IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, OKWENGU, ASIKE- MAKHANDIA, JJ.A)

CIVIL APPLICATION NO. 61 OF 2020

BETWEEN

COUNTY GOVERNMENT OF HOMABAY.....APPLICANT

AND

JARED OMONDI OBER.....1ST RESPONDENT

JOHN OLUOCH ORINDA.....2ND RESPONDENT

(An application for stay of execution of the Ruling of the Employment & Labour Relations Court

at Kisumu (N. M. Nderi, J.) dated 30th April, 2020

in

ELRC Cause No. 39 of 2013)

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RULING OF THE COURT

Before us is a motion on notice dated 3rd June, 2020 in which the applicant prays for an order for stay of execution of the judgment and decree of the Employment & Labour Relations Court dated 4th October, 2018 and all consequential proceedings, pending the hearing and determination of this application and the intended appeal.

The application is brought under Rule 5(2) (b) of the Court of Appeal Rules and is premised on the grounds that: by a judgment dated 4th October, 2018 the trial court awarded the respondents a total sum of Kshs 12, 314,507. 54 and 9,779,837.70 respectively as damages for unfair termination of Employment; the applicant was only made aware that the hearing of the suit had proceeded ex parte shortly after the delivery of the judgment; the applicant thereafter took necessary steps to set aside the judgment by instructing their then advocates on record to do so; the applicant believed that the said advocates had taken appropriate legal steps and acted on the instructions only to be served with a notice to show cause on 22nd October, 2019; the applicant then instructed its current advocates on record to take necessary steps to set aside the ex-parte judgment and stay the execution process; the application to set aside the ex-parte judgment was however dismissed on grounds that it had been brought after inordinate delay and that the applicant had not demonstrated that it had a viable defence against the claim; the applicant is apprehensive that the respondents will take out warrants of arrest against its officials and proceed with execution whereas the applicant has at all material times been ready and willing to defend itself were it not for the mistakes of its previous advocates; the applicant had filed a defence which raised triable issues; the court should have allowed the application to enable it reach a just determination; the applicant was ready and willing to abide by any terms and conditions that the court may impose in allowing the application; and finally that the respondents had not demonstrated that they will be able to pay the decretal amount in the event that the applicant's intended appeal succeeds.

The application was further supported by an affidavit sworn by George Illah, the applicant's principal legal counsel, in which he reiterated and expounded on the aforesaid grounds. Suffice to add that on whether the intended appeal was arguable, the applicant reverted to its draft memorandum of appeal in which it raised four grounds of appeal and emphasized that the learned Judge erred in failing to allow the application and in holding that the defence filed did not raise any triable issues.

On the nugatory aspect, the applicant pointed out that the respondents had commenced contempt proceedings and were seeking warrants for

the arrest of its officers hence if stay of execution is not granted it will be forced to pay the respondents the entire decretal sum and the purpose of the intended appeal will be defeated.

In a replying affidavit sworn by the respondents they deposed that the application lacked merit, was bad in law and an abuse of the court process; the complaints raised by the applicant were properly and extensively interrogated by the trial court and found to be lacking in merit; the application was brought in bad faith and with unclean hands and was being used to hide gross violation of the Constitution by the applicant who had blatantly disobeyed court orders; failure to defend the suit should be blamed on the applicant and should not be visited upon the respondents; the application was an afterthought and the wheels of justice should not be halted due to inaction of the parties. They therefore urged us to dismiss the application with costs.

Having considered the application, the grounds and rival affidavits, submissions by the parties and the law, we must from the onset state that the application is hopelessly incompetent and ought to be struck out. We say so because the notice of appeal which gives us jurisdiction to entertain applications of this nature pending the filing of the substantive appeal is in respect of the ruling and order of 30th April, 2020. However, the orders sought in the application are for stay of execution of judgment and decree dated 4th 0ctober, 2018. Even the intitulment of this application speaks to the same being for stay of execution of the ruling and order the Employment and Labour Relations Court. We have not been shown any notice of appeal filed in respect of the judgment and decree. Therefore the prayers sought in the instant application as framed cannot issue. They cannot be granted *in vacuo* in the absence of appropriate notice of appeal. This is enough to dispose of this application.

However, it is possible that counsel for the applicant got mixed up when drawing the application. We would therefore treat the application dated 30th April, 2020 as though it was for stay of execution of the ruling and order dated 30th April, 2020.

Under rule 5(2) (b) of this Court's rules our jurisdiction to entertain an application such as this is original, independent and discretionary. The discretion however has to be exercised judiciously and with reason and not capriciously. In the case of **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR,** this Court stated *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." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."***

Thus the instant applicant must demonstrate that its intended appeal will be arguable, that is, the intended appeal is not frivolous, and upon satisfying that principle, it has the additional duty to demonstrate that the intended appeal, if successful would be rendered nugatory in the absence of an order of stay of execution. In **Trust Bank Limited & Anor. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (UR) this Court held thus:

> ***"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 … (***Emphasis ours.)

As to whether the applicant has established an arguable intended appeal, we note that the applicant annexed a draft memorandum of appeal to the application in which it raised four grounds which all attack the trial court's exercise of discretion in dismissing its application. It is trite that an appellate court rarely interferes with the trial court's exercise of discretion unless the discretion was exercised injudiciously or on wrong principles (See **Mbogo vs Shah (1967) EA 166** and **Kenya Human Rights Commission & Anor vs The Attorney General & 6 others (2019) eKLR**. We entertain doubts as to whether those grounds of appeal are really arguable.

Further we note that the application leading to the intended appeal was an application to set aside the ex-parte judgment, which application was subsequently dismissed by the trial court. Such an order is incapable of execution and there can therefore be no stay of execution of such an order. In other words, it was a negative order incapable of enforcement. In **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR** this Court expounded on stay of execution of a negative order by stating thus:

> ***"16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:***
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> > ***"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C)."***

On whether the appeal will be rendered nugatory, we do not see any risk of execution as the said order is incapable of execution as already stated. For that reason, the appeal cannot be rendered nugatory

From what we have so far stated the applicant has failed to attain the threshold required by Rule 5(2)(b) of this Court's Rules with regard to applications of this nature. The upshot is that the application dated 3rd June, 2020 is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

HAHHAN OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR