



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

APPEAL NO. 7 OF 2011

KENYA EXPORT FLOURICULTURE, HORTICULTURE AND ALLIED WORKERS UNION

(KEFHAU) REPRESENTED BY ITS PROMOTERS AND APPLICANTS:-

DAVID BENEDICT OMULAMA

ANDREW MAKWAGA

BERNARD AMUCHIZI MUKAISI

ADRIANO MUKALO

WYCLIFFE SORE

SOVERIO MASIKA

LILIAN INGUTIA

EFELI A. NANDI

JAMES AMATONYE.....APPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONRESPONDENT

AND

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNIONINTERESTED PARTY

RULING

1. On 18th February 2014 the Interested Party herein, the Kenya Plantation and Agricultural Workers Union (IP) filed an application by Notice of motion under the provisions of order 42 Rule 6 and 7 of the Civil Procedure Rules and all other enabling statutes seeking stay of court orders made on 11th February 2014 pending the hearing and determination of the intended Appeal by the IP. The application is supported by the annexed affidavit sworn by Francis Atwoli. The appellant on their part filed the Replying Affidavit and a Supplementary Affidavit sworn by David

Benedict Omulama and both dated 3rd March 2014.

2. The IP application is based on the grounds that they are aggrieved by the Court judgement of 11th February 2014, they will be prejudiced by the same if executed as they intend to file an appeal against the same and the same should be stayed. That the court exceeded its mandate by directing the registration of the appellant and there is a good ground for appeal. In the supporting affidavit in support of the application, the IP states that on 11th February 2014 the court registered the appellant and further directed the respondent herein to issue certificate of registration contrary to section 14(1) (d) of the Labour Relations Act, which act and finding aggrieved the IP and now wishes to lodge an appeal. If the judgement is not stayed the IP will suffer damage as the intended appeal will be rendered nugatory.

3. Advocate for the IP made extensive submissions in support of the application reiterated the grounds of the application and the supporting affidavit noting that immediately the judgement herein was delivered on 11th February 2014 they filed a Notice of Appeal on 12th February 2014 and applied for certified copies of the proceedings and on 18th February 2014 proceeded to file application for stay under Certificate of Urgency. That after filing the application before court seeking stay, the IP learnt through the reply by the Appellant that a Certificate of registration had been issued to them by the Respondent. That the Appellant has also moved into the sector and or industry served by the IP Union seeking to recruit members and if stay is not granted to allow time for the IP appeal to be heard, the appeal will be academic.

4. The IP further submitted that even though the Certificate of Registration has now been issued, they should be restrained from recruiting members as if this is not stopped the IP will be economically affected. The application was filed in good faith and there was no prior knowledge of the enforcement of the court judgement when the court granted interim stay of execution.

5. In reply the Appellant states that upon judgement herein on 11th February 2014, the Appellant has now been registered and certificate issued on 17th February 2014 and thus there is nothing to stay as the judgment has already been enforced. The judgement herein was in recognition of workers' rights and freedoms under Article 41(c) of the Constitution to form join or participate in the activities and programmes of a trade union and if stay is granted it will contravene Article 36. The judgment herein is valid and no stay should be allowed as it has been enforced and thus the application by the IP should be dismissed in its entirety with costs.

6. The Appellant further submitted that they extracted the court orders and served the respondent and now are in possession of a certificate of registration that renders the IP application void. That when the IP made the application under certificate of urgency they failed to inform the court that the Appellant had already been registered. The Appellant cannot be stopped from recruiting members as this would be in contravention of the ILO Conventions and the Constitution.

7. Section 17 of the Industrial Court Act, a party that is dissatisfied with any judgement, award, order or decree issued by this Court has an inherent right of appeal to the Court of Appeal in accordance with Article 164(3) of the Constitution. That right does not abet simply because a party has party executed a judgement for the others' stay of execution application to be declined. That right subsists before the same Court upon good grounds advanced in a formal application giving grounds as to why the Court should consider granting such a stay of its orders pending an appeal. The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.

8. The granting of stay of execution pending appeal by the High Court is governed by Under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on

sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the Halsbury's Law of England, vol.17, paragraph 14:

Incidence of the legal burden in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.

9. Other grounds that must be established by an applicant are;

(a) Substantial loss may result to the Applicant unless the order is made;

(b) The application has been made without unreasonable delay and

(c) Such security as the court orders for the due performance of the decree has been given by the Applicant.

10. Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that ***Substantial loss may result to the applicant unless the order is made***, and therefore the court may direct for the deposit of ***Such security for the due performance of the decree or order as may ultimately be binding on the applicant*** where an applicant has been able to satisfy the Court that ***The application has been made without unreasonable delay.***

11. These conditions are the essence of Order 42 Rule 6 CPR which I need not recite in verbatim. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in ***Mukuma V Abuoga (1988) KLR 645*** reinforced this position. I will therefore give a deep consideration of each condition and see whether the circumstances of this case neatly fit those scales.

12. On the issue of substantial loss occurring, no doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, or Certificate of Registration issued to the Appellant, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR and Rule 17 of the Industrial Court Procedure Rules. This is so because execution is a lawful process. 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 aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

...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.

13. With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR and Rule 17 of the Industrial Court Procedure rules only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above. The Applicants in their grounds of the application must outline the firm basis for the application for stay. Questions of law arising from the orders from which an appeal is intended must be outlined in this case the provisions of section 14 (c) of the Labour Relations Act

where the IP contest that this court went beyond its powers. That is not for this court to determine; rather such holding, judgement and finding must be before the Higher Court, Court of Appeal. To seek to address that would be opening up the judgment of the court already delivered.

14. The question is; whether the IP has demonstrated that substantial loss will occur unless an order for stay of execution is issued? The IP as the applicants in answer to the above question say that substantial loss will result as their appeal will be rendered nugatory. The Appellant on the other hand, says the IP have not established that substantial loss will occur unless an order for stay is made.

15. After considering all the rival arguments herein, I am of the view that substantial loss would befall the IP as the Applicants if execution is levied at this stage. The judgment being executed will be the subject of their intended appeal for which notice has been filed. On the principles outlined above on the right of appeal, it would only be fair to have stay pending the hearing of such appeal. The fact that an execution has already been levied with the issuance of the Certificate of Registration to the Appellant, Respondent herein makes it undesirable that further execution should be levied when an appeal whose Notice has been issued, which I believe is not frivolous, is pending. The right of appeal is a constitutional right that should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.

16. On the issue of security, this is not a money judgment and no such security was insisted upon by the Appellant in response to the application herein. This provision should therefore not be applied as punishment to the IP as the applicant herein.

17. These orders are made in cognisance that the IP has moved the court without **undue delay**. From the record I find there was no undue delay in making this application. The application herein was filed on the 18th February 2014, seven (7) days from the date of judgment on 11th February 2014.

On this basis, I will order a stay of execution and any subsequent orders in execution of the decree appealed from by the Interested Party herein following this court judgment delivered on 11th February 2014 pending filing of the appeal.

Each party to bear own costs.

Those are the orders of the court.

Dated and delivered at Nairobi this 29th day of April, 2014

Monica Mbaru

Judge

In the presence of

Court Assistant:

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