IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & OKWENGU, JJ.A.)

CIVIL APPLICATION NO. 49 OF 2019

BETWEEN

PRESSMASTER LIMITED..APPLICANT

AND

JOHN ELEGO & 103 OTHERS.............................RESPONDENTS

(Being an application for stay of execution pending the hearing and determination of an intended appeal from entire judgment and decree of the Environment and Labour Relation Court of Kenya at Nairobi (Nduma Nderi, J) dated 20th July, 2018 and delivered on 10th August, 2018 in ELRC Case No. 468 of 2013)

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RULING OF THE COURT

[**1**] The applicant Pressmaster Limited, is aggrieved by the judgment of the Employment and Labour Relations Court (ELRC) delivered on 10th August, 2018 in which the court ruled in favour of the claimants, John Elego & 103 others (**the respondents**). The applicant lodged a notice of appeal on 24th August, 2018 and moved this Court by way of a notice of motion dated 12th February, 2019, in which it seeks orders that:

> **"Pending the hearing and determination of the appeal herein, conservatory stay orders do issue restraining the respondents either by themselves, their servants and/or agents or otherwise howsoever from executing the judgment of Hon. Justice Nduma Nderi delivered on 10th August 2018 and any resultant decree or consequent orders therefrom"**

[**2**] The application is supported by an affidavit sworn by **Harjinder Singh Panesar**, a Director of the applicant company, and grounds stated on the face of the motion. The applicant is aggrieved by the court's adoption of the respondents' tabulation of Kshs. 64,859,427 as the amount due to them. The applicant contends that the intended appeal raises serious issues and has great probability of success, and that if the judgment of the ELRC is not stayed, it will suffer miscarriage of justice and the intended appeal would be rendered nugatory.

[**3**] In its written submissions, the applicant has urged that the appeal raises arguable issues including the locus of the respondents to institute the class action, and the reliance by the learned Judge on an unregistered collective bargaining agreement in awarding the respondents damages.

[**4**] In addition, the applicant argues that if an order of stay is not granted, it will be forced to pay the decretal amount, and it may not be able to recover the amount even if its appeal is successful as the respondents will not be able to reimburse the money, most of them being unemployed. The applicant indicates that it is ready to deposit security in the form of a bank guarantee to secure the interest of both parties.

[**5**] The respondents have replied to the applicant's motion through a replying affidavit sworn by one of the respondents **John Elego Navade** (**Navade**), who claims to be a representative of all the respondents. He maintains that the court adopted the respondents' computation of Kshs. 64,859,427 on 28th January, 2019 after the applicant was given numerous opportunities to file its own computation, but failed to do so.

Navade depones that the applicant has filed an application dated 6th February, 2019 in which it seeks to review the order of 28th January, 2019 so that an earlier computation that had been filed by the respondents on 28th October, 2018 is adopted, and this application is still pending for determination, and that there is no risk of execution as there is no decree that has been extracted.

[**6**] In their written submissions, the respondents have urged that the applicant's intended appeal is not arguable, and that the applicant has failed to demonstrate that the appeal will be rendered nugatory as there is no risk of execution; that in any case, the applicant has filed an application for review, and the application before the Court is therefore premature. In addition, that the terminal dues owed to the respondents are of a specific value and the applicant can be adequately compensated by damages, which the applicant has not shown that the respondents are incapable of paying.

[**7**] It is also contended that the respondents will suffer prejudice if the orders sought are granted as they were terminated from their employment in 2012 without payment of their terminal dues, and they have a right to enjoy the fruits of their judgment. The Court was urged if inclined to grant the orders sought, to order the applicant to pay 50% of the damages granted by the court to the respondents, and the balance to be deposited in the joint account in the names of the parties' advocates.

[**8**] In **Safaricom Limited vs Ocean View Beach Hotel Limited [2010] eKLR** Omolo JA had this to say about conservatory orders issued pending the hearing of an appeal:

> ***"Under Rule 5 (2) (b) the Court is entitled to give a preservative order where a notice of appeal has been lodged. It has been said time without number that in an application under Rule 5 (2) (b) what gives the Court the jurisdiction to hear and determine the motion is the filing of the notice of appeal. But it is not automatic that once a notice of appeal is filed the Court must give a preservative order. The Court has, over the years, developed certain well known guidelines on which it will grant or refuse to grant the preservative order sought. The appeal or the intended appeal must be one which is arguable, i.e. one which is not frivolous. If an appeal or the intended appeal is a frivolous one, the Court will refuse to grant an order preserving the status quo. Again the party seeking the preservative order must show to the Court that if an order is not granted and his appeal or the intended appeal were to succeed in the end, that success would have been rendered nugatory by the earlier refusal to grant the preservative order."***

[**9**] In **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR,** this Court endorsed the position in **Safaricom Limited vs Ocean View Beach Hotel Limited** (supra) and appreciated that Rule 5(2)(b):

> ***".is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended (see also Africa Eco-Camps Limited v Exclusive African Treasurers Limited [2014] eKLR).***

[**10**] We have considered the motion, and the contending submissions in light of the law as stated above. In the judgment delivered on 10th August, 2020 the learned judge entered judgment for the respondents as follows:

> **"(a) Four months' salary in compensation for the unlawful and unfair termination of employment.**
>
> **(b) Unpaid bus fare allowance at kshs. 250 per month from 1st January 2003 to September, 2012.**
>
> **(c) Gratuity at 15 days basic salary completed year of service.**
>
> **(d) the court awards payment in lieu of notice to the claims in terms of the CBA as follows:**
>
> **(i) those with service below 5 years, one month salary in lieu of notice,**
>
> **(ii) those with service of 5 years and above, two months' salary in lieu of notice.**
>
> **(e) The claimants are awarded CBA increment of salary at 10% from September 2011 to date of dismissal. Any increment of allowances in the said CBA that remains unpaid to be included in the computation of gross salary increment from September 2011 to date.**
>
> **(f) The awards in (a) (b) (c) and (d) above to be computed by the claimant, filed and served on the respondent within 30 days of this judgment. Same to be confirmed by the court on a date to be fixed subsequently.**
>
> **(g) The award should be paid with interest at court rates from the date of judgment until payment in full.**
>
> **(h) Respondents to pay costs of the suit."** *(emphasis added*)

[**11**] These are the orders in regard to which the applicant filed a notice of appeal on 24th August, 2018. It is noteworthy that, the notice of appeal was filed before the computation provided under (f) above, which resulted in the figure of Kshs. 64,859,427. In the motion which is before us, the applicant seeks to stay the judgment of 10th August, 2018 and any resultant decree. The application is properly anchored on the notice of appeal filed on 24th August, 2018 as the amount of Kshs 64,859,427 arises from the decree subject of the judgment of 10th August 2018.

[**12**] It is not disputed that the applicant has filed an application for review of the order of 28th February, 2019 in which the figure of Kshs. 64,859,427 was adopted by the ELRC. In the application the applicant is not seeking review of the judgment of 10th August, 2018, but only seeks review of the computation adopted on 28th February, 2019. The application for review does not therefore impact the intended appeal in which the applicant, as per the memorandum of appeal, intends to challenge the full judgment on grounds which includes locus of the respondents; whether the respondents were eligible to be part of the class action; whether the learned Judge was right in taking into account the CBA agreement which was unregistered; and whether the claimants were employees of the applicant, and if so, whether they were dismissed unlawfully and in violation of the law. In our view, these are arguable issues.

[**13**] As was stated by this Court in **Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others [2014] eKLR**:

> ***"An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication"***

[**14**] We are satisfied that the applicant's motion is properly before us, and that the intended appeal is arguable and not frivolous.

[**15**] As regards the nugatory aspect, the execution of the decree involves payment of a substantial amount to the respondents. In **Kenya Hotel Properties Limited vs. Willesden Properties Limited**, **Civil Application No. 322 of 2006 (UR 178/2006**), this Court stated as follows:

> ***"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree, so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant."***

[**16**] The applicant contends that most of the respondents are unemployed and will not be able to refund the money should the applicant's appeal succeed. This contention has not been challenged. As per the order of 28th January, 2019, the amount was calculated as Kshs. 64,859,427. The fear that the respondents may not be able to refund the money is not unfounded. In the circumstances, we think it would be fair and just to grant a conditional order of stay of execution.

[**17**] We therefore issue an order that pending the hearing and determination of the appeal, the respondents, their servants or agents are restrained from executing the judgment of 10th August, 2018 or any resultant decree or consequential order therefrom, on condition that the applicant shall provide security for the sum of Kshs. 64,859,427 in the form of a bank guarantee within 30 days from the date hereof. In default, the order of stay shall lapse. Costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR