



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM. ASIKE-MAKHANDIA, J. MOHAMMED & KANTAL, JJ.A)

CIVIL (APPLICATION) SUP NO. 3 OF 2020

BETWEEN

JAMII BORA BANK LIMITED.....APPLICANT

AND

MINNIE MBUE.....RESPONDENT

(An application for certification and leave to appeal to the Supreme Court of Kenya

and stay of execution of the judgment of the Court of Appeal at Nairobi

(Musinga, Gatembu & Murgor, JJ.A) dated 10th March, 2017

In

Civil Appeal No. 224 of 2014)

RULING OF THE COURT

Background

1. Before us is an application dated 28th January, 2020 seeking *inter alia* the following orders:

a) A stay of execution be granted restraining the Appellant/Respondent from executing he (sic) judgment delivered on 10th March, 2017 in Nairobi Civil Appeal No 224 of 2014 delivered at Nairobi (Musinga, Gatembu & Murgor JJ.A) pending the determination of the present application.

b) Leave be granted to the Respondent/Applicant to lodge an appeal to the Supreme Court from the judgment delivered on 10th March 2017 at (sic) Nairobi Civil Appeal No 224 of 2014 delivered at Nairobi (Musinga, Gatembu & Murgor JJ.A).

c) In the event that leave is granted to appeal to the Supreme Court, there be a stay of execution of the judgment delivered on 10th March, 2017 in Nairobi Civil Appeal No. 224 of 2014 delivered at Nairobi (Musinga, Gatembu & Murgor JJ.A) pending the determination of the intended appeal to the Supreme Court.

d) Costs.

2) The application is premised on the grounds that the intended appeal to the Supreme Court raises issues of general public importance which ought to be considered by the apex Court. Further, that unless stay is granted the intended appeal would be defeated.

3) The pertinent facts which gave rise to the current application are that by a contract of employment dated 25th March, 2010, the respondent was engaged by the applicant as its Executive Director with effect from 15th April, 2010. The duration of the contract was set out as follows:

“ 2.1 Your employment commences on the 15th day of April, 2010 and shall unless otherwise terminated, in accordance with the provisions of this Letter of Appointment (sic) run for a contract period of five (5) years to be renewed for a further five (5) year period.”

4) However, vide a letter dated 29th August, 2011 the respondent’s employment was terminated by the applicant by mutual consent effective from 31st August, 2011. After this termination, the parties disagreed on the terminal benefits payable to the respondent with the result that the respondent instituted a suit in the Employment and Labour Relations Court (ELRC) arguing that the duration of her contract with the applicant was 10 years. She sought *inter alia* payment of the salary she would have otherwise have earned during the unserved term of her contract. As would have been expected, the applicant refuted the respondent’s claim.

5) Upon hearing the parties’ respective cases, the trial court (Nzioki wa Makau, J.) by a judgment dated 1st November, 2013 held that the duration of the respondent’s contract was 5 years. He also found that the respondent was entitled to 12months’ salary as compensation for her termination together with other benefits. The trial court granted the respondent a judgment sum of Kshs.15,466,666.70. Aggrieved with that decision, the respondent lodged an appeal the subject of this application.

6) Ultimately, this Court by a judgment dated 10th March, 2017 upheld the trial court’s decision to the extent that the duration of the respondent’s contract was for five years. Nonetheless, this Court found that by virtue of the contract of employment as well as the termination letter, the respondent was entitled to payment of her monthly gross salary for the unserved period of her contract, that is, 44 months. As a result, this Court awarded the respondent a sum of Kshs. Kshs.38,666,666/= plus interest at court rates from the date of the trial court’s judgment, 1st November, 2013 until payment in full.

7) Going back to the application, the applicant through its Legal Manager, **Ms. Christine Wahome (Ms. Wahome)**, deposed that following the delivery of the impugned judgment it filed a notice of appeal on 22nd March, 2017. Thereafter, it filed an application dated 28th April, 2017 imploring this Court to review the impugned judgment or in the alternative, grant leave to appeal to the Supreme Court. This Court directed the applicant to elect which application it would proceed with since the Court could not entertain both applications simultaneously. The applicant elected to proceed with the review application and also lodged another application dated 15th November, 2017 praying for stay of execution of the impugned judgment pending the determination of the review application. The application for stay of execution was compromised with the effect that the applicant was directed to pay the respondent a sum of Kshs. 10,000,000.

8) It was further deposed that the review application was subsequently dismissed by this Court by a ruling dated 20th December, 2019 hence the stay orders were effectively extinguished. Since then, as per the applicant, the respondent has taxed her costs and expressed her intention to proceed with execution. In point of fact, she had refused the applicant’s offer to offset the balance of the decretal amount in instalments. It is for that reason that the applicant is apprehensive that the respondent will commence execution proceedings to the detriment of the intended appeal. In the applicant’s view, the respondent has no means to refund the decretal amount should the intended appeal succeed. **Ms. Wahome** deposed that the applicant was also willing to deposit the balance of the decretal amount in 10 equal instalments in a joint interest earning account in the names of the parties’ advocates. In an effort to demonstrate that the intended appeal to the Supreme Court involves matters of general public importance, the applicant set out what it termed as important questions of law which would be raised as follows:-

i. Whether it is fair labour practice under Article 41 of the Constitution for employees who entered into fixed term contracts to be awarded terminal benefits for the remainder of the contract period as opposed to employees on permanent terms of contracts who can only compensated for a maximum of 12months’ salary under Section 49 of the Employment Act.

ii. Whether it amounts to discrimination in violation of Article 27 of the Constitution for a fixed term employee to be awarded for the remainder of the contract period and permanent term employee to be awarded a maxim of 12months’ salary as provided under Section 49 of the Employment Act.

iii. Whether a party can contract out of statute.

iv. Whether it is just & equitable for an employee to be paid the remainder of a contract employment when it amounts to unjust enrichment for work not done.

v. Whether in ordering an employer to pay an employee the balance of the contract period is tantamount to holding an employer in servitude leading to unjust enrichment and thus a violation of employer’s right to property under Articles 10(2) & 40 of the Constitution.

vi. Whether a fixed term contracts are sui-generis contracts not subject to the compensatory awards under Section 49 of the Employment Act, and if yes, whether the parties can contract outside the provisions of the law.

vii. Whether it is fair labour practice under Article 41 of the Constitution and Section 50 as read with Section 49 of the Employment Act to award an employee a balance of the fixed term period when such an employee has not mitigated the loss.

viii. Is mitigation of loss a factor to be taken into account by the court in awarding damages to the employees with fixed term contracts?

ix. Do courts have a constitutional obligation to uphold the principles of Article 10(b) of the Constitution and avoid a judgment that may occasion a miscarriage of justice to avoid eroding public confidence in the administration of justice and equity?

x. The intended appeal transcends the parties as the determination of the same will address the questions inter alia, as to whether public officers like Members of Parliament and County Assembly ought to be paid for the remainder of their term in office. If a scenario arises where their term comes to an end before the expiry of the 5years contract, should they be paid by the

taxpayers for the remainder of the period when such members can mitigate by being re-elected back to Parliament and County Assembly.

xi. *There is a state of uncertainty in the law arising from the contradictory precedents in the ELRC and this Court on whether an employee who entered into fixed term contract ought to be paid for the balance of the contract period and question of alleged discrimination between employees who executed permanent contracts vis-à-vis fixed term contracts.*

9) In opposition, the respondent deposed that the applicant was estopped from bringing the current application having elected previously to proceed with the review application as opposed to the earlier application for leave to appeal to the Supreme Court dated 28th April, 2017. The respondent contends that the application is an abuse of the court process. She further deposed that the applicant had admitted in its own application that it was on the verge of insolvency. Therefore, it should be the applicant who provides security for payment of the decretal amount and not vice versa.

Submissions by Counsel

10) The application was disposed by way of written submissions without the appearance by counsel. It is instructive to note that the respondent did not file any written submissions.

11) Citing this Court's decision in ***Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR**, the applicant submitted that for an application for stay to succeed, two principles should be demonstrated. Firstly, that the intended appeal to the Supreme Court was arguable and secondly, the intended appeal would be rendered nugatory in the event that stay is not granted.

12) It was further argued by the applicant that the intended appeal to the Supreme Court raises issues of general public importance which would be defeated if the impugned judgment was not stayed. Expounding on this argument, the applicant contended that it neither knew of any assets of the respondent nor her capability to refund the decretal sum which including interest stood in excess of Kshs.65 Million. In support of that proposition, reference was made to the case of ***Kenya Hotel Properties Ltd vs. Willesden Properties Ltd. - Civil Application NO. NAI 322 of 2006 (UR)***. Besides, the applicant posited that the respondent would not suffer any prejudice if stay is granted since she had already been paid a sum of Kshs.29,155,765.70.

13) The applicant also urged this Court to invoke its inherent jurisdiction under ***Rule 1 (2)*** of the ***Court of Appeal Rules*** and grant the stay sought in the interest of justice. Towards that end, we were referred to this Court's decision in ***M. Mwenesi vs. Shirley Luckhurst & Another- Civil Application No. Nai 170 of 2000***.

14) On the leave sought to appeal to the Supreme Court, the applicant contends that the intended appeal not only involves matters of general public importance but also raises 9 fundamental questions of law which ought to be considered by the apex Court. According to the applicant, its application meets the threshold set out by the Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnechi-Ruscione - Civil Appl. No. Sup.4 of 2012 (UR3/2012)*** in that, the intended appeal transcends the parties as the determination of the same will address the question *inter-alia*, as to whether public officers like Members of Parliament and County Assembly ought to be paid for the remainder of their term in office. Further, the same will help employers and employees across the board in interpreting fixed term contracts. The applicant also alluded that there is a state of uncertainty in the law arising from contradictory precedents in the ELRC and this Court on whether an employee who entered into fixed-term contract ought to be paid for the balance of the contract period and the question of alleged discrimination between employees who executed permanent contracts *vis-a-vis* fixed-term contract. In conclusion, the applicant urged this Court to allow its application as prayed.

Determination

15) We have considered the application based on the grounds in support thereof, the respondent's replying affidavit, the submissions by the applicant as well as the law. On the competency of the appeal, it is not in dispute that the applicant had filed an application dated 28th April, 2017 seeking review of the impugned judgment and in the alternative, leave to appeal to the Supreme Court. It was upon the court's direction that the applicant elected to proceed with the review application as opposed to the application for leave. In our view, that election on the part of the applicant could not be taken to mean that it was estopped from pursuing a subsequent application for leave since the same had not been heard or determined by this Court in the earlier application.

16) An appeal to the Supreme Court can arise in two ways, that is, as of right where the issue involves the interpretation and application of the ***Constitution***; and with leave either by this Court or the Supreme Court where a matter of general public importance is involved. See ***Article 163(4)*** of the ***Constitution***. Accordingly, issues raised by the applicant concerning interpretation and application of the ***Constitution*** do not fall within the ambit of our jurisdiction to grant leave to appeal to the Supreme Court. Nevertheless, we shall proceed to consider whether the other issues identified by the applicant constitute matters of general public importance.

17) There is no hard and fast definition of what a matter of general public importance entails. However, a broad criteria of gauging whether an issue is of general public importance has since been established as set out by the Supreme Court in ***Malcom Bell vs. Daniel Toroitich Arap Moi & Another* [2013] eKLR** –

i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;

- iii. *such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;*
- iv. *where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;*
- v. *mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier levels of the] superior Courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of the Constitution;*
- vi. *the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;*
- vii. *determinations of fact in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;*
- viii. *issues of law of repeated occurrence in the general course of litigation may, in proper context, become “matters of general public importance”, so as to be a basis for appeal to the Supreme Court;*
- ix. *questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court;*
- x. *questions of law that are destined to continually engage the workings of the judicial organs, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court;*
- xi. *questions with a bearing on the proper conduct of the administration of justice, may become “matters of general public importance,” justifying final appeal in the Supreme Court.”*

18) Applying the above principles to the matter at hand, we do not think that the issues raised by the applicant constitute matters of general public importance. We say so because firstly, the issue in dispute was the terminal benefits payable to the respondent following her termination. The answer to the dispute lay with the terms of her contract of employment as observed by this Court. In particular, clause 19 and 20 of the contract which read as follows:

“19. Employment Termination

Your employment shall terminate upon occurrence of any of the following events:

19.1 Your resignation from employment for reasons acceptable to the Board.

19.2 A material breach of any material obligations under this Letter of Employment.

19.3 Committing such misconduct as set out under the Employment Act 2007 or such other succeeding or amending statute justifying summary dismissal.

19.4 Your inability, due to a physical or mental disability, for a period of 40 days, whether or not consecutive, during any 12 consecutive months to perform the services contemplated under this Contract.

19.5 In the event of the bank being placed under statutory management by the Central Bank of Kenya or other succeeding regulator or in the event of the bank being placed under liquidation by the Central Bank of Kenya or other succeeding regulator.

19.6 Service of three (3) months’ notice of termination by either party or payment of salary in lieu for the equivalent period thereof.

20. Effect of Termination

20.1 You shall be paid the balance of your contractual salary and benefits other than in the application of clauses 19.1 to 19.3 above.

20.2 You shall immediately deliver to the Employer all correspondence, documents and property belonging to the Employer, which may be in your possession or under your control.

20.3 You shall continue to be bound by all the provisions of this letter of appointment, which specifically provide or by their nature are deemed to survive the termination or lapse of your employment.” [Emphasis supplied].

19) The application of the above clauses in determining the terminal benefits payable was further corroborated by the letter dated 9th

September, 2011 under the applicant's hand which read as follows:

“RE: TERMINATION OF EMPLOYMENT

Following the resolution of the Board of Directors during the 140th meeting of 29th August 2011 that the bank pursued negotiated disengagement with you, and further to your subsequent meetings with the undersigned and in particular on Friday 2nd September 2011, on behalf of the Board, I have the pleasure of offering the following:

a) Termination under clause 19.6 of your Letter of Appointment

This clause provides that employment may be terminated by way of 3 month's (sic) notice by either party, or in the alternative payment of 3 month's salary in lieu of notice.

Accordingly, the bank shall pay the three months' salary in lieu of notice upon acceptance of this offer.

b) Termination under clause 20.1 of your Letter of Appointment

This clause provides that upon termination of employment by the employer, the employer shall pay the salary due for the balance of the contract period. Accordingly, the Bank would be liable to pay your salary for the remaining 44 months, being the balance of your unspent contract period. This would amount to approximately Kshs.35.2 million. As you are aware, the Bank's financial position cannot support such an outlay. After lengthy consultations, and in the interest of harmony and peaceful disengagement, the Bank proposes to pay 24 months' salary in full and final settlement under this clause and in the following manner:

i) By 31 January 2012: 12 months' salary

ii) By 31 January 2013; 12 months' salary

iii) In both instances, interest shall accrue at the rate of 9% per annum with effect from 1 December 2011 until settlement.”
[Emphasis supplied]

20) It is on the basis of the contract of employment that this Court held that the respondent was entitled to payment of her salary for the unserved period of her contract, that is, 44 months. This finding was based on the terms of the contract which were peculiar to the parties herein hence it cannot be said that the finding transcended the circumstances of the case at hand. As such, it is unclear why the applicant submits that the intended appeal would address whether public officers like Members of Parliament and County Assembly would be entitled to be paid for the remainder of their unserved term in office. This issue was not before the trial court or this Court.

21) Secondly, the issue of whether parties could contract out of statute as it pertained to the payment of the respondent's salary for the unserved term was similarly not before the trial court or this Court while dealing with the appeal. Our position is fortified by the sentiments of the Supreme Court in Hermanus Phillipus Steyn vs. Giovanni Gneccchi- Ruscone [2013] eKLR to the effect that-

“iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination; ...”

22) Thirdly, the burden lay with the applicant to demonstrate uncertainty in law arising from contradictory decisions of ELRC and this court with respect to whether an employee in a fixed term contract ought to be paid for the balance of the unserved contract period following premature termination. See the case of Koinange Investment & Development Ltd vs. Robert Nelson Ngethe [2013] eKLR. Did the applicant discharge this burden? The answer is in the negative. In as much, as the applicant set out several cases, it fell short of demonstrating how they contradicted each other as far as the compensation payable under a fixed term contract and permanent employees are concerned.

23) Our reading of the cases cited by the applicant reveals that the respective courts in each case, while dealing with the issue of compensation for wrongful termination in fixed term contract held that the remedies under **Section 49** of the **Employment Act** are available in such cases like permanent contracts of employment, including the compensation of 12months'salary. However, the courts did note that the remedies available to an employee following unfair termination of fixed term contracts can be dictated by the terms of the contract to include payment of unserved duration of the contracts. To mention a few, for instance the persuasive case of Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya [2013] eKLR which was cited by the applicant Radido, J had this to say-

“My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms.” [Emphasis supplied].

24) All in all, we find that the issues raised by the applicant in the intended appeal to the Supreme Court are no more than facts which were in contest between the parties and do not in any way transcend the circumstances of the case. As such, the applicant has not made out a case

to warrant the leave sought.

25) On the issue of stay of execution, we re-affirm the decision of this Court in Dickson Muricho Muriuki vs. Timothy Kagundu Muriuki & 6 others [2013] eKLR where it was held:

“On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made...

It is our considered view that subject to the Court of Appeal’s jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court.”

26) The upshot of the foregoing is that the application lacks merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

ASIKE-MAKHANDIA

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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