IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU JJ.A)

CIVIL APPLICATION NO. NAI. 72 OF 2001 (UR 489/2011)

BETWEEN

KENYA TEA GROWERS ASSOCIATION …….……..……. 1ST APPLICANT
UNILEVER TEA KENYA LTD ……..……..…… 2ND APPLICANT

AND

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION ……..……..…….. RESPONDENT

(An application for stay of execution of the order of reinstatement pending the lodging and determination of an intended appeal from the ruling of the Industrial Court (Madzayo J.) dated 22nd March 2011

in
INDUSTRIAL CAUSE NO.1281 OF 2010)
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RULING OF THE COURT

In this application made under **rule 5(2)(b),** of the Court of Appeal Rules, there are two applicants, **Kenya Tea Growers Association** and **Unilever Tea Kenya Limited**, the 1st and 2nd applicants respectively. The 1st applicant is an Association of tea growing companies, while the second is a tea growing company but which is not a member of the 1st applicant association. The **Kenya Plantantion & Agricultural Workers Union**, the respondent , is a trade union of workers employed by the applicants.

The matter in contention which gave rise to judicial proceedings culminating in the application before us relates to a decision by the applicants to introduce tea plucking machines in their tea production. The respondent union was opposed to it fearing that the use of machines would lead to redundancies and to forestall that they issued a seven day strike notice on 11th October 2010, to go on strike at the expiry of the notice unless the applicants withdrew the use of those machines. In view of that threat of industrial action, the 1st applicant petitioned the High Court for, *inter alia*, declaratory orders that its members were entitled to use tea plucking machines in their respective operations without prior consultation with the respondent and that the basis upon which the respondent issued a strike notice was an attempt to infringe on the petitioner's constitutional right as enshrined under the provisions of **sections 27**, **40** and **41** of the Constitution. It also asked the court to declare the threatened strike unlawful and for an order that the notice for the strike be withdrawn forthwith. That petition was filed on 14th October 2010.

Filed with the constitutional petition was a chamber summons expressed to be brought under **sections 19(1)(2)** and (**3**), **20 (1) (2) (3)** and (**4**), **22 (1)** and **(2), 23 (1)** and (**3**), **24 (1)** and **(2)** etc of the Constitution seeking on the main, an injunction restraining the respondent, its agents, members and or representatives from causing, effecting, inciting or otherwise calling for a strike by the petitioner's employees. Interim orders were issued on the same day by Gacheche J. and the extracted order was allegedly served upon the respondent union on 15th October, 2010, although this has been denied. The respondent's members went on strike on 18th October, 2010.

The applicants contend that the strike was in flagrant breach of the court order of 14th October, 2010, and did infact cite the respondent's officials for contempt of court in an application for committal filed in court on 21st October, 2010. That application is still pending for hearing due to later developments in the matter.

The 2nd applicant herein appears to have joined the fray following their being named as respondent in a Notice of Motion, dated 21st October, 2010, which was filed in the Industrial Court signed by Issa W. Wafula, Assistant Secretary General of the respondent herein. The main prayer in that motion was for an interlocutory injunction restraining Kenya Tea Growers Association, Unilever Tea Kenya Ltd and Eastern Produce Kenya Limited from terminating, suspending, dismissing or locking out or evicting the applicant's members from residential houses, pending the hearing and final determination of the suit in which that motion was interlocutory.

In an affidavit Mr. Issa W. Wafula swore in support of the motion, he deposes that the named applicants had threatened to lock out, suspend, terminate, evict and or dismiss all unionisable employees who had participated in the aforesaid strike. The Industrial Court issued orders, *ex parte*, restraining the applicants from dismissing the respondent's members as had been prayed in the motion. That in effect countered the High Court order of 14th October 2010. Subsequently on 1st November, 2010, the Industrial Court ordered the calling off of the strike and ordered that there be no victimization of the employees who participated in the strike and directed the parties to enter into conciliation meetings, which order the applicants herein intend to challenge in an appeal to this Court, allegedly already filed to wit **Civil Appeal No. l16 of 2011.** That notwithstanding, the applicants participated in conciliation proceedings and the presiding conciliator rendered his report on 12th November 2010, but which report the applicants are unhappy with due to alleged inaccuracies and moved the Industrial Court to have the report interpreted. The matters the applicants wanted interpreted, we think, are not material for purposes of this application. What is material however, is that the respondent's injunction application, the application seeking the interpretation of the conciliator's report and an application by the applicants, dated 27th October, 2010, seeking , among other orders, that the *ex parte* order made on 21st October, 2010, in favour of the unionisable members of the respondent herein, be set aside, were ordered to be heard together. They were indeed heard and the resultant ruling is the subject matter of the application before us. The ruling was delivered by Stewart M. Madzayo, J. In a nutshell, two substantive orders were made, thus:-

"(1) That pending the full hearing and determination of this suit/dispute, interlocutory injunction be and is hereby issued against the 1st and 2nd Respondents, Agents, Assigns and or any other persons from suspending, dismissing, locking-out and or evicting the claimant's members from their residential houses.

(2) That all the employees who have not been allowed to resume duty due to this suit/dispute, to report back to their respective working stations within the NEXT SEVEN (7)DAYS without any loss of any benefits from the date of suspension and or lock out."

The above two orders are the ones both applicants would want stayed pending determination of the aforesaid appeal. Several arguments have been put forward by Mrs. Opiyo for the applicants in support of the motion, namely, that the aforesaid orders have given protection to employees from the consequences of their own unlawful action of participating in an illegal strike; the orders may be used to justify a future

strike or massive walk out; employers, both in the tea sector and other sectors of the economy have by those orders been exposed to uncertainty and potentially unrestrained industrial unrest resulting in lawlessness and anarchy in industrial relations and that concurrent proceedings, both in the High Court and Industrial Court over the same issue are likely to lead to conflicting decisions and for that reason the proceedings later in time should be stayed.

It is also the applicants' case that allowing the employees to continue working by the time the applicants' intended appeal will come for hearing and determination the issues being raised presently shall be merely an academic exercise.

Mr. T. Kajwang appeared for the respondent union. In his submissions he sought to put the record straight by outlining the sequence of events. It was his contention that prior to Gacheche J.s order made on 14th October, 2010 the respondent had issued and served a 7 day strike notice which was due to expire on the day the order was made. By the date of service of the order upon the respondent the threatened strike had commenced. In his view, therefore, the members of the respondent union did not breach any court order. Furthermore, he said, the right to strike is protected by the present Constitution. The return to work formula entered into on 1st November 2010 was within the law, he said, because as at that date there was a conflict of jurisdiction on industrial relations matters, considering that therebefore such matters were exclusively within the jurisdiction of the Industrial Court. He implied that as at the date the return to work formula was ordered it was soon after the new Constitution had been promulgated. It was that Constitution which denied the High Court jurisdiction to handle industrial relations matters.

Finally Mr. Kajwang submitted that the employees who were affected by the return to work formula were shop stewards, and they had already reported back to work in compliance with the Industrial Court's order of 1st November, 2010, with the result that the orders the applicants want stayed have been overtaken by events.

On the nugatory aspect the main thrust of Mr. Kajwang's submissions was that the situation in the country has to be considered before an order is made one way or the other. In his view there is presently industrial unrest in many sectors of the economy and because each side is in away gaining benefit from the changed circumstances arising from the return to work formula the present status quo should be maintained for the sake of Industrial peace.

Mrs. Opiyo in reply, submitted that the strike started on 18th October, 2010 after the injunction order had been served on the respondent. Besides, she said, the return to work order affects only the 1st applicant. Furthermore it was her contention that the order was not negotiated but was imposed upon the applicants.

The power of the Court under rule 5(2)(b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision. It is also trite that the applicant need not show several issues. As stated earlier at least one issue suffices for purposes of an application under rule 5 (2)(b). Second, the applicant must in addition, show that, unless he is granted either a stay or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory.

As at the date this matter was filed before this Court the procedure for approaching the court by an intending appellant against the decision of the Industrial Court had not been spelled out. The applicants assumed that the Court of Appeal Rules were applicable to them, but it should be recalled that the Court of Appeal Rules are made pursuant to the provisions of section 5 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya, which provides in section 3(1) thus:

"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."

The jurisdiction of the Court under **rule 5(2)(b)** is original. The court exercises that jurisdiction once a notice of appeal has been filed pursuant to **rule 75** of the Court of Appeal Rules. (Formerly rule 74). The 1st applicant filed a notice of appeal pursuant to that rule, not in the High Court but apparently in the Industrial Court. The case cited therein is The Industrial Court of Kenya At Nairobi, Cause No. 1281 of 2010.

Amidst the uncertainty as to how the applicants were supposed to approach this Court, we asked ourselves how we should proceed with this matter. It cannot be gainsaid that the present Constitution now allows appeals from the Industrial Court to this Court. The relevant authority however has yet to prepare legislation and amend relevant laws for instant **section 27** of the **Labour Institution Act No. 12 of 2007** and the Appellate Jurisdiction Act to pave the way for parties who wish to approach this Court to come without any hesitation or any impediment. These two Acts appear to limit the Jurisdiction of this Court to entertain appeals from the Industrial Court.

We have agonized over the next cause of action. We have come to the conclusion that as the Court indeed does have the general jurisdiction to hear appeals from the Industrial Court, absence of procedural enablement is a technicality which under Article 159 of the Constitution 2010, should not preclude us from granting orders in a deserving case. With that in mind, we will now consider the merits of the applicants' motion.

The notice of appeal we referred to earlier, is dated 11th November, 2010, and states in part, that the applicants intend to appeal against the decision of Mr. Justice Madzayo given at the Industrial Court of Kenya at Nairobi on the 1st November, 2010. They intend to appeal against the whole decision. This motion was filed on 25th March 2011. Since its filing a period well over 10 months has passed. The respondent's employees who benefited from the order against which the applicants intend to appeal returned to work, and have been working for well over eight months. The order appears to have been implemented. No wonder therefore that Mrs. Opiyo submitted before us that what the applicants were seeking from us is not an order of stay but a mandatory injunction to compel those employees to cease working pending the hearing and determination of the intended appeal. That is not, however, the motion before us. The motion before us seeks on the main, an order of stay of the order made on 1st November, 2010, by Mr. Justice Madzayo.

Clearly the applicants motion had as at the date it came before us for hearing, been overtaken by events. There is nothing to stay and the applicants having not applied for leave to amend their motion it is not open to this Court to treat it as duly amended by a mere statement from the bar that the applicants were in effect seeking a mandatory order against the respondent's employees.

Having come to the foregoing conclusion it is axiomatic that no purpose will be served by us considering whether or not the applicants intended appeal is either arguable or that its success will be rendered nugatory unless they are granted the stay they had prayed for.

In the result, the application dated 25th March 2011 and filed in court on the same day is dismissed, but with no order as to costs.

Dated delivered at Nairobi this 3rd day of February 2012.

S.E.O. BOSIRE

…….....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……
JUDGE OF APPEAL

P.N. NYAMU

……...
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR