



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSES NO 116, 241 AND 587 OF 2013

RIFT VALLEY RAILWAYS WORKERS UNION.....CLAIMANT

VS

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....1ST RESPONDENT

RAILWAYS AND ALLIED WORKERS UNION.....2ND RESPONDENT

RULING

Introduction

1. On 24th September 2014, I ordered a balloting exercise for the 1st Respondent's unionisable employees with a view to determining the actual status of union membership as between the Claimant and the 2nd Respondent.
2. Being dissatisfied with my ruling, the 2nd Respondent filed a Notice of Appeal on 30th September 2014 and a Notice of Motion under certificate of urgency on 9th October 2014 seeking a stay of the orders of the Court issued on 24th September 2014. The matter went before **Mbaru J** on 10th October 2014, who stopped the balloting exercise *ex parte* and the application was heard *inter partes* on 1st December 2014.

The Notice of Motion

3. The application by the 2nd Respondent which is supported by the affidavits of John T. Chumo sworn on 9th October 2014 and 28th November 2014 is based on the following grounds:
 - a. That unless the orders sought are granted, the 2nd Respondent's appeal will be rendered nugatory;
 - b. That the 2nd Respondent has an arguable appeal with good prospects of success;
 - c. That the balance of convenience weighs in favour of the 2nd Respondent.

The Claimant's Reply

4. In its reply dated 12th November 2014, the Claimant challenges the law under which the 2nd Respondent's application is brought stating that the Civil Procedure Rules are not applicable in the Industrial Court. According to the Claimant, the 2nd Respondent ought to have come before this Court under the Industrial Court Act and the Industrial Court (Procedure) Rules.
5. Further, the Claimant states that the matters raised in the current application were dealt with in an

earlier application filed on 10th February 2014 and that the matters are therefore *res judicata*.

Determination

6. Before addressing the substantive matter in this application, I need to dispense with issues of a technical nature raised by both the 2nd Respondent and the Claimant. First, there is the question whether, the 2nd Respondent's application is incompetent by virtue of it having been brought under the Civil Procedure Rules.

7. The Claimant's submission on this score is informed by the position of this Court as a specialised court established to deal with labour and employment matters. While the specialised nature of the Industrial Court is not in doubt, it is also true that the Industrial Court (Procedure) Rules do not provide for all procedural matters that come before the Court.

8. In this regard, the practice adopted by the Court has been to resort to the Civil Procedure Rules in cases where there is a lacuna in the specific Rules of this Court. I therefore agree with the submission by the 2nd Respondent that since the Industrial Court Act and the Industrial Court (Procedure) Rules do not provide for stay of proceedings, then the Civil Procedure Rules are properly applicable.

9. Second, there is the Claimant's assertion that the matters raised in this application are *res judicata* as the Respondent had filed a similar application on 10th February 2014 which was dismissed by this Court on 24th March 2014. With much respect, the Claimant's submission in this regard is a misrepresentation of the principle of *res judicata* which bars a party from litigating on matters that have been conclusively determined by a court of competent jurisdiction.

10. While it is not in contest that this Court heard and dismissed an earlier application for stay of proceedings brought by the 2nd Respondent, the subject matter in that application was on union dues and agency fees while the current application has to do with recognition of the Claimant by the 1st Respondent. Consequently, it is my view that the subject matter of the current application cannot be said to be *res judicata* and the application is therefore properly before the Court.

11. On its part, the 2nd Respondent submitted that the Claimant's reply to the application is in fact incompetent as it is not commissioned by a commissioner for oaths and that it is not signed by a specific officer of the Claimant. In making this submission the 2nd Respondent appears to have made the assumption that the Claimant's reply is by way of an affidavit. However, Rule 16(6) of the Industrial Court (Procedure) Rules allows a party to respond to an application by way of a statement of grounds of opposition. In such cases, an affidavit is optional. I therefore find that the Claimant's reply is proper in both form and content.

12. Having settled the technical issues raised by the parties, I will now deal with the merits of the 2nd Respondent's application. Order 42 Rule 6(2) of the Civil Procedure Rules under which the application is brought gives the conditions upon which an order for stay of execution or proceedings may be granted as follows:

- a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;
- b) That the application has been made without unreasonable delay;
- c) That the applicant has given adequate security for the due performance of such order as may be binding on him.

13. Under case law, there is the additional condition that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see ***Reliance Bank Limited Vs Noriake Investments Limited [2002] 1EA 227 (CAK)227 Case No. 937 of 2002***) and ***Abel Okoth Okello Vs Kenya Medical Research Institute (Kemri) [2014] eKLR***).

14. Additionally, since under Section 17(2) of the Industrial Court Act and Rule 27(4) of the Industrial Court (Procedure) Rules appeals from this Court lie to the Court of Appeal only on matters of law, an applicant seeking stay of proceedings pending appeal must show the point of law upon which they seek to proceed to the Court of Appeal. As held by **Rika J** in ***Rosebell Wambui Muthee Vs Freight in Time [2013] eKLR*** an applicant seeking an order for stay pending appeal must demonstrate that they have an arguable appeal grounded on recondite matters of law, not recycled arguments on facts.

15. The 2nd Respondent's draft Memorandum of Appeal raises the following grounds:

- a. That the Court erred in law and fact in holding that all employees of the 1st Respondent engage in the balloting process;
- b. That the Court erred in law and fact in failing to appreciate that the 2nd Respondent was not in need of recognition;
- c. That the Court erred in law and fact in directing the 1st Respondent to facilitate a balloting exercise;
- d. That the Court erred in law and fact in failing to find that the production of membership register by the 2nd Respondent was *prima facie* proof of membership.

16. My examination of these grounds does not reveal any point of law. Even worse, the first ground is a misrepresentation of the ruling of the Court dated 24th September 2014 since the Court did not order balloting for all employees of the 1st Respondent but only for the unionisable employees.

17. Ultimately, I find the application by the 2nd Respondent to be without merit and proceed to dismiss it thus setting aside the interim orders issued on 10th October 2014. I direct that the balloting exercise shall proceed as directed in my orders of 24th September 2014, the only rider being that time shall now begin to run from the date of this ruling.

18. The 2nd Respondent shall meet the costs of this application.

19. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Munayi (Union Representative) for the Claimant

Mr. Seriani for the 2nd Respondent