

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & V-P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO 3 OF 2017

BETWEEN

AVIATION & AIRPORT SERVICES

WORKERS UNION (KENYA) PETITIONER/APPLICANT
VERSUS

REGISTRAR OF TRADE UNIONS1ST RESPONDENT

KENYA AVIATION WORKERS UNION 2ND RESPONDENT

(Being an Application for stay of execution of the Ruling of the Court of Appeal sitting at Nairobi (Githinji, J. Mohammed & Ole Kantai, JJA) dated 3rd February 2017 in Nairobi Civil Application No. 274 of 2016)

RULING

I. INTRODUCTION

[1] The Substantive matter before this Honorable Court is a Petition of Appeal dated and filed on the even date of 23rd February, 2017. The appeal is brought under Article 163 (4) (a) of the Constitution, sections 15 (2) of the Supreme Court Act and Rule 9 and 33 of the Supreme Court Rules, 2012. It challenges the decision of the Court of Appeal dated 13th February, 2017 which stayed execution of the judgment of the Employment and Labour Relations Court (ELRC) dated 2nd December, 2016, which ELRC decision had directed that the 2nd Respondent be deregistered as a Trade Union.

II. LITIGATION BACKGROUND

[2] This appeal springs from a Judicial Review Application: *Misc. Application No. 439 of 2013*, filed by the Applicant/Petitioner herein, challenging the decision of the 1st Respondent to register the 2nd Respondent as a Trade Union. The registration was challenged on the grounds that the application for registration was

defective, as the name of the proposed trade union was sufficiently similar to an existing trade union, so as to mislead or cause confusion, in contradiction to section 19 of the Labour Relations Act (LRA). The JR application was transferred to the ELRC following a jurisdictional question and assigned the number, *Judicial Review No. 1 of 2015*.

[3] The matter was heard and in a judgment dated and delivered on *2nd December, 2016*, the Learned Judge of the ELRC (*Nduma, J*) allowed the application holding that the decision of the 1st Respondent to register the 2nd Respondent as a trade union in the aviation industry was a nullity and quashed it. The Court ordered the 1st Respondent to deregister the 2nd Respondent through Gazettement.

[4] The 2nd Respondent was aggrieved by this judgement and filed a Notice of Appeal dated *6th December, 2016* signaling its intention to appeal the decision to the Court of Appeal. It subsequently filed two applications both seeking stay of execution of the judgment. First was *an application dated 8th December, 2016 filed in the ELRC*; and *secondly, an application dated 13th December 2016 filed in the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules, 2010*.

[5] Meanwhile, in compliance with the decision of the ELRC, the 1st Respondent via a letter dated 9th December 2016 notified the 2nd Respondent that it had been deregistered as from 5th December 2016. This was subsequently followed by a Gazette Notice No. 10372 notifying the Cancellation of the Registration of the 2nd Respondent on 16th December, 2016.

[6] Subsequent to these developments, the stay application filed in the Court of Appeal was heard on 17th December, 2016 and in a Ruling delivered on **3rd February, 2017**, the Court of Appeal being cognizant of the fact that the 2nd Respondent had already been deregistered, stated that: “[t]he de-gazettement of the applicant (2nd Respondent herein) is merely a process of execution, which is not final until and unless the applicant’s undoubted right of appeal has been

exhausted.” It thus allowed the application and ordered for stay of execution of the ELRC judgment pending the hearing and determination of the intended appeal to be filed before it. It is this Ruling by the Court of Appeal that aggrieved the Petitioner/Applicant and propelled its filing of the Petition before this Court

III. BEFORE THE SUPREME COURT

(a) The Petition of Appeal

[8] The Petition of appeal filed before this Court seeks the following main reliefs, that: *the Ruling and orders of the Court of Appeal (Githinji, Mohammed and Kantai JJA) delivered on 3rd February 2017 in Nairobi Civil Application No. 274 of 2017 Kenya Aviation Workers Union v Registrar of Trade Unions and Aviation & Airport Services Workers Union be set aside; and, that any consequential orders made or actions taken following the Ruling of the Court of Appeal in compliance thereof are null and void.*

(b) The Stay Application and subsequent motions

[9] Contemporaneous with the Petition, the Petitioner filed a *Notice of Motion application dated 23rd February 2017* under certificate of urgency. It is this application that is the subject of this Ruling. In particular, the application sought the following reliefs:

- 1. ... (spent)*
- 2. There be a stay of execution of the entire Ruling and orders of the Court of Appeal issued in Civil Application No. Nai 274 of 2016 on 3rd February 2017 pending the hearing and determination of the appeal by this Honourable Court.*
- 3. Pending the hearing and determination of this Application inter partes there be an order of temporary injunction, restraining the 2nd Respondent herein from entering into any Collective Agreements; signing any Recognition Agreements; recruiting any new members in the Aviation*

Industry; Collecting Agency Fees from employees it purports to represent; Collecting Trade Union Dues; calling for industrial action by the employees it purports to represent and any other action as a Trade Union duly registered to represent the interests of the employees in the Aviation Industry.

4. Pending the hearing and determination of this Appeal there be an order of temporary injunction, restraining the 2nd Respondent herein from entering into any Collective Agreements; signing any Recognition Agreements; recruiting any new members in the Aviation Industry; Collecting Agency Fees from employees it purports to represent; Collecting Trade Union Dues; calling for industrial action by the employees it purports to represent and any other action as a Trade Union duly registered to represent the interests of the employees in the Aviation Industry.

5. Costs of this Application be provided for.

6. Any other Order that this Honourable Court may deem fit to grant.

[10] Having been filed under a certificate of urgency, the Application came up for hearing on 7th April, 2017 before *Ibrahim, SCJ* when a Consent by the parties was recorded in the following terms:

“1. THAT the applicant and the second respondent to continue carrying out their respective services as Trade Unions and which includes receiving dues from the employers of their members pending the hearing and determination of the Notice of Motion dated 23rd February, 2017. Further, such employers to release any withheld Union dues to the respective Unions pending the aforesaid hearing and determination.

2. THAT the respondents to be granted leave to file and serve written submissions on or before 12th April, 2017.

3. THAT the Court, through the Chief Justice and/or Deputy Chief Justice, empanels a 5 Judge Bench expeditiously when the Court can next sit.”

[11] In compliance with Order (3) of the consent, the 2nd Respondent filed its Written Submissions and List of Authorities on 12th April, 2017, while the 1st Respondent filed its Written Submissions and List of Authorities on 20th April, 2017.

[12] Meanwhile, during the pendency of this stay application before this Court, two other applications were filed. **First**, on 8th June, 2017, the 2nd Respondent, Kenya Aviation Workers Union, filed a *Notice of Motion application dated 7th June 2017* seeking to cite *Kenya Airports Authority* and one, *Jonny Anderson* for contempt of Court. The crux of its application was that the alleged contemnors had disobeyed the *Orders of the Honourable Court (Ibrahim, SCJ) issued on 7th April, 2017*. This application was disposed of by consent of parties dated 19th July 2017 marking it as settled with no order to costs, which consent was adopted by the Court (*Ibrahim, SCJ*) as an order of Court on the same date.

[13] **Secondly**, on 3rd July 2017, the same 2nd Respondent, Kenya Aviation Workers Union filed another *Notice of Motion application dated 30th June, 2017* seeking to cite *Kenya Civil Aviation Authority, Captain Gilbert Kibe* and *Cyris S Wayong'o* for contempt of Court, again for disobeying the Court's orders of 7th April, 2017. This application came up for hearing before the Court on 19th July 2017 whereupon, the Court, *Ibrahim, SCJ* struck it out. The Learned Judge found that the parties the 2nd Respondent wanted cited for contempt of court were not parties in the main matter before the Court, being *Petition No. 3 of 2017*, rendering the application fatally defective.

[14] Consequently, there remained on record this one application, the Notice of Motion application dated 23rd February 2017, that is the subject of this Ruling.

IV. THE APPLICANT'S CASE

[15] As earlier stated, the application seeks two major prayers, to wit: *a stay of execution of the Ruling of the Court of Appeal issued on 3rd February 2017; and a temporary injunction restraining the 2nd Respondent from basically operating as a Trade union.*

[16] The application is supported by an affidavit sworn by one Bonnie Nicholas Barasa, the Applicant's Secretary General. The gist of the grounds in support of the application and the Supporting Affidavit is that the Court of Appeal proceeded to hear and grant the stay application before it notwithstanding that there was a similar application pending before the High Court, which was an utter violation of the principle of *sub judice*. It is further contended that the Court of Appeal violated the principles of stay of execution that a court can only stay a judgment whose execution process has not been completed, and that in granting the stay, the Court of Appeal clothed itself with jurisdiction it did not have.

[17] It is also averred that the moment the 2nd Respondent was notified of its de-registration, it lost its status in law, hence lost locus standi to purport to institute any legal proceedings and its recourse only laid entirely with the Industrial Court as stipulated under section 28(5) of the Labour Relations Act of 2007. Hence it could not bring a competent application before the Court of Appeal. In addition, it is averred that in its Ruling, the Court of Appeal erred in holding that the 2nd Respondent had satisfied the twin principles of arguability and nugatory when execution had already been completed.

[18] The Applicant avers that it has an arguable appeal with high probability of success and it will suffer irreparable harm that cannot be compensated through damages. Further, that the balance of convenience lies in favour of allowing the application as prayed.

[19] In its Written submissions on record, the Applicant urges that the matter properly invokes the jurisdiction under Article 163(4)(a) of the Constitution. That while the appeal emanates from a Rule 5(2)(b) Ruling of the Court of Appeal, that Ruling has occasioned violation of human rights and grave injustice. It cites this Court's decision in ***Deynes Muriithi & 4 others v Law Society of Kenya & another*** [2016] eKLR, in support of the proposition that the Court of Appeal exercise of discretion under Rule 5(2)(b) does not bar this Court from assuming jurisdiction to correct grave injustices. It also cites the concurring opinion of Ojwang SCJ in ***Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission and two others***, [2014] eKLR on the extent of jurisdiction exercisable by this Court particularly, that "*this Court is not to sidestep meritorious occasions for a decision, by invoking obsolescent concepts: for the Supreme Court is the fundamental plank of the constitutional order...*". It thus urges that this Court has jurisdiction to interfere with the ruling of 3rd February 2017 as its effect is going to occasion a non-existent entity to purport to act for the employees in the Aviation industry.

[20] On the merits of the application, the Applicant urges that the principles for grant of stay as stated in the cases of ***Board of Governors, Moi High School, Kabarak & Another v Malcom Bell***, [2013] eKLR, ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR (*Munya 1* case), and ***Zacharia Okoth Obado v Edward Akong'o oyugi & 2 others*** [2014] eKLR, have been met. That is, that the appeal is arguable and not frivolous; and that unless stay is granted, it will be rendered nugatory; and that it is in the public interest to grant stay.

V. RESPONDENTS' CASES

[21] The 1st Respondent, Registrar of Trade Unions, filed its Written Submissions on 20th April, 2017. While the submissions are headed "*Written Submissions in Response to the Notice of Motion dated 23rd February 2017*" they do not reply to

the stay application directly. The Submissions are more of a response to the substantive petition of appeal with the 1st Respondent reiterating its mandate as the body legally charged with registration and deregistration of trade unions and that all it did was in accordance with the Judgement of the ELRC. It also states that it is willing to abide by the orders of this Honourable Court.

[22] The 2nd Respondent filed 3 documents: a *Notice of Preliminary Objection (PO)*, a *Replying Affidavit*, and *Written Submissions*. The Notice of Preliminary Objection is dated 6th April, 2017 and prays that the application be struck off and/or be dismissed with costs on the basis that:

(1) This Honourable Court lacks jurisdiction to entertain an application challenging an interlocutory ruling made by the Court of Appeal in that no final decision was made by that Court.

(2) The application herein does not satisfy the conditions set out under Article 163(4) of the Constitution due to the undernoted grounds:

(a) Only appeals arising from cases involving interpretation or application of the Constitution can be entertained by this Honourable Court as of right. However, the present application arises from proceedings before the Court of Appeal in Civil Application No. Nai 274 of 2016 and the Employment and Labour Relations Court in Judicial Review No. 1 of 2014. Arguments before the aforesaid courts were based on the provisions of the Labour Relations Act, 2007. No constitutional issues arose in those proceedings.

(b) The Applicant did not seek leave from the Court of Appeal for certification that a matter of general importance is involved in the dispute between the parties prior to the application herein being filed.

(c) No valid or competent appeal therefore lies before this Honourable Court.

[23] In the Replying Affidavit sworn by one Moss Ndiema, its Secretary General, the 2nd Respondent avers that the Court of Appeal Ruling was in exercise of discretion in an interlocutory application pending the hearing of the appeal. That the essence of the Applicant's motion is to reverse the ruling of the Court of Appeal without hearing the substantive appeal.

[24] In the Written Submissions filed on 12th April 2017, it reiterates that the application before the Court of Appeal was predicated on Rule 5(2)(b) of the Court of Appeal Rules and that the appellate Court has developed principles to guide it in the exercise of its discretionary jurisdiction. It asserts that it satisfied the requirements for grant of the reliefs under Rule 5(2)(b) hence the grant of stay by the Court of Appeal.

[25] The 2nd Respondent submits that it has already filed and served a Record of Appeal upon the Applicant and the 1st Respondent. It is stated that the same was coming up for pre-trial conference on 2nd May 2017. It is further submitted that from the pleadings and submissions by the Appellant/Applicant, its appeal is based on Article 163(4)(b) but no leave/certification was sought and/or granted.

[26] Citing the case of ***Teachers Service Commission v Kenya National Union of Teachers & 3 others*** [2015] eKLR, it is submitted that Article 163(4) of the Constitution does not confer upon this Court the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules, 2010. And lastly, that the substantive question in this matter is the deregistration of the 2nd Respondent, which issue is still pending determination before the Court of Appeal hence it is prematurely being brought to the Supreme Court. Hence it is urged that the application be dismissed with costs.

VI. ISSUES FOR DETERMINATION

[27] The foregoing appreciation of the matter before as presents two substantive issues for determination:

(i) Whether this Court has the requisite jurisdiction to hear and determine the Application, and by extension the Petition of Appeal filed before it; and if yes;

(ii) Whether a case has been made to the satisfaction of the Court for grant of the stay orders sought.

VII. ANALYSIS AND DETERMINATION

(a) Whether this Court has the requisite jurisdiction to hear and determine the Application, and by extension the Petition of Appeal filed before it.

[29] It is trite law that a jurisdiction challenge whenever raised has to be determined *in limine* as it goes to the core of the case for where a court finds that it has no jurisdiction, it cannot make a further step. In determining the jurisdictional question in this matter, the factual background comprehensively outlined above illuminating. It is common ground that the ruling of the Court of Appeal of 3rd February 2017, which forms the subject matter of the Petition of Appeal before this Court and which this application seeks to stay its execution was subject of a Notice of Motion application under Rule 5(2)(b) of the Court of Appeal Rules. In its submissions, the 2nd Respondent at paragraph 7 has confirmed that it has filed and served the Record of Appeal upon the Applicant and the 1st Respondent. The two have not controverted this account. Hence it can be pragmatically concluded that there is a substantive appeal before the Court of Appeal pending determination.

[30] This Court is replete with decisions on the nature of the Court of Appeal decisions under Rule 5(2)(b) of the Court of Appeal Rules, 2010 as being decisions rendered in exercise of a discretion and the same not being appealable before this Court as of right. In the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others**, [2013] eKLR this Court emphasized the principle that decisions of this Court ought to be predictable, consistent and reliable. As such, we find no hesitation in following the set precedents on deference to Court of Appeal discretionary Rulings on applications under Rule 5(2)(b) of its Rules.

[31] Indeed, while the Applicant has cited the case of **Deynes Muriithi & 4 others v Law Society of Kenya & another** in urging that this Court has jurisdiction, we find no difficulty in distinguishing that decision. First the **Deynes** case did not depart from the principles laid in **Daniel Kimani Njihia v. Francis Mwangi Kimani & Another**, where the Court stated that discretionary decisions of the Court of Appeal are not appealable to the Supreme Court; and **Teachers Service Commission v. Kenya National Union of Teachers and 3 Others** (among others) where this Court stated that Rule 5(2)(b) Rulings are made in exercise of the Court of Appeal discretion hence not appealable to the Supreme Court. The **Deynes** case was decided on the basis of its unique factors which are distinguishable from the case before us.

[32] We reiterate the fundamental principle that Court of Appeal Rulings under Rule 5(2)(b) are made in exercise of a discretion and hence are not appealable to this Court as of right stands and is still good law. The substantive justice of this subject matter still lies before the Court of Appeal which is yet to hear the substantive appeal. Fundamentally, the Court of Appeal itself was cognizant of the fact that the said ‘de-registration’ had already been gazetted when it stated: “[t]he de-gazettement of the applicant (2nd Respondent herein) is merely a process of execution, which is not final until and unless the applicant’s undoubted right of appeal has been exhausted.” Hence, it considered the prevailing circumstances in

making the decision it made. Courts of law seek to do justice. It cannot be that fully aware of the circumstances, the Court of Appeal outrightly made a decision to defeat the intended appeal before it.

[33] Hence it is our finding that to the extent that the Petition of Appeal before this Court, on which the application before us is predicated, emanates from a Ruling of the Court of Appeal on an application under Rule 5(2)(b), the same is fatal for want of jurisdiction. As nothing can stand on an illegality, it follows that equally, this application is also fatally defective and if for striking out.

[34] Before our final orders, we note that when this application first came before a single Judge of this Court (*Ibrahim, SCJ*), a consent was recorded by the parties. It is trite law that jurisdiction is a fundamental legal question and the same can even be raised by a Court of law *suo motto*. In ***Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others*** [2012] eKLR, this Court was categorical that, “*jurisdiction of a court flows from either the Constitution or legislation or both. [That] a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.*” We hasten to add that, where a court has no jurisdiction, parties cannot consent to clothe the Court with jurisdiction. Consequently, the parties earlier consent in this matter is not a bar to our holding that the Court lacks jurisdiction. Parties only consent to factual issues as between/among them and not on fundamental legal issues like jurisdiction of a court.

[35] In the same breath, earlier proceedings before the single judge (*Ibrahim, SCJ*) does not in any way waive the consideration of the question of jurisdiction for at that preliminary stage of the proceedings the jurisdictional question was not up for consideration by the learned judge. This was captured in the case of ***Basil Criticos v Independent Electoral and Boundaries Commission & 2 others***, [2015] eKLR”, where it was stated that at that preliminary stage before a

single Judge, “[t]here was no opportunity, in the circumstances, to consider vital questions relating to this Court’s jurisdiction as regards the exercise of purely discretionary powers by other Courts.”

[36] The upshot of the foregoing is that we are inclined to make the following orders:

- i. The Notice of Preliminary Objection dated 6th April, 2017 is hereby allowed.**
- ii. The Notice of Motion Application dated 23rd February 2017 is hereby dismissed for want of jurisdiction.**
- iii. As a consequence, and for avoidance of doubt, the Petition of appeal dated 23rd February 2017 is hereby struck out for want of jurisdiction.**
- iv. The Petitioner/Applicant shall bear the costs of the Respondents.**

[37] Orders accordingly.

DATED and DELIVERED at Nairobi this 23rd Day of July, 2019.

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE- PRESIDENT OF THE SUPREME

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT
COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this a true copy of the original

**REGISTRAR
SUPREME COURT OF KENYA**