



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR J.J.A.)

CIVIL APPLICATION NO. 36 OF 2017

BETWEEN

KENYA REVENUE AUTHORITY.....APPLICANT

AND

EVELYNE ONYANGO OBONDO.....RESPONDENT

(Being an Application seeking stay of execution of the Ruling and Order of the Employment and Labour Relations Court (H. Wasilwa, J.) dated 13th February, 2017 in **Nairobi ELRC Cause No. 2141 of 2016**)

RULING OF THE COURT

On 13th February, 2017 the Employment and Labour Relations Court at Nairobi (ELRC) (**Wasilwa, J.**) delivered a ruling in favour of **Evelyne Anyango Obondo** (the respondent) against the applicant wherein the learned Judge found *inter alia*, that the respondent had been subjected to an administrative process that was neither fair nor expeditious. Neither had the applicant given any information concerning the outcome of the disciplinary process since 2013. It was therefore apparent to the learned Judge that the respondent's rights under **Article 47** and **35** of the Constitution had been infringed. The court therefore directed the respondent to resume duty unconditionally and be paid all withheld salaries and allowances from the time of suspension to the time of resumption of duty and forbade the applicant from re-opening the flawed disciplinary process against the respondent considering that they had failed to resolve the issue 3 years preceding the initiation of the litigation against them by the respondent.

Aggrieved, the applicant timeously filed a notice of appeal dated 14th February, 2017 on 17th February, 2017 against the whole ruling, on which the application under consideration is anchored. The application dated 28th February, 2017 is brought under **sections 3A** and **3B** of the **Appellate Jurisdiction Act, Rule 5(2)(b)** of this Court's **Rules, sections 27(1)** and **(2)** of the **Labour Institutions Act**, substantively seeking:

“3. THAT there be a stay of execution of the ruling, and orders flowing therefrom, delivered on 13th February, 2017 in Employment and Labour Relations Cause No. 2141 of 2016, by Hon. Lady Justice Hellen Wasilwa, to the extent that the respondent herein resume duty immediately without any conditions and be paid all withheld salaries and allowances from the time of interdiction, pending the hearing and determination of the applicant's intended appeal.

4. THAT the costs of and incidental to this application do abide the result of the said intended appeal.”

The application is supported by grounds on its body and a supporting affidavit of **Grace Mwangi**, who has described herself as appellant's Manager Employee Relations Human Resource Unit, sworn on 28th February, 2017 together with annexures thereto. It has been opposed by the respondent's replying affidavit deposed on 22nd July, 2018 together with annexures thereto. It was canvassed virtually through rival pleadings and written submissions of the respective parties in the absence of learned counsel for the respective parties and without oral highlighting owing to the Covid-19 Pandemic.

Supporting the application, the applicant avers and submits that on the basis of supporting facts proffered by them, they have satisfied the twin prerequisites for granting relief under **Rule 5(2)(b)** of the Court's **Rules**.

On arguability of the intended appeal, the applicant intends to raise six (6) grounds of appeal namely, that the learned Judge erred in law: in issuing final orders sought at an interlocutory stage, thus denying the applicant the right of discharging the burden of justifying termination decision, showing the fairness of procedure and explaining the delay at the full hearing as prescribed under the **Employment Act**; in

disregarding the applicant's statement in response, written submissions and grounds of opposition which demonstrated prima facie sufficient grounds to exercise their right to take disciplinary action against the respondent; by basing her entire decision on the fairness/legality or otherwise of the delay in taking administrative action which delay could only be adequately explained by way of evidence during the hearing upon presentation of facts through viva voce evidence; in failing to appreciate that general damages sought would have been an adequate remedy to the respondent in lieu of reinstatement; by granting an order restraining the applicant from reopening the disciplinary process on the same issues, which had not been sought; and lastly, the learned Judge overstepped her mandate in descending into the arena of the disciplinary process by determining how the same should be conducted contrary to well established judicial tenets.

In law an arguable appeal need not be one that must succeed, but one that warrants not only an invitation of the opposite party to respond thereto, but one that also warrants the Court's interrogation. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others**, Civil Application No. 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai 345 of 2004.

We have applied the above threshold to the rival positions herein on the issue. We are satisfied that all the above proposed six (6) grounds of appeal the applicant intends to raise on appeal are all arguable, their ultimate outcome on appeal notwithstanding.

On the nugatory aspect, the appellant submits that considering the substratum of the appeal namely, whether the respondent's suspension was lawful; allowing the respondent to resume her duties and receiving her salary and allowances would negate the very essential core of the appeal especially when there is no demonstration on the respondent's part that she would be able to refund the salary and allowances paid should the appeal succeed.

The applicant cited the cases of **Co-Operative Bank of Kenya Limited vs. Banking Insurance & Finance Union Kenya (2014) eKLR** and **Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR** both on the threshold for granting relief under **Rule 5(2)(b)** of the **Court of Appeal Rules**.

In rebuttal, the respondent opposed the application averring and submitting that the instant application is devoid of merit as it does not meet the threshold required for granting relief under **Rule 5(2)(b)** of the **Court of Appeal Rules** for applicant's failure to demonstrate how the appeal would be rendered nugatory upon her reinstatement considering that she has already been reinstated, promoted and paid all arrears of her dues. The application has therefore been overtaken by events and urged that it be dismissed with costs to her.

The respondent cited the case of **Kaushik Panchamatia & 3 Others vs. Prime Bank Limited & Another (2020) eKLR** in support of their averments and submissions that relief sought cannot issue where what is sought to be stayed has already been overtaken by events.

Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited above. **Section 27(1)** and **(2)** of the **Labour Relations Act** does not fall for our consideration in an application of this nature. It is therefore discounted. **Sections 3A** and **3B** of the **Appellate**

Jurisdiction Act Cap 9 Laws of Kenya falls for consideration peripherally. It is therefore sufficient for us to state that it enshrines the overriding objective principle of the Court which donates power to the Court to discharge its mandate with greater latitude. The substantive provision falling for consideration is **Rule 5(2)(b)** of the Court's **Rules**.

This Court has carefully considered the record in light of the rival positions of the parties herein. It is our finding that there is a notice of appeal duly filed, which donates jurisdiction to this Court to entertain the application. We are therefore properly seized of the application and shall proceed to pronounce ourselves on its merits. See **Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 Others (2010) eKLR**.

The principles that guide the Court in the exercise of its unfettered discretion to grant relief under **Rule 5(2)(b)** of the Court's **Rules** are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal notwithstanding that it may not be an appeal that will necessarily succeed, but one 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 have been restated and amplified on numerous occasions by this Court. We take it from the case of **Multimedia University & Another vs. Professor Gitile N. Naituli [2014] eKLR** wherein the Court expressed itself as follows:

“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 underlining those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR ...

We have applied the above threshold to the rival position herein on satisfaction of the first prerequisite. We reiterate what we stated earlier above that 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 vs. Kenya Planters & Agricultural Workers Union** [supra]. Considering this threshold in light of the proposed grounds of appeal highlighted above, we are satisfied that they are all arguable their ultimate outcome on appeal notwithstanding.

On the nugatory aspect, the position in law which is now trite is that 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) vs. Norlake Investments Ltd, (2002) 1 EA 227**.

In **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others**, [supra] this Court reviewed previous decisions on the nugatory aspect and stated as follows:

“(iv). In considering whether an appeal would be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. (David Morton Silverstein vs Atsango Chesoni, Civil Application No. Nai 9 of 2009 ...

(ix). The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Limited vs. Norlake Investments Limited [2002] (1 EA 227) at page 232.

(x). Whether or not an appeal would 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.”

In light of the respondent’s uncontroverted position that she has already been reinstated, paid her withheld salaries and allowances as ordered by the trial court, redeployed and even promoted to a higher grade, we are in the circumstances satisfied that the application has been overtaken by events as what was sought to be stayed has already been effected by the applicant. There is therefore nothing to be rendered nugatory.

In law, the applicant is required to demonstrate existence of both limbs, for granting relief under **Rule 5(2)(b)** of the Court’s **Rules** before earning relief under the said provision. The applicant having failed to demonstrate the nugatory aspect cannot earn relief as prayed. Accordingly, the application fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR