



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), KOOME & KANTAL, J.J.A)

CIVIL APPLICATION NO. 155 OF 2019

BETWEEN

NG-CDF MWEA CONSTITUENCY.....1ST APPLICANT

ISAAC W. WAMUGUNDA.....2ND APPLICANT

NICHOLAS K. KIRIKO.....3RD APPLICANT

AND

ISAAC MWENDIA MUTHONI.....RESPONDENT

(Being an application for stay of execution of the judgment and decree of the Employment and Labour Relations Court of Kenya at Nyeri (Nzioka Wa Makau, J.) dated 30th July, 2019

in

ELRC Cause No. 247 of 2018)

RULING OF THE COURT

1. Before us is an application by way of a notice of motion dated 20th September, 2019. It is taken out by the applicants who are principally seeking an order of stay of execution of the judgment and decree issued in **Nyeri ELRC Cause No. 237 of 2018** which was delivered on 30th July, 2019 by **Nzioka Wa Makau, J.** In the said judgment that has aggrieved the applicants, the learned Judge found in favour of the respondent and entered judgment for him as follows: -

“1. Payment of Ksh. 228,012/= being salary for the months of July to December, 2018

2. Ksh. 456,024/= being the maximum compensation under section 49 (1) of the Employment Act for the egregious dismissal and disdain for court orders.

3. Costs of the suit.

4. Interest at court rate on the sums (i) and (ii) from the date of filing till payment in full.”

2. The applicants filed a Notice of Appeal on 6th August, 2019 and the instant motion that is predicated under **Rule 5 (2) (b)** of the Court of Appeal Rules. According to the supporting affidavit sworn by **Issac Wamugunda** (the 2nd applicant) and the grounds in support of the motion, the applicants state that the respondent was appointed on 4th January, 2016 in the position of Accounts Assistant in the CDF office of Mwea Constituency. That the appointment was for fixed period of three (3) years between 8th January, 2016 to 7th January, 2019. The respondent was earning a monthly salary of Ksh. 19,323 house allowance of Ksh. 4000 and commuter allowance of Ksh. 4000. That the respondent was sent on compulsory leave vide a letter dated 1st July, 2018 which action he challenged before the ELRC and he was granted interim *ex-parte* orders of injunction reinstating him back to work and injuncting the applicants from interfering with his employment until the suit was heard and determined.

3. The applicants state that they complied with the *ex parte* orders, but the respondent failed to report to work although they continued to pay his salaries. That notwithstanding the applicants contend that they were denied a hearing. They therefore faulted the learned Judge for denying them audience thereby condemning them unheard despite having complied with the court order. The applicants are also aggrieved with the award made in favor of the respondent for including even remedies which they claim were not pleaded. Counsel for the applicants also filed written submissions and a list of authorities which are on the well-established principles for granting an order of stay, to stress the point that the intended appeal is arguable and unless the order sought is granted, the appeal would be rendered nugatory.

4. The application was opposed by the respondent vide his replying affidavit sworn on 13th August, 2020. He deposes that the intended appeal is not arguable for reasons that the applicants treated him with imperiousness by reinstating his co-claimant but refused to comply with the interim order as far as his case was concerned. That the applicants went on to replace him despite an order restraining them from doing so. Regarding the allegations that the applicants were denied audience, it was his argument that they entered appearance but failed to file a defence. Therefore, the suit was not defended. Counsel for the respondent also filed written submissions citing the cases of **Mukuma vs. Abuoga [1988] KLR pg 645** and **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2112] eKLR** to reinforce his argument that the intended appeal is frivolous and cannot be rendered nugatory.

5. This application was heard virtually vide 'GO TO MEETING' Platform pursuant to the Court Practice Directions to mitigate the spread of the COVID 19 Pandemic. We have considered it against the background of established principles under ***Rule 5 (2) (b)*** of this Court Rules, that for the application to succeed, it must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal, if successful will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that 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 that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

6. It is necessary to point out that when this application first came up for hearing on 19th February, 2020, an interim order maintaining the *status quo* in regard to the orders appealed against was issued to remain in force until this application was heard and determined. That said, we have applied the above principles to the facts of this case. First, to answer the question on whether the intended appeal is arguable, we find there are two issues that stand out. That is whether the applicants were denied audience and whether the awards made in favour of the respondent were pleaded and supported by law.

7. We however state this with the usual caution that that an arguable appeal, does not necessarily mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court as was decided in **Dennis Mogambi Mang'are vs. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** where this Court held that: -

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

8. On the nugatory aspect, we have to balance the circumstances of the respondent who is no longer working with the applicants. The respondent has also not demonstrated his ability to refund the decretal sum in the event that the appeal is successful. On the other hand, the 1st applicant is a statutory body, and the 2nd and 3rd applicants are the officials and we are not persuaded that in the event the appeal is not successful, they will not be in a position to settle the award. However, being a claim based on unlawful termination that touches on the respondent's right to survival, we are inclined to grant a conditional stay by directing the applicants to pay the respondent Ksh. 100,000 being part of the decretal within forty-five (45) days of this ruling.

9. We accordingly grant an order staying the judgment and decree of **Nyeri ELRC Cause No 247 of 2018** dated 30th July, 2019 as aforesaid. In default, the application for stay will automatically stand dismissed. The costs of this application to abide the outcome of the appeal.

It is so ordered.

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

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

Signed

DEPUTY REGISTRAR