



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, MUSINGA & GATEMBU, JJA.)

CIVIL APPLICATION NO. E219 OF 2020

BETWEEN

KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY LIMITED.....APPLICANT

AND

DANSON MBUBI MUTABI.....RESPONDENT

(Being an application for stay of further proceedings and execution of the

Ruling of the Employment and Labour Relations Court at Nairobi

(Wasilwa, J.) delivered on 25th June, 2020

in ELRC Cause No. 1660 of 2017)

RULING OF THE COURT

1. In a judgment delivered on 20th December 2018, the Employment and Labour Relations Court (***Wasilwa, J.***) found that the respondent's employment with the applicant was unfairly terminated and awarded him Kshs.2,325,780.00 made up of 3 months' salary *in lieu* of notice (Kshs.129,210); and severance pay for 24 years calculated at 2 months' salary for each year worked (Kshs.2,067,360). Interest on the judgment amount, which appears to be at the heart of the applicant's grievance, was awarded at court rates from the date of filing suit. The applicant did not however appeal against the judgment but applied for its review, particularly on the stipulation by the Judge that interest would be computed from date of filing suit. In its ruling delivered on 25th June 2020, the Employment and Labour Relations Court (***Wasilwa, J.***) dismissed the application for review.

2. Aggrieved by the order dismissing its application for review, the applicant filed a notice of appeal on the basis of which it is now before us with an application dated 30th July 2020 made under Rule 5(2)(b) of the Court of Appeal Rules, seeking an order to "*stay execution and all consequential orders arising from the ruling delivered...on 25th June 2020 pending the hearing and determination of the intended appeal.*"

3. Based on the affidavit sworn by chairman of the applicant, David Mutangili, in support of the application and the submissions tendered on behalf of the applicant by learned counsel ***Mr. Bundi***, the applicant's case is that it has paid the entire principal decretal amount; that what remains outstanding, for which the respondent has already commenced execution proceedings and proclaimed the applicant's assets, relates to "*colossal interest*" awarded from the date of filing suit; that the matter was in court for over 20 years and the award interest from the date of filing suit is oppressive as delays in prosecution of the suit were largely caused by the respondent and not by the applicant. It is urged that the applicant is a cooperative society, and it is not easy to dispose of assets to meet the outstanding decretal amount especially in the current circumstances of Covid 19 epidemic.

4. According to the applicant, the intended appeal is arguable as the Judge erred in, among other grounds: awarding interest on the judgment amount from the date of filing suit and condemned the applicant to pay interest for a period of about 20 years wrongly holding the applicant responsible for the long delay in disposing of the suit attributable to the respondent; failing to properly consider and analyze the evidence in her judgment; and dismissing its application "*against the overwhelming weight of evidence...*". It was urged that unless the orders sought are granted, the appeal will be rendered nugatory as the respondent is unlikely to be in a position to refund the amount.

5. The respondent through his replying affidavit and submissions tendered on his behalf by learned counsel ***Mr. Muthama*** holding brief for

Mr. Makau opposed the application. According to the respondent, no grounds exist to warrant the grant of the orders sought; the intended appeal is not arguable as the delay in disposing of the matter before the lower court was occasioned by the applicant and the award of interest from date of filing suit was therefore justified. The respondent states that he has grown old waiting to have closure on this matter which has been in court for over 20 years; that in any event he would be able to refund the decretal amount should the appeal ultimately succeed; that the applicant has had more than ample time to pay the decretal amount as judgment was delivered in December 2018; and that he will be highly prejudiced should the application be allowed.

6. We have considered the material before us in support and in opposition to the application in line with the applicable legal principles, as articulated, for instance, in **Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR**.

7. Based on the draft memorandum of appeal, the applicant's main grievance as already indicated relates to the award of interest from the date of filing suit. However, the award of interest was contained in the judgment delivered on 20th December 2018. There is no notice of appeal in relation to that judgment. The applicant opted to apply for the review of the judgment before the lower court. That application was declined in the ruling delivered on 25th June 2020, the subject of intended appeal. In other words, the notice of appeal on which the present application is hinged relates to the ruling and order dismissing the application for review. On the strength of the decision of this Court in **Nguruman Limited vs. Shompole Group Ranch & another, Civil Application No. Nai. 90 of 2013 [2014] eKLR**, the notice of appeal relating to the ruling of 25th June 2020 cannot be a basis for the Court to effectively stay the judgment of 20th December 2018 in respect of which there is no appeal.

8. Furthermore, in the impugned decision of 25th June 2020 the lower court no more than dismiss the application for review. The learned Judge having dismissed the applicant's application, the resultant order is a negative order not capable of execution, except in regard to costs, which is not the applicant's complaint. **See Western College of Arts and Applied Sciences vs. EP Oranga & 3 others [1976] eKLR**.

9. For those two reasons, we do not think the application before us is merited. In effect, even if we were to find that the intended appeal is arguable, we are not satisfied that it will be rendered nugatory if we decline to grant the orders sought. The result is that the application fails and is hereby dismissed with costs.

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

W. KARANJA

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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