



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 191 OF 2020

BETWEEN

SANPAC AFRICA LIMITED.....APPLICANT

AND

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....RESPONDENT

(Being an Application for Stay of Execution of the judgment of the Employment and

Labour Relations Court of Kenya at Nairobi, (Wasilwa, J) dated

and delivered on 11th October 2019 pending the lodging,

hearing and determination of an intended Appeal

in

ELCR Cause No. 1643 of 2013)

RULING OF THE COURT

1. By a judgment dated 11th October, 2019 the Employment and Labour Relations Court (ELRC) at Nairobi (Wasilwa, J.) entered judgment in favour of **Kenya Union of Commercial Food and Allied Workers** (the respondent), a trade union representing the 65 employees of **Sanpac Africa Limited** (the applicant herein) who were members of the respondent. In her Judgment, the learned Judge held that the said employees had been unfairly terminated from permanent and pensionable terms and placed on contractual terms of employment without any process, consultation or notice. In the impugned judgment, the learned Judge awarded each of the employees ten (10) months' salary as compensation for unlawful termination of employment and one (1) month's salary in lieu of notice.

2. Aggrieved, the applicant filed a Notice of Appeal dated 14th October, 2019 against the whole judgment and subsequently filed the instant application, dated 30th June, 2020 under **Rule 5(2) (b)** of this Court's rules seeking stay of execution of the judgment and decree of the ELRC pending the hearing and determination of its intended appeal.

3. There are no grounds articulated on the face of the application, save for the applicant's concern that the respondents are likely to execute for the amount awarded to them, which the applicant says is enormous and onerous to recover from the respondents in the event the intended appeal succeeds.

4. The application is supported by the affidavit of the applicant's Operations Manager, one Sanjiv Z. Raja, sworn on 30th June, 2020. In the said affidavit, Mr Sanjiv reiterates the fact that the amount awarded is colossal and if paid to the respondent's members, it may not be possible to recover the same if the intended appeal succeeds. In the annexed memorandum of appeal, the learned Judge is faulted for misapplying the law relating to termination and redundancies and for disregarding the applicant's evidence. The learned Judge is also faulted for arriving at the conclusion that the claimants were not heard, hence finding that they were unfairly terminated.

5. In written submissions filed by learned Counsel for the applicant, he contended that the intended appeal is arguable as it raises the issue of misconstrued matters of fact which led to a wrong conclusion by the trial Court that the respondent's members were unfairly terminated.

Citing the case of **Jaribu Holdings Limited v. Kenya Commercial Bank Limited (2008) eKLR** counsel submitted that the applicant was deserving of a stay of execution of the trial Court's Judgment and decree. (See also: **Multimedia University & Another v. Professor Gitile N. Naituli (2014) eKLR**. Counsel argued that the decretal sum was colossal with a potential of destabilizing the applicant if it was to be compelled to pay the same through execution of the decree. Counsel maintained that if stay is not granted, the applicant stood to suffer irreparable damage as the decree holders do not have the financial capacity to pay back the decretal sum in the event that the intended appeal succeeded.

6. The application is opposed through the replying affidavit sworn by the respondent's Branch Secretary at Athi River, one Rebecca Muthoki, on 17th July, 2020. Learned counsel for the respondent in his written submissions maintained that the instant application was frivolous and that the applicant's draft memorandum of appeal did not disclose reasonable grounds of appeal warranting this Court's exercise of its discretion in their favour. Counsel contended that the learned Judge was proper in finding that the respondent's aggrieved members had been unfairly terminated as the said termination was in violation of **Article 40, 41, 43, 45, 49 & 50** being that the applicant failed to consult with and notify the grievants of the alleged change of terms of service. He urged the Court to dismiss the application.

7. We have carefully considered the application before us and the rival submissions by learned counsel. There is a notice of appeal duly filed, which grants this Court jurisdiction to entertain the application. (See: **Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others (2010) eKLR**). It is trite that for this Court to grant an order of stay of execution, the applicant must demonstrate that its intended appeal is arguable and that if stay is not granted, the intended appeal would be rendered nugatory in the event that the appeal succeeds. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR**).

8. We remind ourselves that an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court; a single bona fide issue would suffice. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**). We have studied the judgment now impugned and without delving into the issues raised in the memorandum of appeal, it is clear to us that the learned Judge addressed in detail the law to be applied if an employer desires to change an employee's terms of employment, and more specifically section 10(5) of the Employment Act. We are not persuaded by the applicant's argument that the learned Judge misapprehended the law in this area.

9. The limb on arguability has in our view not been demonstrated. Having so found, it will not be necessary for us to consider the nugatory aspect as the applicant is required to demonstrate both arguability and the nugatory aspect and demonstrating only one of the limbs does not aid the applicant at all.

10. For these reasons we conclude that the application before us falls short of the threshold set for applications under **Rule 5(2)(b)** of the Rules of this Court. We dismiss the same with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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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