



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), SICHALE & KANTAL, J.J.A)

CIVIL APPLICATION NO. 324 OF 2019

BETWEEN

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> APPLICANT

PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> APPLICANT

AND

EDITH MUMBI KAMAU.....RESPONDENT

*(Being an application for Stay of Execution of the Judgment of the Employment & Labour Relations Court at Nairobi*

*(B. Ongaya, J) dated 30<sup>th</sup> August, 2019*

*in*

*ELRC Cause No.2019 of 2017)*

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**RULING OF THE COURT**

The respondent was employed by the applicant on 19<sup>th</sup> November, 2007 in the capacity of an Immigration Officer II and rose to the rank of Immigration Officer I. On 1<sup>st</sup> August, 2013 at 0900 hours the respondent, who was on night shift at the Jomo Kenyatta International Airport (JKIA), was arrested by the Kenya Airport Authority Security officials as she left work for home at the end of her night shift on allegations that she was found in possession of a single journey visa sticker book serial No. SAA 4180651 to 4180700, partially used from serial No. 4180651 to 4180692; a receipt book; and 12 bottles of Carlsberg beer in 2 six packs.

The respondent was then charged in Makadara Chief Magistrates Court Criminal Case No. 4130 of 2013 with stealing by person employed in the public service contrary to **section 280** of the Penal Code. Following these developments, on 5<sup>th</sup> September, 2013 the applicant placed the respondent on interdiction citing gross misconduct.

After hearing the prosecution witnesses the trial court by a ruling delivered on 29<sup>th</sup> May, 2015, acquitted the respondent under **section 210** of the Criminal Procedure Code. The acquittal notwithstanding, the 1<sup>st</sup> applicant by a letter dated 29<sup>th</sup> April, 2016 informed the respondent of her dismissal from the service with effect from 5<sup>th</sup> September, 2013 on account of dishonesty. The respondent preferred an appeal to the 2<sup>nd</sup> applicant under the Public Service Regulations which was disallowed, prompting her to institute a claim in the Employment and Labour Relations Court for unlawful termination of employment.

The court found that both the show cause/interdiction letter and dismissal letter were illegal, irregular, null, void and contrary to the Constitution. In the result, after setting them aside the court ordered that the respondent be re-engaged in the service of the applicants at the prevailing remuneration and benefits in the position of Immigration Officer I; that the period between the date of the letter of dismissal and the date of reporting be treated as leave without pay; that the applicants to pay the respondent the withheld half salaries from the date of interdiction to the date of dismissal.

This has naturally aggrieved the applicants who have taken out this application for stay of those orders pending the lodgment of an appeal. The applicants are apprehensive that unless the said decision is stayed, the respondent shall execute the decree yet the position to which the respondent has been reinstated does not exist, having been filled, considering that the respondent had been out of employment for 6 years; and that the 1<sup>st</sup> applicant's office and the applicants may be found to be in contempt of those orders.

As is customary, the applicants in their endeavor to persuade us that they will have an arguable appeal, pointed out *inter alia* that the learned Judge erred in law and fact in, among others: holding that the interdiction and dismissal letters were illegal, irregular and void whilst disregarding the applicants' evidence before him; issuing an order for reinstatement of the respondent without considering the exceptional circumstances under **section 49 (3)** of the Employment Act; and awarding the respondent half salaries from the date of interdiction to the date of dismissal which the respondent did not specifically plead and prove.

Mr. Odera, learned counsel for the respondent, conceded that the appeal is arguable. That being the case, our attention turns to the second limb; the nugatory aspect. The applicants have averred that there are persons already employed in the respondent's position; that they stand to be cited for violating the order of reinstatement if that order is not stayed; and that they will suffer financial loss if they were to pay to the respondent salary and other remunerations as directed and if the appeal were to succeed.

The respondent does not think the intended appeal will be rendered nugatory if the aforesaid orders are not stayed; that apart from the order of reinstatement, the applicant has ignored to pay to the respondent the withheld salaries as directed by the court; that should the Court be inclined to grant a stay it should be on terms that  $\frac{3}{4}$  of the withheld salary be paid to the respondent's account and the other  $\frac{1}{4}$  deposited in an interest earning account in the joint names of the advocates for the parties as condition for grant of the stay as was done in the case of **Nation Newspapers Ltd V. Peter Barasa Rabando**, Civil Application No. 1 of 2007.

The respondent denied that the applicants will suffer loss if she was paid her salary arguing that she was in a position to reimburse it (Kshs. 700,000) in the event the appeal succeeded and that she owns property whose title deed was annexed to her replying affidavit.

By the application and practice under **Rule 5(2)(b)** of the Court of Appeal Rules, the burden was on the applicants to demonstrate the traditional two facets: that the intended appeal raises arguable points and; that the appeal would be rendered nugatory if the interim orders were to be denied. These twin principles are conjunctive and not disjunctive. An application under **Rule 5(2)(b)** must demonstrate the existence of both limbs. See: **Reliance Bank (in liquidation) V. Norlake Investments Ltd**, (2002) 1 EA 227.

In considering whether an appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised. In consideration of an application brought under **Rule 5(2)(b)**, the Court must not make definitive or final findings of either fact or law. See: **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others**, Civil Application 31 of 2012 for these proportions.

The respondent, we reiterate, has conceded that the intended appeal raises arguable questions. Upon our own evaluation of the application we are satisfied that indeed there are arguable grounds as enumerated by the applicants, hence the first limb is satisfied.

The two points raised in support of the nugatory aspect is that reinstatement is not feasible as position of Immigration Officer I that the respondent was to be reinstated to has since been filled and secondly, that the respondent will not be able to refund the decretal sum should the intended appeal succeed.

This Court, in the case of **National Industrial Credit Bank Ltd V. Aquinas Francis Wasike and Another**, Civil Application No. Nai. 238 of 2005, stated as follows regarding an appeal being rendered nugatory on the grounds of the capacity to pay back the decretal sum:

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”**

To demonstrate her ability to reconstitute the funds, the respondent has annexed a copy of a title deed as proof of her ownership of a parcel of land described as **GATUANYAGA/NGOLIBA BLOCK 1/4281** measuring 0.04HA. Without a valuation report, the fact of ownership of the land *per se* is not proof of ability to reconstitute the sums awarded should the intended appeal be successful.

The respondent herself has given the figure of Kshs. 700,000 as what she would be entitled to from the applicants. Without proof of her ability to refund that sum, and bearing in mind that the funds are public funds, the balance tilts in favour of the applicants.

Accordingly, the applicants, having satisfied both limbs are entitled to the orders sought in the instant application. The application is allowed with costs being in the intended appeal.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of February, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**