



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, SICHALE & J. MOHAMMED, JJA]

CIVIL APPLICATION NO. 225 OF 2019

BETWEEN

KENYA AIRWAYS LIMITED..... APPLICANT

AND

KENYA AVIATION & ALLIED WORKERS UNIO...RESPONDENT

(Being an application for stay of execution pending appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Byram Ongaya, J) dated 28th June, 2019 **In ELRC Cause No. 1349 Of 2015**)

RULING OF THE COURT

The applicant, **Kenya Airways Limited**, filed a Notice of Motion dated **17th July, 2019** seeking orders *inter alia* that:

i. ... (spent)

ii. The Honourable Court be pleased to grant a stay of execution of the Judgment of Justice Byram Ongaya delivered on 28th June, 2019 in Nairobi Employment and Labour Relations Court Cause No. 1349 of 2015 pending the inter parties hearing of this application.

iii. The Honourable Court be pleased to grant a stay of execution of the Judgment of Justice Byram Ongaya delivered on 28th June, 2019 in Nairobi Employment and Labour Relations Court Cause No. 1349 of 2015 pending the hearing and determination of this application.

iv. The Honourable Court be pleased to grant a stay of execution of the Judgment of Justice Byram Ongaya delivered on 28th June 2019 in Nairobi Employment and Labour Relations Court Cause No. 1349 of 2015 pending the hearing and determination of the intended appeal.

v. The costs of the application be provided for.

vi. The Court be pleased to grant any further orders if any in the interest of justice”.

In the motion, **Kenya Aviation & Allied Workers Union** (hereinafter, “*the Union*”) was named as the respondent.

The motion was supported by an affidavit of **Caleb Abayo**, an advocate and Legal Counsel of the applicant sworn on **17th July, 2019**, in which he deponed that the judgment, subject of the intended appeal was delivered on **28th June, 2019**; that in the said judgment, the learned judge ordered that the appellant re-engage **Anastacia M. Muli** (the grievant), (a member of the Union) to her former position effective **1st July, 2019**; that the period between the grievant’s termination and reinstatement be considered as leave without pay for the sake of continuity of service; that the applicant has since lodged a Notice of Appeal to the Registrar of the Employment & Labour Relations Court (ELRC) in accordance to Rule 75 of the

Court of Appeal Rules, 2010; that the applicant has also requested for typed proceedings for purposes of the appeal and finally, that the applicant has an arguable case with high chances of success.

In a replying affidavit sworn on **4th November, 2019** by **Julius M. Kitheka**, an advocate in conduct of the matter on behalf of the Union, it was deposed that the application lacked merit; that the judgment, subject of the intended appeal was legally sound and did not deviate from the pleadings and the matters before the court; that the applicant will not suffer any prejudice if it complies with the judgment of **Byram Ongaya, J**; that to the contrary, the grievant stands to suffer

irreparable loss and damage if the orders of the ELRC are stayed; that the applicant is seeking to perpetuate the injustice wrongly meted upon the grievant and that it was unconscionable to grant a stay as prayed as it would amount to condemning the grievant once more to a life of suffering and hopelessness.

On **9th December, 2019**, the motion came up for plenary hearing before us. **Mr. Weru**, learned counsel for the applicant stated that the learned judge had ordered immediate reinstatement of the flight attendant which order is tantamount to an order of specific performance; that the judge having found that the termination of the grievant was fair and for good reasons should not have granted orders in favour of the grievant and further, that the issue of re-engagement was not pleaded. On the nugatory aspect, counsel stated that the grievant is a flight attendant and engaging her would be a risk to the crew and passengers as she was last employed four (4) years ago and hence she was not familiar with the current fleet of the appellants. Counsel was of the further view that if stay is not granted, the appeal would be an academic exercise.

In response, **Mr. Kitheka** for the respondent submitted that the merited relief was reinstatement and that the grievant has since been reinstated.

In a brief response, **Mr. Weru** contended that the grievant could not be reinstated after a lapse of three (3) years.

We have considered the record, the rival oral arguments made before us, the authorities cited and the law. As always, our jurisdiction under **Rule 5(2)(b)** is discretionary and fairly wide, guided only by the interests of justice. In the judicious exercise of this discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** as follows :

i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & Another (1989) KLR 459.*

ii. The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.*

iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein Atsango Chesoni, Civil Application No. Nai 189 of 2001.*

v. An applicant must satisfy the court on both of the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.*

vii. An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.*

viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.*

x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniness, the onus shifts to the latter to rebut by evidence the claim". *International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.*

As this Court has often stated, in considering arguability, it is sufficient if an applicant demonstrates that the intended appeal is not idle and it is sufficient if a single arguable point is established. In our view, it is arguable whether an employee who has been out of employment for a period of not less than three (3) years can be reinstated. The grievant's employment was terminated by a letter dated **13th January, 2015** and was effected on the same day (**13th January, 2015**). As at the date of the judgment (**28th June, 2019**), more than three

(3) years had elapsed.

In our view, it is arguable, given the passage of time whether the grievant can be reinstated into her former position.

On the nugatory aspect, again we are in agreement with the applicant that if the grievant was to be re-engaged by the applicant, then the intended appeal will be rendered nugatory, as having gone back to her employment; the appeal will be rendered superfluous.

It is our view that both limbs of the conditions precedent before an order of stay is issued have been satisfied. Accordingly, the motion dated **17th July, 2019** is hereby allowed. Costs of the motion shall be in the intended appeal.

Dated and Delivered at Nairobi this 8th Day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR