



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & ASIKE-MAKHANDIA, JJA)

CIVIL APPLICATION NO. 253 OF 2018

BETWEEN

AFRICAN COTTON INDUSTRIES LTD. ....APPLICANT

AND

PATRICK WAMBUA IKUSYA.....RESPONDENT

*(Being an application for stay of execution of the judgment and decree of Employment & Labour Relations Court at Nairobi (O.Makau, J) dated 13<sup>th</sup> July 2018*

in

ELRC NO. 313 OF 2013)

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RULING OF THE COURT

The dispute before the Employment & Labour Relations Court was triggered by a claim filed by the respondent alleging unlawful and summary dismissal from the employment of the applicant on 28<sup>th</sup> January 2013. In his claim the respondent asked for three(3) months salary in lieu of notice, fifty (50) accrued leave days plus damages totaling to ksh.683,333.33/=. The claim was defended by the applicant vide its defence and counterclaim. It was averred that the respondent had failed to meet his marketing responsibilities and the set targets despite numerous calls for him to improve. Thus his contract of employment was terminated on the 28<sup>th</sup> January 2013 justifiably on account of poor performance and misconduct.

The suit was heard and judgment was rendered in favor of the respondent and was awarded total sum of ksh. 446,333.35/= as damages plus costs and interest. Aggrieved by the judgment the applicant filed a notice of appeal signaling its intention to appeal. Fearing that the respondent may proceed to execute the decree, the applicant filed the instant motion under Rules 5(2)(b) of this Court's rules beseeching us to stay the execution of the aforesaid judgment and decree until the appeal is heard and determined.

The grounds in support of the motion are that; the respondent was awarded ksh.446,333.35/= plus costs and interest; the respondent was likely to enforce the judgment in order to frustrate the appeal; the intended appeal raises triable issues which in the absence of stay shall be rendered nugatory; there has been no delay in filing the application; the applicant is willing to deposit security for costs as shall be required and that the appeal had overwhelming chances of success.

In support of the motion is an affidavit sworn by **Mureithi Regeru** the General Manager of the applicant who has largely reiterated and expounded on the grounds above.

There is no response to the motion despite a reminder by email dated 2<sup>nd</sup> March 2021 from the Registrar of this Court. Similarly none of the parties filed written submissions.

We have considered the application and the law cited on the application; there is a notice of appeal duly filed, which grants this Court jurisdiction to entertain the application. See **Safaricom Ltd v. Ocean Beach Hotel Ltd & 2 others [2020] eKLR**.

The motion is premised on rule 5(2)(b) of this court's rules. The purpose of the rule is to preserve the substratum of the appeal. However before the applicant can succeed he has to demonstrate that the appeal or intended appeal as the case may be, is arguable and secondly, that

in the absence of stay, the same shall be rendered nugatory. See the case of ***Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR.***”

We have perused the memorandum of appeal which raises fourteen (14) grounds which hinge on the misapplication of the law on employment by the trial court; awarding excessive damages; failing to consider and properly evaluate the uncontroverted evidence of the applicant amongst, other grounds. In considering whether the applicant has established an arguable appeal, we remind ourselves that it does not necessarily imply one which will succeed, but one which is not frivolous. For an appeal to be considered arguable, even one grounds will suffice, as was held in ***Commissioner of Customs v. Anil Doshi [2007]eKLR.*** We are satisfied that the intended appeal on the above grounds is not idle. The grounds are certainly arguable.

Turning to whether the appeal shall be rendered nugatory if we were to decline grant of stay, the applicant had been ordered to pay a sum of ksh. 446,333.35/= plus costs and interest. The applicant is only apprehensive that the respondent may execute against the decree. It has not stated which kind of loss it shall incur in the absence of stay. Neither has it deposed that the respondent may not be able to refund the decretal sum in the event it succeeds in its appeal. In any event it is very rare that a money decree will render an appeal nugatory if satisfied.

We are convinced that the applicant has only established one of the two limbs on arguability but not on the nugatory aspect. However since it is a requirement that both limbs be satisfied, the application fails and is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**