REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ& P; Rawal, DCJ& V-P; Ibrahim, Ojwang, Wanjala, SCJJ)

APPLICATION NO. 16 OF 2015

BETWEEN

TEACHERS SERVICE COMMISSION.....APPLICANT

AND

1. KENYA NATIONAL UNION OF TEACHERS

2. KENYA UNION OF POST- PRIMARY EDUCATION TEACHERS (KUPPET)

3. ATTORNEY-GENERAL

4. SALARIES AND REMUNERATION COMMISSION.....RESPONDENTS

(Being an application for stay of execution of the Ruling and Orders of the Court of Appeal at Nairobi (Warsame, Mohammed and Kantai, JJ.A) dated 23rd July, 2015 in Civil Application No. NAI 190 of 2015)

RULING

A. **INTRODUCTION**

[1] This matter emanates from the decision of the Employment and Labour Relations Court, in Nairobi Petition No. 3 of 2015, ***Teachers Service Commission v. Kenya National Union of Teachers and Others.***

[2] The applicant, being aggrieved by the decision of the Employment and Labour Relations Court, lodged a Notice of Appeal, pursuant to which it filed an application for stay of execution of the Court's Judgment, under Rule 5(2) (b) of the Court of Appeal Rules, 2010. Rule 5(2) (b) of the said Rules provides that:

"Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(*a*)…

(*b*) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

[3] Upon hearing the application, the Court of Appeal granted a conditional stay of execution of the Judgment and Orders of the Employment and Labour Relations Court, in the following itemized terms:

"(i) The applicant and the interested parties herein shall implement the increment ordered by the Judge in respect only of basic salary with immediate effect from 1st August, 2015.

"(ii) Thereafter, the applicant shall continue to pay the increment ordered above until the hearing and final determination of the appeal.

"(iii) We hereby stay implementation of the Judgment in respect of arrears of salary and all allowances ordered by the Judge until hearing and determination of the appeal.

"(iv) The applicant and the interested parties shall file and serve their respective appeals within the next fourteen days.

"(v) Parties thereafter to file and exchange respective written submissions within seven days of service the first party being the applicant and the interested parties and thereafter the respondents within seven days of service.

"(vi) Written submissions be limited to twenty pages, font 12, double-space.

"(vii) The appeal shall be heard on 22nd September, 2015.

"(viii) The Deputy Registrar of the Employment and Labour Relations' Court is hereby ordered to supply certified proceedings and Judgment to the respective parties by or before 29th July, 2015.

"(ix) Costs of the Motion shall abide the appeal."

[4] Dissatisfied with the exercise of the Appellate Court's powers under Rule 5(2)(b), the applicant filed the present application dated 3rd August, 2015 seeking a stay of execution against the interim Orders granting conditional stay of execution against the Judgment of the Employment and Labour Relations Court. Thereafter, the 1st respondent filed a Notice of Preliminary Objection dated 11th August, 2015, contesting the jurisdiction of this Court to re-consider, on appeal, the exercise of the Court of Appeal's discretion under Rule 5(2)(b). The 1st respondent specifically contested the power of this Court to entertain interlocutory appeals from the Court of Appeal. In the 1st respondent's view, the assumption of any such powers would breach the principles of expeditious dispensation of justice enshrined in Article 159(2)(b) of the Constitution. The 1st respondent's main contention is that the application is not sustainable as an appeal within the meaning of Article 163(4) (a) of the Constitution.

In particular, the applicant sought Orders to the effect that:

"1. This application be certified urgent and service thereof be dispensed with at the first instance.

"2. Pending the hearing and determination of this application, there be a stay of execution of the order made by the Court of Appeal at Nairobi in Court of Appeal Civil Application NAI 190/2015 namely that the Applicant do pay the increased basic salary as ordered by the Employment & Labour Relations Court in Petition No. 3/2015 with effect from 1st August 2015.

"3. Pending the hearing and determination of this application, there be stay of execution of the Order made by the Court of Appeal at Nairobi in Court of Appeal Civil Application NAI 190/2015 namely that the Applicant do continue paying the increased basic salary as ordered by the Employment & Labour Relations Court in Petition No. 3/2015.

"4. There be stay of execution of the order made by the Court of Appeal at Nairobi in Court of Appeal Civil Application No. NAI 190 of 2015 namely that the Applicant do implement the salary increment ordered by the Employment and Labour Relations Court in Petition No. 3/2015 in respect to basic salary with effect from 1st August 2015 pending the hearing and determination of the Petition of Appeal herein;

"5. There be stay of execution of the orders made by the Court of Appeal at Nairobi in Court of Appeal Civil Application No. NAI 190 of 2015 requiring the Applicant to continue paying increased basic salary by the Employment and Labour Relations Court in Petition No. 3/2015 pending the hearing and determination of the Petition of Appeal herein.

"6. There be a stay of proceedings of the appeal(s) filed or intended to be filed pursuant to the Notice(s) of Appeal by the Applicant and the 3rd and 4th Respondents in the Court of Appeal pending the hearing and determination of the Petition of Appeal herein.

"7. The Applicant be granted leave to file the Petition of Appeal excluding the certified copies of the Order of the Court of Appeal in the first instance.

"8. Costs to abide the outcome of the appeal herein."

[5] On 4th August, 2015 the application was certified urgent by a single judge of this Court *(Rawal, DCJ)*, who gave directions on service, and set it down for *inter partes* hearing on 13th August, 2015.

[6] At the beginning of the *inter partes* hearing, the parties informed the Court that notwithstanding the preliminary objection filed by the 1st respondent, they had agreed that the applicant could still canvass the merits of its application even as it responded to the Preliminary Objection. The 1st respondent, on its part, would not only prosecute its Preliminary Objection, but would also address the submissions of counsel for the applicant (both written and oral), as it urged the Court to dismiss the application proper.

[7] The applicant, supported by the 3rd and 4th respondents, contends that the application raises fundamental constitutional issues that call for determination by this Court. The applicant also states that an arguable appeal has already been filed at the Court of Appeal, and the same would be rendered nugatory if this Court fails to grant the Orders sought. The parties also submit that the appeal is one of great public interest, and that this Court, as the apex Court in the land, should exercise its discretion and act to protect the Constitution.

[8] In response, the 1st and 2nd respondents submit that this matter does not raise any constitutional issue to warrant a determination by this Court. They argue that the applicants have moved to this Court after failing to secure all the interlocutory orders they had sought in the Court of Appeal. Further, it is their contention that no determination has been made by the Court of Appeal on the substantive matter. The said respondents have also urged this Court not to interfere with the decisions of the Court of Appeal in exercise of its discretionary jurisdiction.

B. THE ISSUE OF JURISDICTION

[9] Before considering the detailed submissions by counsel, it is necessary to dispose of the main jurisdictional question, namely:

Whether Article 163 (4) of the Constitution confers upon this Court jurisdiction to entertain an interlocutory application challenging the Court of Appeal's Orders issued by the latter in exercise of its discretionary authority under Rule 5 (2) (b) of its Rules of 2010"

[10] The question as to when this Court will assume appellate jurisdiction on the basis of Article 163 (4) (a) of the Constitution has been repeatedly addressed in a number of cases. We have no doubt that the guiding principles enunciated by this Court as to when and whether it may assume appellate jurisdiction, are not only clear, but, devoid of any ambiguity. In ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** S.C Petition No. 3 of 2012; ***(*2012) eKLR;*** a two-Judge-Bench of this Court *(Tunoi and Wanjala SCJJ)* observed that:

"Article 163 (4) (a) of the Constitution ***must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the***

Constitution can be entertained by the Supreme Court ….Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."

[11] This Court had earlier expressed a similar opinion in ***Peter Oduor Ngoge v. Hon Ole Kaparo & Others,*** S.C Petition No. 2 of 2012. The learned Judges were of the opinion that the petitioner had not "***rationalized the transmutation of the issue from an ordinary subject of leave to appeal, to a meritorious theme involving the interpretation or application of the Constitution such that it becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court."***

[12] The foregoing judicial pronouncements were affirmed and further clarified in successive decisions of this Court namely, ***Hassan Ali Joho & another v. Suleiman Said Shahba & 2 Others*** **(2014) e KLR;** ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others (2014)*** and ***Evans Odhiambo Kidero v. Ferdinand Waititu.***

[13] Thus far, there appears to be no uncertainty regarding the frontiers of Article 163 (4) (a) of the Constitution. What, however, remains to be decided with finality, in our view, is whether Article 163 (4) of the Constitution confers 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 that Court's Rules of 2010. The said Article provides that:

"Appeals shall lie from the Court of Appeal to the Supreme Court

a. ***as of right in any case involving the interpretation or application of this Constitution; and***

b. ***in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.."***

C. **SUBMISSIONS ON THE ISSUE OF JURISDICTION**

i. ***The 1st Respondent***

[14] Learned counsel for the 1st respondent, Mr. Kioko Kilukumi, submitted that the application filed pursuant to Article 163(4)(a) of the Constitution raised issues that constituted the substance of the appeal, and which had neither been heard, nor determined by the Court of Appeal. Counsel was of the view that the powers of the Appellate Court under Rule 5(2)(b) were discretionary in nature and, therefore, immune to interference by this or any other Court. Counsel urged that, for the mechanisms of Article 163(4)(a) of the Constitution to be engaged, thus opening the jurisdiction of this Court, the issues raised in the appeal ought to have been canvassed and determined, as a matter of first instance, before the superior Courts. It was submitted that the principle detailing the proper exercise of jurisdiction by this Court had been settled in the ***Lawrence Nduttu*** case (aforementioned).

[15] Counsel also made reference to the determination by this Court in the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, Sup Ct. Petition No. 10 of 2013, (paragraph 37):

"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution…"

[16] Counsel further cited ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** Sup Ct. Petition No. 5 of 2012 (paragraph 13A):

"…[the Court may] decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court."

[17] Counsel argued that the twin considerations in an application under Rule 5(2)(b) did not directly engage this Court's jurisdiction under Article 163(4)(a) of the Constitution. He submitted in the alternative, that the exercise of power under Rule 5(2)(b) was discretionary in nature, and that this Court could not substitute such discretion with its own, unless it was manifestly

clear that such exercise of discretion was injudicious and, in terms of the *ratio* by *De Lestang VP* (as he then was) in the case of ***Mbogo v. Shah*** [1968] EA 98, wrong, or resulting from a misdirection. Counsel further submitted that the applicant had demonstrated neither that there was an arguable appeal, nor the risk of rendering the appeal nugatory, without Orders of stay of execution issued by this Court.

[18] Counsel cited the decision of this Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Sup. Ct. Application No. 5 of 2014, urging that the public-spirited ethos of the Constitution, had been an important factor in the grant of stay applications, and that it was in the public interest to decline the Orders sought by the applicant.

ii. ***The 2nd Respondent***

[19] Learned counsel for the 2nd respondent, Mrs. Guserwa, submitted that the applicant had not filed an appeal before the Supreme Court, arguable or otherwise; and so the prayers made should be declined.

iii. ***The Applicant***

[20] Learned counsel for the applicant, Mr. Ngatia and Mr. Issa, did not address the Court on the preliminary objection, but urged that the application met the three conditions set in the ***Munya*** case, to warrant the grant of Orders of stay, namely: that the applicant had established an arguable case with prospects of success; that the appeal would be rendered nugatory in the absence of Orders of stay; and that it was in the public interest to grant the stay Orders. However, Mr. Issa submitted that the application would come under the jurisdiction of this Court on the basis that it involved an issue of constitutional interpretation.

iv. ***3rd Respondent***

[21] Learned counsel for the 3rd respondent, Mr. Nyamodi, submitted that the instant matter involved the interpretation and application of the Constitution, right from the Employment and Labour Relations Court, particularly in view of Articles 27, 41, 201, 220, 221, 230(5), 237 and 259(11). Hence, in his submission, this Court's jurisdiction had been properly engaged, by virtue of Article 163(4)(a) of the Constitution. Counsel further urged that the Orders sought were necessary to preserve the subject-matter of the appeal, and that the applicant had demonstrated that there was an arguable appeal which would be rendered nugatory if the Orders of stay were declined. He submitted that public interest was in favour of granting the Orders sought.

D. **ANALYSIS**

[22] In the ***Lawrence Nduttu*** case, the Court only made a marginal reference to the question before us when it stated thus:

"***Coming to the question whether article 163 (4) confers upon the Supreme Court the jurisdiction to entertain not just concluded cases but interlocutory Orders from the Court of Appeal, all we can say at this stage is that even if it were to be assumed that the Court has appellate jurisdiction in appeals against interlocutory Orders (which position we hesitate to declare at this stage)…"***

[23] Now returning to the question whether *this Court has jurisdiction to hear appeals arising from interlocutory Orders of the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules,* it is necessary to consider the nature of the jurisdiction under that Rule. It is clear to us that Rule 5(2)(b) is essentially a tool of *preservation.* It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years.

[24] The jurisprudence emerging from the Court of Appeal's decisions on applications made pursuant to Rule 5(2)(b) was summarized in ***Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others***, Civil Application No. NAI 31/2012. The Court noted *inter alia,* that:

"in dealing with Rule (5) (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge's discretion to this Court".

[25] In that case, the Court was reaffirming the long-held position in earlier decisions, regarding the nature of its powers to issue interlocutory Orders, pending the determination of an appeal.

[26] *Can an application challenging the Orders of the Court of Appeal under Rule 5(2)(b) be regarded as an appeal, for the purposes of Article 163(4)(a)"* In almost all the cases where the Supreme Court has been called upon to invoke its jurisdiction under Article 163 (4) (a) of the Constitution, the Court has almost invariably proceeded on the assumption that *there exists a substantive determination of a legal/constitutional question by the Court of Appeal which the intending appellant seeks to impugn.* Indeed, in general, this is the rational meaning to be ascribed to the word "appeal", in an adversarial system, where jurisdiction is assigned by the legal norms to a hierarchy of Courts. We agree with *Githinji J.A's* observation in ***Equity Bank Limited v. West Link MBO Limited,*** Civil Application No. 78 of 2011 (UR 53/2011), where, in a similar context, he thus remarked:

*"……..…an application under **Rule 5(2) (b)** is **not an appeal** as envisaged by **Article 164(3)**. For purposes of judicial proceedings an **appeal is broadly speaking, a substantive proceeding instituted in accordance with the practice and procedure of the Court, by an aggrieved party, against a decision of a Court to a hierarchically-superior Court with appellate jurisdiction, seeking consideration and review of the decision in his favour**"* [emphasis supplied].

[27] Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as "***original"*** (the term ***"inherent"*** more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction.

[28] We would draw a parallel between the exercise of the Court of Appeal's power under Rule 5(2)(b), with the inherent powers of this Court to grant interim reliefs, with particular reference to our decision in ***Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell,*** Sup. Ct Applications Nos. 12 and 13 of 2012, in which this Court thus pronounced itself [paragraph 25]:

*"Does the grant of interlocutory relief in the instant matter encroach on the jurisdiction of the Court of Appeal" We do not think so. For interlocutory applications in the nature of injunctions and stay of execution are **made within the substantive matter of the appeal**; and that is the case, in this instance. The Court has jurisdiction to hear and determine such interlocutory applications with special regard to the circumstances of each case. Where necessary, this Court may also **exercise its discretion** to decline to grant interlocutory relief, if the same may imperil the ultimate function of the Court – to render justice in accordance with the Constitution and the ordinary law*" [emphasis supplied].

[29] In that case, this Court came to a conclusion as follows [paragraph 39]:

"Apart from considering several questions of law and principle bearing on the matter before us, it is clear that the core question was, *whether the Supreme Court has the jurisdiction to grant interlocutory orders,* and more particularly, *orders of stay of execution of decrees issued by other superior Courts*. This question is, by this Ruling, now set to rest: ***where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction**, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum.* A typical instance of such exercise of ancillary power is that of *safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issue*s" [emphasis supplied].

[30] The general stand of the law, therefore, is that there will be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution, or for grant of an injunction. We affirm the statement of legal principle as stated in ***Malcolm Bell,*** regarding the inherent jurisdiction of this Court to grant stay of execution, or injunction, so as to preserve the substratum of an appeal, or intended appeal.

[31] The case of ***Basil Criticos v. Independent Electoral and Boundaries Commission & 2 Others***, Sup Ct. Petition No. 22 of 2014, presented a similar situation, in which interim Orders were sought outside the framework of an appeal in the Supreme Court; it was thus held (Paragraphs 50 and 51):

"*It is clear to us that an appeal against a Court of Appeal decision declining to extend time is not a matter falling under the purview of Article 163(4) (a) of the Constitution. **In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over"*** *We have no doubt that, had this fact been openly ventilated in Court in the initial application by the applicant, the ex parte Order for stay would not have issued from the single-Judge Bench of this Court.*

"An Order for stay will only issue from this Court to preserve either the subject matter of an appeal, or the appeal itself" [emphasis supplied].

[32] The Court went further, in the foregoing case, to safeguard the exercise of discretion by the superior Courts, as follows (paragraph 54):

"The application is actually premised upon an intended appeal that exists in a vacuum. It is an application ***that, were it to be allowed, would have the effect of compelling the Court of Appeal to exercise a discretion of which it is itself the lawful repository****. And such would* ***perversely affect the vital principle of unconstrained decisional liberty for every Court and every Bench"*** [emphasis supplied].

[33] In ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another***, Sup. Ct. Civil Application No. 13 of 2014, this Court thus held (paragraph 21):

"*We are in agreement with the Court Appeal. For a party to be granted leave to appeal to this Court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of Courts, and has been the subject- matter of judicial determination. It is* ***clear to us that this Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court****. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate****. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution"* [emphasis supplied].

[34] The application before us relates to the exercise of the Court of Appeal's inherent discretion under Rule (5) (2) (b), and is to be distinguished from instances when this Court has dealt with appeals arising from interlocutory applications originating from the High Court, through to the Court of Appeal and finally to this Court. In the ***Joho*** case, we heard and determined an appeal *emanating from a substantive determination by the Court of Appeal of a constitutional question*. The appeal had originated from an interlocutory application filed within the Election Petition before the High Court, challenging the constitutionality of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). This application triggered the appellate jurisdiction of this Court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal.

[35] The application before us contests the exercise of discretion by the Appellate Court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of Article 163 (4) (a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date of 22nd September, 2015 has already been assigned. Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

[36] In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court. We in this regard, again embrace the perception of Chief Justice Marshal (1755–1835) at the U.S Supreme Court, in ***Cohens v. Virginia,*** 19 U.S. 264 (1821):

*"****It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should…We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution…"***

E. **ORDERS**

[37] The foregoing analysis, in our opinion, bears a clear direction, and must culminate with the following Orders:

The Preliminary Objection dated 11th August, 2015 is allowed.

i. The Application dated 3rd August, 2015 is disallowed.

ii. The Applicant shall bear the costs of the 1st and 2nd respondents, while the 3rd and 4th respondents shall bear their own costs.

DATED and **DELIVERED** at **NAIROBI** this **24th** day of **August**, 2015.

……..…… ……..……

W. M. MUTUNGA **K. H. RAWAL**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE &**

OF THE SUPREME COURT **VICE-PRESIDENT OF THE OF THE SUPREME COURT**

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M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……..……..……

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA