REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1153 OF 2012

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION …………………………………………………….CLAIMANT

-VERSUS-

PLANTATION PLANTS (K) LIMITED ………………………….RESPONDENT

Mr. Masese George for Respondent/Applicant.

Mr. Meshack Khisa for Claimant/Respondent.

R U L I N G

Application dated 18th July, 2013 seeks stay of execution of the orders issued by the court on 19th March, 2013 and 26th June, 2013 pending the hearing and determination of the appeal.

The application is founded on the grounds set out in the Notice of Motion and the Supporting Affidavit of ***Mr. Danson Maina***, the Human Resource Manager of the Respondent/Applicant.

The Application is opposed by the Claimant/Respondent by way of a Replying Affidavit by ***Mr. Thomas Kipkemboi*** the Deputy General Secretary of the Claimant/Respondent deposed to on 26th July, 2013.

The Notice of Appeal attached to the Application dated 16th April, 2013 is with respect of **Industrial Cause No. 25 of 2012,** ***Kenya Plantation and Agricultural Workers Union*** and ***Bilashaka Flowers Limited***, a completely different case from **Cause No. 1153 of 2012** between ***Kenya Plantation and Agricultural Workers Union*** and ***Plantation (K) Ltd*** in which the court issued an award on 19th March, 2013 and 26th June, 2013.

The issues for determination are as follows:

1. *Is there a pending appeal before the Court of Appeal on which the application for stay is premised?*

2. *If the question (1) above is answered in the affirmative, is the appeal arguable?*

3. *Will the appeal be rendered nugatory if the stay is not granted?*

4. *Where does the balance of convenient fall if the court is in doubt on issue (3) above?*

Issue I

As pointed earlier, the Notice of Appeal annexed to the application is with respect to a different case to the one under consideration.

The court raised the issue of lack of Notice of Appeal attached to the Application for stay of execution during the hearing of the application and counsel for the Applicant sought leave to produce one from the bar but was faced with an objection from Mr. Meshack Khisa for the Claimant/Respondent.

The court upheld the objection stating that if a Notice of Appeal had not been filed with the court before the application was lodged, it could not be subsequently filed and produced from the bar in support of the application for stay of execution.

The court however promised to peruse the record carefully and if there was a Notice of Appeal with respect to the decision of the court delivered on 19th March, 2013 and 26th June, 2013, then it would be at liberty to consider it as filed.

The court has carefully perused the court file and has found on record a Notice of Appeal dated 5th July, 2013 and filed on 8th July, 2013.

In the Industrial Court of Kenya **Cause No. 467 of 2010 Bentack Kilindo versus Schenker Limited** while considering an application for stay of execution pending appeal in a matter where no Notice of Appeal had been filed I stated:

> *"The authorities I have perused deal with the consideration by the court in granting a stay of execution pending appeal after a notice has been filed. The issues whether the intended appeal is arguable with high probability of success, whether the failure to grant a stay would render the intended appeal nugatory and whether the balance of convenience favours the grant of stay or not are moot points where no notice of appeal has been lodged."*

Counsel for the Applicant told the court that the wrong Notice of Appeal was attached to the Application by error. The court has now found a proper Notice of Appeal on record and accordingly proceeds to consider the application on its merits since there is a pending appeal.

Issue II

Is the appeal arguable?

The Applicant has attached a draft Memorandum of Appeal with three (3) grounds of appeal as follows: -

1. *The learned Judge erred in law by failing to examine the evidence placed before him and ended up making a wrong analsyis and examination of the evidence vis a vis the provisions of Section 41 of the Employment Act, 2007 as to the Rule of AUDIALTERAM PARTEM and therefore applied the wrong principle of the law contrary to the rule of ultimatum in collective industrial action in employment Law and practice.*

2. *That the learned Judge erred in law by disregarding the rule of admission of facts in the law of evidence which proved the reason for the termination as tendered in court by the Claimant and therefore failed to establish that the Appellant had discharged its obligation as per the provisions of* ***Section 43*** *of the Employment Act 2007 hence arriving at a contrary finding hence the miscarriage of justice.*

3. *The learned Judge erred in law by applying the wrong principle of the law. The Judge failed to appreciate that the proper applicable law in the circumstances was **Section 80** of the **Labour Relation Act 2007** and not the provisions of **Section 41** of the Employment Act 2007 when considering the issue of collective industrial action hence arriving at a wrong decision.*

The **Industrial Court Act No. 20 of 2011** provides under ***Section 17*** thus: -

> **"(1) Appeals from the court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the court in accordance with Article 164 (3) of the Constitution.**
>
> **(2) An appeal from a judgment, award, decision, decree or order of the court shall lie only on matters of law."**

It is not for this court to determine the substantive matters raised in the intended appeal. The court's minimum role is to establish that the intended appeal is not frivolous, vexatious and an abuse of the process only meant to delay the benefactor of the award to enjoy the fruits of the judgment.

The Applicant has therefore to demonstrate that the intended appeal has raised points of law that have some merit and which if determined in favour of the Appellant would result in a reversal of the judgment of the court *aquo*.

The parties have presented competing arguments mainly based on the decision of the Labour Appeal Court of South Africa held at Johannesburg <u>**Modise and others vs. Steve's Spar Blackheath**</u> **Case No. JA 29/99** wherein Zondo AJP dealt at length with the law relating to a fair ultimatum and hearings before dismissal in the context of a strike and said the following: -

> *"A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur or, at least ought to occur at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken on it. The purpose of an ultimatum is not to elicit any information or explanation from the workers but to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The consequence of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequence of a failure to comply with an ultimatum is usually and is meant to be a dismissal.*
>
> *In the case of a hearing the employee is expected to use the opportunity to seek to persuade the employer that he/she is not guilty and why he/she should not be dismissed. In the case of an ultimatum the employee is expected to use the opportunity provided by an ultimatum to reflect on the situations, before deciding whether or not he will comply with the ultimatum. <u>In the light of all these differences between the audi rule and the rule requiring the giving of an ultimatum, there can be no proper basis, in my judgment, for the proposition that the giving of a fair ultimatum is or can be a substitute for the observance of the audi rule.</u>"* (emphasis mine).

Indeed, the Labour Relations Act No. 14 of 2007 makes no provision for an ultimatum whereas it is a statutory phenomena in the Republic of South Africa as per ***item 6*** of the **Code of Good Practice** which provides:

> **"(2) Prior to dismissal the employer should at the earliest opportunity contact trade union official to discuss the course of action it intends to adopt. <u>The employer should issue an ultimatum</u> in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense**

with them."

In our jurisdiction, the Labour Relations Act has no schedule comprising a code of good practice in these terms or at all.

Section 80 (i) of the Labour Relations Act provides that:

> **"An employee who takes part in , calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employee's contract and –**

(a) is liable to disciplinary action. This disciplinary action is subject to the provisions of the Employment Act No. 11 of 2007 and in particular, with respect to procedure, under ***Section 41 (a)*** which reads:

1. **Subject to Section 42 (1), an employee shall, before terminating the employment of an employee, on the grounds of misconduct……explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

2. **Notwithstanding any other provision of this part an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make"**

The words in ***Section 41*** are not mere trophies for display but are meant to protect the right of an employee who is accused of misconduct (for the avoidance of doubt embarking on unlawful strike is misconduct) to be given an opportunity to explain to the employer why disciplinary action should not be taken against him/her.

As often happens in strikes, it is difficult to tell which employee actually participated in the strike or not especially where the employer locks the gates of its premises to avoid damage to its property. There is a grave danger in such circumstances that collective disciplinary action would result in victimization of employees who actually did not participate in the strike and actually reported to their work places but were unable to perform their tasks for reasons beyond their control.

Having said this, the court is prepared to assume in favour of the applicant that they have an arguable appeal though this is clearly open to doubt.

The court is however only prepared to grant a stay of execution of the judgment of the court if the Respondent deposits the entire decretal amount in the sum of Kshs.19,535,302.95 in a joint interest earning account in a reputable bank in the names of the Claimant union and the Respondent and/or their legal representatives within thirty (30) days of the date hereof. If that is not done within the stated period the application for stay shall stand dismissed with costs. But if the money is so deposited then there shall be a stay of execution until the hearing and determination of the intended appeal and the costs of the motion shall be in the appeal.

It is so ordered.

Dated and delivered at Nairobi this 6th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE