



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), MUSINGA & GATEMBU, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 87 OF 2019

BETWEEN

READY CONSULTANCY LIMITED.....APPLICANT

AND

TIMA ABDALLA & 21 OTHERS.....RESPONDENT

(Being an application for stay of proceedings (sic) and for extension of time to file the appeal out of time from the

judgement of the Hon. Justice James Rika delivered on 21st June, 2019 at the Employment and Labour

Relations Court at Mombasa)

RULING OF THE COURT

1. In its application dated 1st October 2019, Ready Consultancy Ltd, the applicant, seeks an order for stay of execution of the judgment of the Employment and Labour Relations Court at Mombasa (*J. Rika, J.*) delivered on 21st June 2019 awarding a total of Kshs.3,433,200.00 to all the 22 respondents made up of (in respect of each of them), one month's salary *in lieu* of notice; annual leave of 21 days for 4 years; 15 days' salary for each of the 4 years completed in service of Mombasa Maize Millers Limited; and equivalent of 4 months' salary in compensation for unfair termination. Aggrieved by that judgment, the applicant promptly lodged a notice of appeal on 25th June 2019.
2. In its draft memorandum of appeal, the applicant faults the learned Judge for, among other things, concluding that as at 16th January 2016 when the respondents left employment, the applicant was "*the lone employer*" "*having assumed total control and responsibility of the labour force under successive outsourcing agreements.*" The applicant complains that in making that finding, the learned Judge failed to take into account that the outsourcing contract between it and Mombasa Maize Millers Limited, which was named as the 1st respondent in the lower court, had expired on 31st December 2015.
3. Bearing in mind the legal principles applicable when considering applications of this nature under Rule 5(2)(b) of the Court of Appeal Rules (see *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012*), we are satisfied, in light of the grievances highlighted in the draft memorandum of appeal, that the intended appeal is not frivolous. It is arguable.
4. As to whether the intended appeal will be rendered nugatory if we decline the orders sought, and the appeal ultimately succeeds, Mohamed Issa Ducale, a director of the applicant has deposed in the affidavit supporting the application that the respondents have instructed auctioneers who have already proclaimed its property with a view to selling the same by auction to recover the judgment amount.
5. In *Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227*, the Court expressed that an appeal would be rendered nugatory if refusal to grant an order of stay to the applicant would cause such hardship as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined. See also *Shah Munge & Partners Ltd vs. National Social Security Fund Board of Trustees & 3 others [2018] eKLR*. It is not evident that if execution goes ahead, and the appeal ultimately succeeds, that the respondents will be in a position to refund the amount in question.
6. This, we think, is a proper case for the Court to exercise its discretion in favour of the applicant. Accordingly, we allow prayer 2 of the application and order stay of execution of the judgment of the ELRC given on 21st June 2019 pending the hearing and determination of the intended appeal. To safeguard the respondents' interest, we order that the applicant shall, within 60 days from the date of delivery of this

ruling, deposit the amount of Kshs.3,433,200.00 in a joint account to be held by the advocates for the parties to be held pending the hearing and determination of the intended appeal. In default, the order of stay of execution will automatically lapse.

7. We note that in prayer 3 of the application under consideration, the applicant also sought an order for extension of time to file the substantive appeal from the impugned judgment. However, as already noted, the notice of appeal was lodged in time and the application for stay of execution is properly before the Court. The applicant is of course at liberty to pursue the request for extension of time of the memorandum and record of appeal, if necessary, before a single Judge of the Court.

8. The costs of the application shall abide the outcome of the appeal.

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

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR