



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 13 OF 2019

BETWEEN

FIVE FORTY AVIATION LIMITED.....APPLICANT

AND

JACQUELINE ARKLE.....RESPONDENT

(Being an application under Rule 56 (3) of the Court of Appeal rules for setting aside the ruling dated 9th December, 2019 dismissing the applicant's application dated and signed by Ndolo, J. on 28th December, 2018, delivered at Nairobi by Hon. Judge Maureen Onyango on 12th October, 2018, pending hearing and final determination of the appeal in E&LRC Cause No. 1443 of 2014)

RULING OF THE COURT

Jacqueline Arkle, the respondent took out a claim against the applicant for terminating her employment as the latter's Country Manager, Uganda. The applicant, on the other hand, brought a counterclaim against the respondent demanding USD 6492 erroneously paid to her as severance pay and Kshs. 4,336,000 being unauthorized advances taken by the respondent.

By a judgment delivered on 12th October, 2018, the Employment and Labour Relations Court (Ndolo, J.) dismissed the appellant's counterclaim and entered judgment for the respondent in the following terms:

“a. USD 38,000 (read Thirty-Eight Thousand United States Dollars) being ten (10) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this particular award, I have taken into account the Claimant's length of service as well as the Respondent's callous conduct in effecting the termination;

b. Kshs. 5,000,000 (read Five Million Kenya Shillings) as damages for defamation. In making this award, I have considered the effect of the publication by the Respondent which in my view, has effectively destroyed the Claimant's career in the highly sensitive and regulated aviation industry.

c. USD 5135 (read Five Thousand One Hundred and Thirty-Five United States Dollars) being unlawful surcharge on account of air tickets for Kamanga Mwangi and Uganda Rugby Union”.

The applicant was also ordered to issue the respondent with a certificate of service.

The applicant intends to challenge this decision in this Court, but in the meantime, has taken out a motion to stay the execution of those orders, arguing that it has an arguable appeal; and that without an order of stay, the respondent will execute the decree and render the intended appeal, if successful, academic.

The respondent does not agree with those averments. For her, all the grounds the applicant intends to rely on are not at all arguable; that by paying the judgment sum, the appeal by the applicant, whose wage bill has been given as Kshs. 58,000,000, cannot be rendered nugatory; and that should the Court be inclined to grant a temporary stay, the appellant ought to be ordered to deposit 50% of the judgment sum.

In the exercise of our unfettered discretionary jurisdiction under **Rule 5(2)** (b) of this Court's Rules, which has been invoked in this motion, we are guided by two well-known principles; that the applicants' appeal is not frivolous; and that if the stay sought is not granted, the appeal

will be rendered nugatory, if it were eventually to succeed. See **Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd.** [2002] 1 EA 227.

Without making any conclusive determination on the appeal, we think, from the grounds advanced in the draft memorandum of appeal, that the appeal is not idle. For example, the applicant will be challenging the finding that the termination of the respondent's services was unlawful, as well as the awards by the trial court set out above in (a),(b) and (c). An arguable appeal is not one that must necessarily succeed.

Similarly, the applicant is apprehensive that should the money be paid over to the respondent, it would suffer irreparable damage if the appeal was to ultimately succeed. The respondent has not rebutted this by providing proof that she would be able to reconstitute the funds in case of a successful appeal. The title deed she has presented is of no help here without a valuation report of the property.

The two limbs have, therefore, been satisfied. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR.

Since the purpose of an order of stay is to safeguard the interests both sides of the dispute; a judgment in favour the respondent, and the applicant's undoubted right to appeal the impugned judgment, we are convinced that the proper order in the circumstances is to grant a conditional temporary order of stay of execution.

Therefore, we grant an order to stay the execution of the judgment and decree of the Employment and Labour Relations Court delivered on 12th October, 2018 on condition that, within 30 days of the date of this ruling, the applicant shall deposit 50% of the decretal sum in a joint interest earning account in the names of its advocates and those of the respondent, failing which, the orders 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

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