



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & J.MOHAMMED, J.J.A)

CIVIL APPLICATION NO. NAI 89B OF 2020

SAFARICOM PLC (FORMERLY KNOWN AS SAFARICOM LIMITED).....APPLICANT

-VERSUS-

PAULINE WANGECI WARUI.....RESPONDENT

(Being an application for stay of execution of the judgment and decree of the

Employment and Labour Relations Court at Nairobi (Maureen Onyango, J)

delivered on 6th March, 2020) in ELRC No. 442 of 2016

RULING OF THE COURT

BACKGROUND

1. The applicant, **Safaricom PLC** (formerly known as **Safaricom Limited**) filed a Notice of Motion dated 19th March, 2020 under **Rule 5(2)(b) of the Court of Appeal Rules** seeking orders:

“a) That this Honourable Court be pleased to grant an order of stay of execution of the Judgment and Decree of the Employment and Labour Relations Court (Onyango, J) delivered on 6th March, 2020 pending the hearing and determination of the intended appeal to this Honourable Court.

b) That costs of this application be provided for.”

2. In the motion, **Pauline Wangeci Warui** was named as the respondent.

3. The motion was supported by an affidavit of **Daniel Ndaba**, the applicant’s Senior Manager – Litigation sworn on 19th March, 2020 in which he deponed that in the impugned judgment, the learned Judge ordered that the applicant pay to the respondent Kshs.14,552,600.00 in addition to the amount of Kshs.46,224,890.00 that the applicant had paid to the respondent pursuant to a Mutual Separation Agreement entered into between the applicant and the respondent; that the applicant has since filed a Notice of Appeal against the judgment of Employment and Labour Relations Court in compliance with Rule 75 of this Court’s Rules; that the applicant has also requested for typed proceedings for purposes of filing an appeal to this Court; that the applicant has an arguable appeal with high chances of success; and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

4. When the application came up for hearing before us, via Skype under the current Practice Directions of the Court in view of the COVID-19 pandemic, although there were no written submissions filed by the parties and there is no replying affidavit filed by the respondent we nonetheless considered the application within the established principles of granting the orders sought as herebelow.

5. In the applicant’s grounds in support of the motion which are augmented by the supporting affidavit of **Daniel Ndaba**, the applicant maintains that it has an arguable appeal on the grounds *inter alia* that the learned Judge erred in law and fact: in failing to hold, by dint of the doctrine of freedom of parties to contract, that an employment relationship can be terminated by mutual agreement as the same is not prohibited by any law; by finding that despite the Mutual Separation Agreement entered into between the parties, the respondent should have been taken through a termination/disciplinary hearing; and in finding that the Mutual Separation Agreement entered into between the applicant and the respondent was invalid and unenforceable and amounted to unfair and/or wrongful dismissal.

6. On the nugatory aspect, the applicant argued that if the orders sought are not granted, the respondent will proceed and execute the decree; that if the execution of the decree is not stayed, the intended appeal will be rendered nugatory as the applicant does not know the respondent's means of reimbursing the substantial decretal sum in the event of the intended appeal succeeding. It was the applicant's further contention that since incorporation in 1997, the applicant's financial performance has continued to improve and for the year ending 31st March, 2019, the applicant made a net profit of Kshs 62.491 billion and would therefore easily pay the decretal sum in the unlikely event of the intended appeal being unsuccessful. It was the applicant's further contention that it has already paid the respondent Kshs.46,224,890.00 pursuant to the Mutual Separation Agreement.

DETERMINATION

7. We have considered the record, the authorities cited and the law. Our discretion under **Rule 5(2)(b) of this Court's Rules** is fairly wide and discretionary guided only by the interests of justice. The Court must be satisfied on the twin principles laid down in **Rule 5(2)(b) of this Court's Rules** that the intended appeal is arguable and that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. This was succinctly laid down by this Court in ***Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR***.

8. From the circumstances of the application before us, we are satisfied that the applicant has an arguable appeal on the ground *inter alia*; whether the respondent should have been taken through a termination/disciplinary hearing despite the Mutual Separation Agreement entered into between the applicant and the respondent.

9. On the nugatory aspect, we are in agreement with the applicant that if the execution of the decree is not stayed, the intended appeal will be rendered nugatory as the respondent may execute the decree and applicant does not know the respondent's means of reimbursing the substantial decretal sum in the event that the intended appeal succeeds.

10. We have come to the conclusion that this is a deserving case for the exercise of our discretion under **Rule 5(2)(b) of the Rules of this Court**. Accordingly, we allow the Notice of Motion dated 19th March, 2020. Costs to abide by the outcome of the appeal.

Dated and delivered at Nairobi this 19th day of June, 2020.

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR