



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: R. NAMBUYE, W. KARANJA, & ASIKE-MAKHANDIA JJ.A)

CIVIL APPLICATION NO. 211 OF 2020

BETWEEN

1. KENYA INDUSTRIAL ESTATE LIMITED.....1ST APPLICANT

2. MANAGING DIRECTOR

KENYA INDUSTRIAL ESTATE LIMITED.....2nd APPLICANT

VERSUS

MATILDA TENGE MWACHIA.....RESPONDENT

(Being an Application brought under Rules 1(2) and 5(2)(b) of the Court of Appeal Rules, 2010 seeking stay of Execution of the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi (Lady JUSTICE Hellen Wasilwa.) dated 13th August, 2020)

in

ELRC No. 284 of 2020

RULING OF THE COURT

1. On 13th August, 2020 the Employment and Labour Relations Court at Nairobi (ELRC) (Wasilwa, J.) delivered a ruling in favour of **Matilda Tenge Mwachia** (the respondent) against the applicants whereby the learned Judge found *inter alia*, that the respondent's interdiction was not procedurally fair ; that the respondent should receive her full pay unless there was justification for the applicants withholding the same or any part thereof; the process already in place and all consequences therefrom are null and void and that in the interim the respondent should continue to serve in her employment until due process is effected against her or unless her employment is terminated for any other lawful cause. The court also directed that the respondent should submit to fresh disciplinary process should the applicants wish to do so.

2. Aggrieved, the applicant filed a notice of appeal against the whole Ruling dated 13th August, 2020 and subsequently and without delay, filed the instant application, dated 21st August 2020, under **Rule 5(2)(b)** of this Court's Rules seeking stay of execution of the ruling and orders of the ELRC pending the hearing and determination of the intended appeal against the Ruling.

3. The application is supported by the affidavit of **Parmain Narikae**, the 2nd applicant who is the 1st applicant's Managing Director, sworn on 21st August, 2020. Among the arguable issues proffered on the grounds on the face of the application, the affidavit and submissions by learned counsel for the applicants are the question whether the ELRC can declare a dismissal letter duly served upon an employee as null and void *suo moto* thus automatically shutting out an Employer from proving the validity and fairness of the reasons for dismissal and whether the learned Judge erred in making orders at an interim stage whose effect determined the claim before her.

4. On the nugatory aspect, learned counsel submitted that the substratum of the appeal would be rendered nugatory if the orders sought were not granted. That the substratum of the appeal being whether there existed an employer – employee relationship between the parties herein and that allowing the respondent to resume her duties would negate the very essential core of the appeal pending before thus Court consequently rendering the appeal nugatory and academic. Counsel also submitted that since the order sought to be stayed was a non –

monetary decree then they stood to suffer irreparable loss.

5. Counsel urged that the applicants have an arguable appeal and citing **Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union (2012) eKLR** she reiterated that even one bona fide arguable issue satisfied the requirement of the law.

6. The respondent on the other hand opposed the application arguing that the instant application was devoid of merit and did not meet the threshold required under Rule 5 (2) (b) of the Court of Appeal Rules. She maintained that the applicants did not demonstrate how the appeal would be rendered nugatory upon her reinstatement. In her view, the appeal was not arguable either and it should be dismissed.

7. This Court has carefully considered the application before it and the rival submissions by learned counsels. 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**).

8. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the decision of **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR** wherein it was stated:

*“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide **whether the applicant has presented an arguable appeal** and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR** ...*

9. Have the applicants satisfied the twin principles of arguability and nugatory aspect to entitle them to the orders sought? As stated earlier, an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court and a single bona fide issue would suffice. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union.(supra)**)

10. With the above in mind, we are persuaded that the question as to whether the learned Judge determined the subject matter of the suit at an interlocutory stage is sufficient to engage the court's mind on appeal. We accordingly find that the appeal is arguable.

11. On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. (See: **Reliance Bank (in liquidation) v. Norlake Investments Ltd, (2002) 1 EA 227.**)

12. It is old hat that for this Court to grant an order of stay of execution, the applicants must satisfy this Court that their appeal is arguable and that if stay is not granted, the same would be rendered nugatory in the event that the appeal succeeds. Both limbs must be satisfied and demonstrating only one limb will not suffice. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR**).

13. Have the applicants demonstrated the nugatory aspect? The learned Judge reversed the disciplinary process the respondent was subjected to and declared it null and void. She nonetheless went ahead and directed that the respondents were at liberty to restart the process and ensure that they followed due process and observe the rules of natural justice. We do not actually see why the applicants could not restart the process as directed by the court. The said process can only be restarted if the whole process is reversed and that process included restoring the respondent to the position she held before the impugned proceedings. We are not persuaded that the nugatory aspect has been demonstrated.

14. As the applicants are required to demonstrate both limbs, having failed to demonstrate the nugatory aspect consigns their application to the realm of dismissal. Accordingly, and for the foregoing reasons, this application fails and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of February, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR