



IN THE COURT OF APPEAL

AT ELDORET

[ORAM: OUKO (P), SICHALE & KANTAI, JJ.A]

CIVIL APPLICATION NO. 148 OF 2020

BETWEEN

ORKISTUDIO COMPANY LIMITED.....APPLICANT

AND

MARGARET ABUKUTSA VIDOLO.....1ST RESPONDENT

ALLAN BROOKS.....2ND RESPONDENT

(Being an application for stay of execution against the judgment of the Employment and Labour Relations Court at Eldoret (J.N. Abuodha, J) dated 20th February, 2020

in

ELRC Cause No. 265 of 2018)

RULING OF THE COURT

The applicant’s Notice of Motion is predicated under Sections 3A and 3B of the appellate Jurisdiction Act and Rule 5 (2) (b) and 42 of this Court’s Rules. The applicant seeks an order staying execution of the judgment of **Abuodha, J** delivered on **20th February, 2020** in which the 1st respondent (the then claimant) was awarded:

“(a) One month’s salary in lieu of notice Kshs 112, 500.00

(b) Twelve months’ salary as compensation for unfair termination of service Kshs 1,350,000.00

(c) The sum of Kshs 1,000,000.00 as compensation for sexual harassment

Total Kshs 2,462,500.00

(d) Costs of the suit”

as against her former employer, the applicant herein and the then 1st respondent.

The motion is supported by the affidavit of **James Mitchell**, (the Chief Executive Officer of the applicant), sworn on **24th September, 2020** in which he depones that the applicant was not required to give reasons for the 1st respondent's termination as she was still under probation at the time she was terminated and that the 1st respondent is unlikely to refund the decretal sum of Kshs 2,462,500.00 as outlined above.

In her opposition to the motion, the 1st respondent swore an affidavit dated **5th November, 2020**. She deponed that her rights, albeit on probation, could not be abrogated by the applicant; that the applicant has no competent appeal as its appeal was lodged out of time; that she is a registered technician grade II and her monthly salary is Kshs 194,127.00; that she is entitled to an annual gratuity of Kshs 420,832.00; that she is a member of Stima Sacco Limited and her deposits at the time stood at Kshs 477,654.41; that she is a joint proprietor of a land parcel known as Eldoret Municipality/Block 2/506 which has a market value of Kshs 6,000,000.00 and that she owns a motor-vehicle, KCW 715 Y which she bought for a sum of Kshs 1,250,000.00.

On **11th November, 2020**, the motion came up before us for consideration "***on written submissions, No appearance of counsel***".

In the applicant's submissions dated **5th October, 2020**, it was submitted that under the exemption provided in Section 42 of the Employment Act, an employer may terminate the services of an employee who is on probation without an elaborate hearing.

On the nugatory aspect, it was contended that the 1st respondent has no known source of income and that she had not demonstrated that she is capable of refunding the decretal sum of Kshs 2,462,000.00.

In her written submissions dated **5th November, 2020**, the 1st respondent reiterated the averments in her affidavit as outlined above.

We have considered the motion, the rival submissions, the relevant authorities and the law. It is now well settled that before this Court can grant an order of stay, an applicant has to demonstrate that he/she has an arguable appeal that will be rendered nugatory, absent stay. (See ***Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 others [2013] eKLR***).

In our view, whether an employee who is on probation can be terminated without an elaborate hearing is an arguable point. More so, remembering that an arguable point need not be one that must succeed and a single bona fide arguable point is enough. To that extent, we are satisfied that the 1st limb has been satisfied. We also hasten to add that the 1st respondent's contention that the applicant's appeal is wanting for having been filed outside the stipulated period is to be addressed in another forum. Suffice to state, that all an applicant needs to demonstrate at this stage is that he /she has filed a Notice of Appeal.

On the nugatory aspect, whereas the 1st respondent has gone out of her way to show her worth, we are afraid that the readily available cash may be the monthly salary of Kshs 194,127.00. This is without taking into account her expenses and other deductions. If called to refund, it may take her time to obtain a loan, dispose of the jointly owned property, or her car.

It is in view of this that we think the applicant's apprehension of getting a refund is justified and hence our finding that the applicant has also satisfied the second criteria on the appeal being rendered nugatory.

In sum, we grant the orders as prayed in the motion of **14th October, 2020**. Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 19th Day of February, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

F. SICHALE

.....

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