



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: W. KARANJA, GATEMBU & J. MOHAMMED, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 212 OF 2019

BETWEEN

EDITH KATHURE MUNYUA.....APPELLANT/RESPONDENT

AND

MOI TEACHING & REFERRAL HOSPITAL..1ST RESPONDENT/APPLICANT

DR. WILSON ARUASA.....2ND RESPONDENT/APPLICANT

MRS. ANN CHEMWORSIO.....3RD RESPONDENT/APPLICANT

MR. THOMAS NGETICH.....4TH RESPONDENT/APPLICANT

(Being an appeal against the Judgment and Decree of the Employment & Labour Relations Court at Kisumu (Nduma Nderi, J.) dated 18th July, 2019

in

Kisumu ELRC Cause No. 359 of 2016)

RULING OF THE COURT

1. The applicants in the present application, namely, Moi Teaching & Referral Hospital, Dr. Wilson Aruasa, Mrs. Ann Chemworsio and Mr. Thomas Ngetich, are the respondents in the appeal. They seek, as against Edith Kathure Munyua, who is the appellant, an order under Rule 5(2)(b) of the Rules of this Court, for stay of execution of the judgment and decree given in her favour by the Employment and Labour Relations Court (ELRC) (*Nduma Nderi, J.*) on 18th July 2019.
2. In that judgment, the ELRC found that termination of the appellant's employment by the applicants was procedurally unfair and that the reasons for terminating her employment were not valid. The court entered judgment for the appellant and awarded her a total of Kshs.1,503,680.00 made up of salary arrears of Kshs.1,264,441.00; one month's salary *in lieu* of notice in the amount of Kshs.18,403.00; and 12 months compensation of Kshs.220,836.00. The appellant was not fully satisfied with that decision and lodged this appeal faulting the ELRC for, among other complaints, failing to order her reinstatement to employment and failing to order payment of loss of future earnings.
3. On 11th August 2020, during the pendency of the appeal, the appellant demanded from the applicants payment of Kshs.8,300,047.89 being what she claimed to be the decretal amount and accrued compound interest. She threatened to apply for execution by "*attachment and auction*" of the applicants' property.
4. Jolted by that demand, the applicants filed a notice of cross appeal dated 12th August 2020 faulting the ELRC for, among other things, concluding that no valid reasons existed for terminating the appellant's employment, when according to them, there was sufficient evidence to show otherwise. The applicants also complain, in the cross appeal, that the court erred in relying on a judgment of a criminal court in reaching its decision and for awarding salary arrears as well as 12 months salary as compensation. Shortly after filing the cross appeal, the applicants filed the present application dated 26th August 2020.

5. In an application of this nature, the applicant is required to satisfy the Court that the intended appeal is arguable and that unless the orders sought are granted, the appeal (the cross appeal in this case) if successful, will be rendered nugatory. As stated by the Court in Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR):

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

6. We have considered the application, the supporting affidavit of Wilson K. Aruasa, the replying affidavit sworn by the appellant and the respective written submissions. On her part, the appellant in her appeal asserts that the trial court erred in failing to order her reinstatement to the position she held and in failing to order payment of loss of future earnings. The applicants on the other hand complain, in their cross appeal, that the learned Judge erred in failing to find that there were valid reasons for dismissing the appellant from employment and in overcompensating her.

7. According to the appellant, the cross appeal lacks merit and should be treated with contempt having been filed over a year after the judgment, and the applicants are guilty of inordinate delay. Furthermore, she has urged, the applicants did not file a notice of appeal and there is therefore no basis for the application. In that regard, we note there is on record a notice of appeal lodged by the appellant on 1st August 2019. On the basis of that notice of appeal, the Court is clothed with jurisdiction to exercise powers under Rule 5(2)(b) of the Court of Appeal Rules. In our view, there is nothing in that rule which prevents a respondent in an appeal, as in the present case, from applying to the Court under Rule 5(2)(b). We are not persuaded that the applicants lack standing to present the application.

8. We are also satisfied, given the rival contentions to which we have referred that the appeal and the cross appeal are indeed arguable. We bear in mind that an arguable appeal is not one that will necessarily succeed.

9. As to whether the cross appeal will be rendered nugatory if the orders sought are not granted, the applicants assert that the amount of Kshs.8,300,047.00 demanded by the appellant is colossal and the respondents are unlikely to recoup it from the appellant if the cross appeal ultimately succeeds. The appellant has not rebutted the claim that she does not have the ability to refund the amount involved in the event of the appeal succeeding.

10. We are inclined therefore to allow the applicants’ application. Considering however the delay by the applicants in moving the Court, the orders of stay of execution shall be conditional upon the applicants depositing the principal decretal amount of Kshs.1,503,680.00 into Court.

11. We accordingly order that execution of the judgment and decree of the ELRC given on 18th July 2019 in Kisumu ELRC Cause No. 359 of 2016 between the parties hereto is hereby stayed pending the hearing and disposal of the appeal and cross appeal herein. The applicants shall deposit into Court the amount of Kshs.1,503,680.00 within 30 days from the date of delivery of this Ruling failing which the order of stay of execution granted herein shall automatically be discharged and the application dated 26th August 2020 shall stand dismissed with costs to the appellant.

12. The costs of the application shall abide the outcome of the appeal and cross appeal.

Orders accordingly.

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

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR