



REPUBLIC OF KENYA



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**Barclays Bank of Kenya Limited v Tarus (Civil Appeal (Application)
244 of 2020) [2022] KECA 1174 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1174 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 244 OF 2020
AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA
OCTOBER 21, 2022**

BETWEEN

BARCLAYS BANK OF KENYA LIMITED APPELLANT

AND

ROSE SANG TARUS RESPONDENT

*(Being an application for stay of execution of the judgment from the
Employment and Labour Relations Court at Nairobi (Onesmus N.
Makau J.) dated 26th June 2020 in ELRC Case No. 1271 of 2015)*

RULING

Background

1. Before us is a Notice of Motion dated June 28, 2021 filed by Barclays Bank of Kenya Limited under Rules 5 (2) (b), 42, 43 and 47 (1) of the *Court of Appeal Rules* (this Court's Rules) for orders *inter alia* that:
 1. pending the hearing and determination of the instant application, there be stay of execution of the entire judgement and decree of the Employment and Labour Relations Court (ELRC) in Nairobi ELRC Case No. 1271 of 2015 – *Rose Sang Tarus vs. Barclays Bank of Kenya Limited* (Onesmus N. Makau J.) delivered on June 26, 2020;
 2. pending the hearing and determination of the appeal, there be stay of execution of the entire judgment and decree of the ELRC;
 3. the court be at liberty to make any further orders in the interests of justice and prioritize the hearing of the appeal; and
 4. the costs of and/or incidental to this application do abide the outcome of the appeal.



2. The application is premised on the grounds set out on its face and supported by the sworn affidavit of Michael Massawa, the applicant's Legal Officer. In a nutshell, the said grounds are: that in the impugned judgment, the learned Judge held that the termination of the respondent's employment was unfair and unlawful, and awarded the respondent Kshs.2,400,000.00 as compensation; that the applicant lodged an appeal in this Court on August 4, 2021; that the applicant filed and served its written submissions in support of the appeal on May 28, 2021, while the respondent is yet to serve her written submissions on counsel for the applicant; that the Court is yet to fix the matter for hearing; that the urgency of the instant application is to forestall execution that may be commenced by the respondent; that the applicant has an arguable appeal with high chances of success; that the applicant will suffer substantial loss if the orders sought are not granted and the appeal succeeds as the respondent will not be in a position to refund the decretal sum; and that the applicant is willing to deposit such security as this Court may deem fit to order.
3. Opposing the application, the respondent swore a replying affidavit on July 30, 2021 deposing inter alia: that she filed written submissions in opposition to the appeal; that she is in a position to refund the decretal sum if the appeal succeeds; that the applicant has failed to prove that the appeal will be rendered nugatory if the appeal succeeds; and that the memorandum of appeal contains untrue allegations of fact faulting the learned Judge's detailed and well-reasoned judgment, which allegations remained unsubstantiated.
4. A brief background to the application is that the respondent filed a suit on July 23, 2015 in the ELRC at Nairobi claiming inter alia that her employment contract was unfairly terminated by the applicant on November 26, 2013. Consequently, she sought orders, inter alia: a declaration that the applicant acted unfairly and unlawfully in terminating her contract of employment; reinstatement from the date of dismissal, without any loss of salary, benefits and privileges, or in the alternative, general damages for loss of salary, allowance and career, from the date of termination until her retirement age of 60 years; maximum compensation for unlawful and unfair dismissal of employment equivalent to 12 months' pay in the sum of Kenya Shillings Four Million, eight hundred thousand (Kshs.4,800,000.00); the issuance of a Certificate of Service; and costs and interest.
5. In opposition, the applicant filed a defence on August 25, 2015, and averred, inter alia that the respondent's dismissal was fair and lawful as it was grounded on valid reasons of misconduct, and that fair procedure was followed. As such, the respondent was not entitled to the reliefs sought.
6. Upon consideration of the evidence, the ELRC held that there was no valid and fair reason to justify the respondent's dismissal and that the dismissal was unfair and unlawful. Further, that the respondent is entitled to compensatory damages and certificate of service. On the aforementioned basis, the learned Judge made the following orders:
 - a. The termination of the claimant's employment is hereby declared unfair and unlawful.
 - b. The claimant is awarded a Certificate of Service.
 - c. The claimant is awarded Kshs. 2,400,000 as compensation for unfair termination subject to statutory deduction.
 - d. The claimant will have costs plus interest at court rates from the date hereof."
7. Dissatisfied with the judgment, the applicant filed a notice of appeal to this Court and a notice of motion in the ELRC for stay of execution of the decree of the impugned judgment pending the lodging



of the intended appeal. On May 27, 2021, the ELRC dismissed the application and held *inter alia*, that the orders sought had been spent since the notice of appeal and record of appeal had already been filed.

Submissions by Counsel

8. The application before this Court was canvassed by way of written submissions, which were orally highlighted by learned counsel for the applicant, Mr. Caxstone Kigata and learned counsel for the respondent, Mr. Ogembo.
9. Mr. Kigata submitted that the applicant has an arguable appeal that raises issues as to whether there was a valid and fair reason justifying the dismissal of the respondent. Counsel relied on the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004 (Unreported; and *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* (2013) eKLR.
10. On the nugatory aspect, it was submitted that the respondent may not be in a position to refund the decretal sum, and this may cause the appellant to suffer substantial loss, and/or may incur more cost in an endeavour to recover the decretal sum. To buttress this, the applicant relied on the case of *National Media Group Ltd & another vs Chirau Ali Mwakwere* (2010) eKLR. Counsel further submitted that the applicant is willing to deposit such security for the due performance of the judgment as this Court may deem fit to order.
11. Mr. Ogembo submitted that the applicant's appeal is not arguable and that this is clearly demonstrated in the respondent's written submissions in opposition to the appeal; that the trial court clearly found that the reasons advanced by the applicant to terminate the respondent's contract of employment were invalid; and that the trial court properly exercised its discretion to award damages.
12. Counsel went on to state that the respondent has aptly proved that she is not a person of straw; and that she is capable of refunding the entire decretal sum should the appeal succeed and the appeal would therefore not be rendered nugatory. Counsel relied on the case of *John Ngugi vs. Daytons Valuers Limited* (2021) eKLR in support of this proposition. More importantly counsel submitted from the bar that the entire decretal sums had already been paid to the respondent by the applicant and as a result there was nothing for this Court to stay.

Determination

13. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and statute law. The jurisdiction of this Court under Rule 5(2)(b) of this *Court's Rules* is discretionary and guided by the interests of justice.
14. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this *Court's Rules* are well settled as was observed by this Court in *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR, where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”



15. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:
- “vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - viii). In considering an application brought under Rule 5 (2)
 - (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
16. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable, *inter alia* whether there was a valid and fair reason justifying the dismissal of the respondent. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal. We are satisfied that the intended appeal is arguable.
17. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*), this Court stated that:
- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
18. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and each case has to be considered on its merits. From the circumstances of the instant application, we find that there is nothing to stay and the appeal will therefore not be rendered nugatory if the order of stay of execution is not granted. Indeed, it has been submitted by counsel for the respondent that the orders sought by the applicant have been overtaken by events as the applicant has already fully paid the decretal amount, a fact which has not been controverted by the applicant. In the circumstances, if this Court were to grant the orders sought, the same would be tantamount to issuing orders in vain. The appeal will therefore not be rendered nugatory, absent stay.
19. As the applicant has to establish both the arguability and the nugatory aspects, it is apparent that, it has failed to establish the twin limbs required under Rule 5(2) (b) of this Court’s Rules.
20. The upshot is that the application dated June 28, 2020 is without merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A. K. MURGOR

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JUDGE OF APPEAL



J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

