



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. NAI 166 OF 2020

BETWEEN

GICHEHA FARMS LIMITED.....1ST APPLICANT

BROOKSIDE DAIRY LIMITED.....2ND APPLICANT

AND

DAVID GICHERU...../.....RESPONDENT

(Application for stay of execution pending the hearings and determination of an intended appeal

against the ruling and order of the Employment and Labour Relations Court of Kenya

at Nairobi (Wasilwa, J.) dated 28th May 2020

in

ELRC Pet. No. 103 of 2018)

RULING OF THE COURT

At all material times **the respondent, David Gicheru**, was employed by **the 1st respondent, Gicheha Farms Ltd**, as a plumber earning a monthly gross salary of **Kshs 10, 620**. On 2nd June 2018 the 1st respondent terminated the respondent's employment on the grounds of "break down of communication" and "erosion of confidence" as well as the respondent's failure to exhaust all internal dispute resolution mechanisms, and paid him his dues of **Kshs 151,149.47**.

On 3rd October 2018 the respondent filed a petition in the **Employment and Labour Relations Court** at Nairobi for unlawful termination of employment. In addition, he sought declarations and damages from the applicants for violation of his constitutional rights, infringement of his right to privacy and copyright, and freedom from slavery and or servitude. These prayers were sought on the assertion that the 2nd applicant had used the respondent's image and likeness in its promotional material without his consent and without compensating him.

The applicants resisted the claim and justified the termination of the respondent's employment. They pleaded that the use of the respondent's image was with his knowledge and consent. On 21st January 2020 the trial court (**Wasilwa, J.**) delivered judgment and awarded the respondent a total of **Kshs 1,650,806.11** made up of 12 months compensation for unlawful termination (**Kshs. 139,209.44**) and damages for violation of his rights (**Kshs 1,500,000**).

On 14th February 2020 the applicants applied to the trial court for stay of execution and setting aside of the judgment on the grounds that they were denied the right to be heard. They contended that they were neither served with notice of the court's order directing the parties to file written submission, nor the notice of delivery of judgment, and as a result the dispute was determined without consideration of their case. By a ruling dated 28th May 2020, the trial court held that the applicants had been served with the respondent's submissions and should have sought directions from the court. As for non-service on the applicants of the notice of delivery of judgment, the court held that it did not negate the proceedings.

The applicants are now before us seeking stay of execution of the impugned judgment pending the hearing and determination of their intended appeal. The main ground upon which their application is based is that they were denied an opportunity to be heard, which constitutes a violation of their constitutional right to a fair hearing. They added that the intended appeal will be rendered nugatory because the respondent, who was earning **Kshs 10, 620** per month did not have capacity to repay the substantial amount awarded by the trial court and had not shown that he had the means to do so.

The respondent opposed the application contending that the intended appeal is not arguable. He maintained that the applicants were sufficiently notified of the hearing when they were served with his submissions, which service they did not dispute. He added that the intended appeal, even if it succeeded, would not be rendered nugatory because it involves a money decree. In support of those submissions the respondent relied on the decisions of this Court in ***Salim Hussein Dungarwalla v. Uzima Press Ltd & 2 Others [2019] eKLR*** and ***ICEA Lion General Insurance Co. Ltd v. Board of Governors, Rioma Mixed Secondary School & 24 Others [2019] eKLR*** .

We have carefully considered this application. As both parties agree, to entitle the applicants to an order of stay of execution under **rule 5(2) (b)** of this Court's Rules, they must establish that their intended appeal is arguable, and that unless we grant an order of stay of execution, it will be rendered nugatory if it succeeds. (See ***Exclusive Estates Ltd v. Kenya Posts and Telecommunications Corporation & Another [2005] 1 EA 53***).

On whether the intended appeal is arguable, it is common ground that other than being served with the respondent's submissions on 11th October 2019, the applicants were never served with notices of the various mentions that the court ordered and even the notice of delivery of judgment. This Court will decide at the hearing of the intended appeal whether service of submissions alone without any indication that the applicants were required to file their replies and within what time, together with failure to serve notice of the date set for mention to give the date for judgment, constitutes sufficient notice and a fair opportunity to be heard. As of now, we are satisfied that point alone is arguable and is not frivolous.

As regards whether the intended appeal will be rendered nugatory, this will depend on the circumstances of each case.

The applicants express the fear that their former employee, who earned Kshs 10,620 per month, is not able to repay the amounts awarded by the court if their appeal succeeds. Other than stating that the decree in question is a money decree, the respondent has not adverted to his means and ability to repay the decretal amount should the intended appeal succeed.

We are accordingly satisfied that the applicants have satisfied the two requirements under **rule 5(2) (b)** of the Rules of this Court. We grant an order of stay of execution of the judgement of the trial court dated 21st January 2020 until the hearing and determination of the intended appeal. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 19th day of March, 2021.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR