



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E470 OF 2020

BETWEEN

CANCER CARE KENYA LIMITED.....APPLICANT

AND

ANITA NZISA KIVULU.....RESPONDENT

*(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the judgment of*

*the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) dated 6<sup>th</sup> November, 2020*

*in*

*E&LRC Cause No. 684 of 2019)*

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**RULING OF THE COURT**

The respondent brought a claim against the applicant alleging wrongful and unlawful termination of her employment as the applicant's Marketing Manager citing the ground that the applicant did not follow a fair procedure as laid down in **section 41** of the Employment Act.

The applicant denied the claim insisting that the respondent was "engaged in arbitrary behavior that saw the applicant's efforts in medical care come under siege"; that prior to the action complained of, she had received 2 warning letters;

that upon being issued with the third warning letter, and it was upon being summoned before the disciplinary committee, and being given a chance to defend herself, that her employment was terminated; and that the respondent herself asked to be paid her terminal dues. Her request having been honoured and all her terminal dues, including leave days, computed and paid, and having herself signed an acknowledgement of receipt, she could not turn around and demand those dues once again. As such, the applicant contended that it did not owe the respondent any terminal dues.

Upon considering the rival versions, the learned Judge, M. Onyango, J. was persuaded that the applicant acted wrongfully by unlawfully terminating the respondent's services. Being of this view, the Judge awarded the respondent six months' compensation for unfair termination, based on her period of service and considering the circumstances under which her employment was terminated, namely, that she had just reported back to work from maternity leave. That award translated to her salary of Kshs.190,000 x 6 months = Kshs.1,140,000.

The respondent was also awarded a Certificate of Service under **section 51** of the Act, leave days earned but not taken in the sum of Kshs.67,692.40. The total award being Kshs.1,207,692.40.

Planning to move this Court with an appeal to set aside the above decision, the applicant has, in the meantime, taken out the instant motion pursuant to **Rule 5(2)(b)** of the Court of Appeal Rules for a temporary order to stay the execution of the aforesaid judgement.

To satisfy the two basic requirements under **Rule 5(2)(b)**, the applicant has argued that the appeal is arguable since the learned Judge did not consider that the reason for termination of the respondent's employment was both lawful and plausible; that she was in error for failing to find that the correct procedure was followed in the termination of the respondent's employment; and in failing to find that the respondent was paid all her dues.

On the second limb, the applicant has argued that the appeal, if successful, will be rendered nugatory and that it would suffer substantial loss if execution was not stayed pending the appeal; that the respondent has not demonstrated that, from her resources she would be able to reconstitute the decretal sum if the appeal was to succeed.

The applicant has, however expressed willingness and readiness to deposit the decretal sum in an interest earning account managed and held in the joint names of the counsel for both parties.

In her replying affidavit and submissions, the respondent has urged us to dismiss the application, insisting that the appeal is not arguable as the learned Judge's conclusion on the manner her services were terminated was sound. The respondent has also submitted that the applicant has not demonstrated how the appeal will be rendered nugatory if the relief sought is not granted.

For our part, we reiterate that we are only concerned with the two well-known principles, which are, in any application brought under **Rule 5(2)(b)** an applicant to succeed must demonstrate the arguability of the intended appeal and its nugatory aspect. See **United Millers Limited vs. Kenya Bureau of Standards & 5 others** [2019] eKLR.

It is readily acceptable to us, from the grounds contained in the draft memorandum of appeal that there are determinations made by the learned Judge that will require further interrogation by this Court.

For instance, was the termination of the respondent's employment justified; was the right procedure followed in terminating her employment; and was she entitled to the reliefs awarded? Those are some of the questions the applicant will be raising in the appeal. We respectfully agree that these are not idle issues.

The applicant has also satisfied the second limb by stating, without any rebuttal, that it will suffer irreparable loss and the appeal, if successful, will be of no purpose for it may not recover the decretal sum which will have been paid over to the respondent, who has, in turn not provided proof of her capability to reconstitute it.

Having satisfied both limbs, the applicant is entitled to the order of stay. However, balancing the respondent's interest as a successful party and the applicant's right of appeal, it is just and mete to allow the applicant to enjoy the orders of stay pending appeal, on condition that it will deposit the decretal sum in an interest earning account held in the joint names of counsel for both parties, within 30 days from the date of this ruling, failing which, the order of stay granted herein shall lapse without any further orders. Costs will be in the appeal.

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

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**