues which ought to be decided by the Court of Appeal.”

The Applicant moves on to submit and support a case for triable issues at the Court of Appeal and also supports a case of the appeal being rendered nugatory in the event of non issue of orders for stay of execution. She further posits that the invitation of the Central & Planning Monitoring Unit into the matter is irregular and premature in that this cannot be coupled with the conciliation process as earlier adopted.

The Claimant/Respondent in opposition to the application submits and identifies three main issues for the courts determination as follows;

i. Whether the Order by Justice Radido delivered on the 5th December, 2014 for the CPMU to prepare a report on the disputed items arising out of the CBA negotiations between the Claimant & the Respondent and the Respondent furnish CPMU with its financial records within the next seven (7) days in light of the appointment of the a conciliator by the Minister of Labour was premature?

ii. Whether the CPMU officials have requisite experience and knowledge to assess and provide advice on labour disputes?

iii. Whether the Labour Relations Act provides that CPMU officials can advice on Labour disputes?

On the 1st issue, whether the orders of Justice Radido in question delivered on 5th December, 2014 directing the Central & Planning Monitoring Unit to prepare a report on the disputed aspects of the Collective Bargaining Agreement *inter partes* and report back within seven (7) days *vis-a-vis* the appointment of a receiver was premature, it is the Claimants/Respondents submission that the four outstanding issues in the Collective Bargaining Agreement negotiations have financial implications and therefore the prayer for an order for the involvement of the CPMU in an analysis of the same as follows;

7.) “We sought the order for CPMU to conduct an analysis and file a report in court because we have proposed a 70% wage increase based on economic reasons which are;-

- High Inflation rate
- Increased cost of living
- Compensation for wage differentials
- Improved labour productivity and
- Reduction of poverty.”

This is buttressed by Section 57 (2) of the Labour Relations Act, 2007 which obligates the Claimant/Respondent to disclose its financial base to the Respondent/Claimant for furtherance and facilitation of negotiations. The learned Judge did not in the ruling deter negotiations but empowered the same.

It is the Claimant/Respondents further submission that the Applicant/Respondent, only have themselves to blame by abandoning the negotiation and conciliation process and opting to walk the appeal road and thus their submission on prejudice by the orders of court is not merited and should be dismissed.

The Claimant/Respondent on the 2nd issue as to whether the CPMU officials have the requisite experience and knowledge to assess and provide advice on labour disputes denies their incompetence and further submits that the Central & Planning Monitoring Unit has for a long time acted as the economic secretariat for this court. This is as expressed in the authority of **Aviation & Allied Workers Union V Kenya Airways Limited & 3 Others (2012) eKLR** where my brother Riika, J. observed as follows at paragraph 29 of his judgement;

“The CPMU has served as the economic secretariat of the Industrial Court. It has collected data on economic disputes and assisted the Court in breaking down such data into intelligible evidence. The Court is not bound by the financial reports of the CPMU. The CPMU prepares the reports to aid not to bind the Court. Parties are free to avail to the Court their own financial reports. The duty of the Court is to impartially examine all evidence brought before it and make a determination guided by the relevant laws. The position of the CPMU under the new Constitution has not crystallized. It would serve the principles of judicial independence well if the economic secretariat of the Industrial Court is to be directed in its work by the Permanent Secretaries Ministries of Labour or Finance or the Prime Minister of Kenya to carry a financial analysis in a matter under the consideration of the Industrial Court. CPMU should shift to the judiciary as an independent economic unit within its research department, assisting the work of the Industrial Court. There is likely to be functional confusion if the Industrial Court continues to share a secretariat with the Executive.”

Further, the allegations by the Respondent/Applicant on the inability of the CPMU or its membership is not demonstrated in evidence and is therefore untenable, unsustainable and unacceptable.

The Claimant/Respondent further positively answers issue No.3 herein on whether the Labour Relations Act empowers CPMU to advise on Labour disputes. It is on the above basis that the employment of the CPMU in a determination of labour disputes by this court becomes sustainable in this and similar circumstances of the going ons in this court.

The Claimants/Respondents in the penultimate argue and submit that a grant of the prayer for *inter-alia* for stay of execution in the circumstances would set a bad precedent in the processes on Collective Bargaining Agreements and industrial relations at large as this would be a basis of frustrating fundamental rights and freedoms as enunciated under Article 41 (5) of the Constitution of Kenya, 2010. Inasmuch as the Respondent/Applicant has a right to appeal against the ruling as nuanced in this application, this should not go on to prejudice the Claimant/ Respondents right to the fundamental freedom of entitlement to a Collective Bargaining Agreement as provided by the constitution.

As submitted by the Respondent/Applicant, the legal requirements in an application for stay of execution are that of a presence of an arguable appeal and the possibility of rendering the outcome of the appeal nugatory in the event of non issue of stay.

The Applicant further submits that she has an arguable appeal and that the appeal would be rendered nugatory if stay is not granted at this stage. The applicant further moves on to demonstrate her grounds for stay. The test therefore is whether the applicant's case for stay outweighs the respondent's negation of the same. Firstly, I am ill convinced that there is an arguable appeal bearing in mind the intent of the court orders made on 5th February, 2015. These were innocent and intended to empower the parties conclude the delicate and contested exercise of the CBA. A contest on the role and power of the CPMU in the conciliation process stands offside in regard to the law, practice and involvement of the said CPMU in guiding the affairs of this court.

Again, refusal to grant stay of execution would not be seen as a fetter to the prospect of the appeal if in the first place a finding of lack of an arguable appeal is made.

It is now opportune, and particularly in employment and labour relations exercises to develop another limb of the grounds for grant of stay of execution; the place of public interest in the circumstances of the case. In the present scenario, this application seeks stay of execution of orders, proceedings and suit touching on the finalization of a CBA. The present condition is a stalemate in the negotiations which the court orders seek to unblock and facilitate the process. Employment and labour relations touch on the economic facet of the entire society and therefore our interest and urge to disentangle any stumblers or obstructions to appropriate industrial relations. In the instant case, an expeditious disposal and conclusion of the CBA negotiation process would not only enhance the parties economic positions but also add value to the societal economic prospects. And here lies the other angle to a determination for or against issue of stay of execution in this kind of situations.

I am therefore in the circumstances inclined to refuse a grant of stay of execution. The application is dismissed with costs to the Claimant/Respondent.

Delivered, dated and signed this 4th day of June 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Khisa for the union/respondent
2. Mrs. Opiyo instructed by Kaplan & Stratton Advocates for the Respondent/ Applicant.