



1IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE, SICHALE, JJ. A)

CIVIL APPEAL (APPLICATION) NO. NAI 184 OF 2019 (UR 170/2019)

BETWEEN

ABERCOMBIE & KENT LIMITED APPLICANT

AND

JOHN WANJAU MAINARESPONDENT

(Being an application for stay of any further proceedings in Cause No. 832 of 2014 pending the hearing and determination of an Appeal from the Ruling and Order of Employment and Labour Relations Court at Nairobi (Lady Justice Linnet Ndolo) delivered on the 5th day of April 2019

in

ELRC No. 8332 of 2014

RULING OF THE COURT

The applicant has moved this Court under **Rule 5(2)(b)** of this Court's Rules, for orders of stay of proceedings in the Employment & Labour Relations Cause (ELRC) No.832 of 2014 pending the hearing and determination of the intended appeal from the ruling and order of Ndolo, J in which she held that the matter before her was formally settled in the sum of KShs. 848, 366.47 by Hon. Justice Mathews Nderi Nduma on 21st June 2017 and that the respondent be stood down to allow the parties to address the court before the Principal Judge for further directions on the 14th May 2019.

The application is supported by an affidavit sworn by one **Geoffrey C. Mwangi** which sets out the background to the motion and the grounds upon which it is anchored. It has also annexed various documents in support thereof.

In brief, the applicant contends that, no consent was recorded as there was no such intention of reaching an agreement as evinced by the fact that the applicant had prepared for and attended the hearing of the suit with its witnesses; it stood to suffer irreparable loss as it had been arbitrarily denied a chance to present its case and have the dispute determined on merits, which was a clear violation of the rules of natural justice; and that the appeal would be rendered an academic exercise should the case proceed in the manner proposed.

The respondent opposed the application vide a replying affidavit sworn by one John Wanjau Maina. In brief, the respondent's position is that the appeal is not arguable and has no chance of success. The respondent deposed that the discussions held between the parties had culminated into a consent recorded between counsel on the 21st June 2017 before Nduma Nderi, J where the applicant had agreed to pay the sum of KShs. 848, 366.47 with costs and that the agreement was endorsed by court. The respondent contended further that the appeal would not be rendered nugatory and that the applicant had not demonstrated what substantial loss it stood to suffer if the application was disallowed. The respondent contends further that parties had reached a consent which forms part of the court record and that the only issue that was left for the court's determination was interest and costs. It was deposed that the matter had come up for hearing during service week where the learned Judge downed her tools and referred the file to the Principal Judge for directions. The respondent further contends that the application did not satisfy the test set out under the provisions under which it was brought.

The application came up for plenary hearing on the 27th January 2020 where **Mr. Weru**, learned counsel appeared for the applicant while **Mr. Mwangi** learned counsel held brief for **Nyaguthie**, learned counsel for the respondent.

Mr. Weru, relying on the grounds on the application and the affidavit in support thereof, submitted that the appeal had high chances of

success as there was no consent or settlement before the court and that there was no meeting of the minds. Counsel, however, conceded that no draft memorandum of appeal had been annexed to the application. He was nonetheless emphatic that the applicant would suffer prejudice if the money ordered was to be paid to the respondent. On those grounds counsel prayed that the application be allowed.

In opposition, Mr. Mwangi relied on the replying affidavit and submitted that the applicant and the respondent had agreed on a settlement and the only pending issue was the applicable interest and costs.

He submitted that the principal amount had been agreed upon by counsel for the parties and therefore prayed that the application be denied. Counsel denied that the appeal would be rendered nugatory. Counsel submitted that the respondent was employed and runs an insurance agency and that if the amount is paid, the respondent would be able to pay back the amount in the event that the appeal succeeds.

The issue for determination is ***whether the applicant is deserving of an order for stay of proceedings under rule 5(2)(b) of the Court's rules.***

The applicable test in applications for stay under **rule 5(2)(b)** is well settled. In the case of **Attorney General -Versus -Okiya Omtata Okoiti & Another (2019 eKLR)**, this Court stated thus;-

“The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”

In the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR** this Court extensively set out the applicable principles when it held 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.

ii. The discretion of this Court under Rule 5(2) (b) to grant a stay of 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.

iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

v. An applicant must satisfy the Court on both the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

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.

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.

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 will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

From the authorities cited, the applicant on the whole has to satisfy that the intended appeal is arguable and not frivolous and secondly that if stay is not granted, the intended appeal would be rendered nugatory.

On the first limb, the applicant is disgruntled by the findings of the learned Judge that the matter had been formally settled in the sum of KShs. 848,366.47. It is the applicant's argument that the parties had never endorsed a consent as there was no meeting of the minds and as a result, it would suffer prejudice if it is forced to pay the money to the respondent. The respondent on the other hand argues that parties had agreed on a settlement and that the only pending issue was one of interest and costs and as such there is no arguable appeal demonstrated by the applicant. Further, there was no Draft Memorandum of Appeal attached and therefore the applicant had failed to demonstrate an arguable appeal with chances of success.

On the issue of failure to annex a draft Memorandum of appeal, this Court has in the past considered the position and rendered itself on the same. In the case of **Somak Travels Limited -versus- Gladys Aganyo (2016) eKLR** this Court held as follows;-

“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be

arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.

In respect of the matter at hand, extensively pleaded its case on the face it is evident that the applicant has of the application and the affidavit in support thereof. One of the distinctive arguable point is whether indeed parties in the suit had reached a consent in terms of the impugned orders sought to be appealed against. The parties have assumed divergent positions in that respect, and that in itself demonstrates an arguable appeal. The applicant has therefore demonstrated an arguable point, worthy of the court's consideration on appeal.

On the second limb, the applicant contends that if the amount sought to be paid to the respondent pursuant to the consent is indeed paid out the same shall prejudice it as the respondent may be unable to pay back the said sum. The respondent on the other hand contends that he is indeed employed and runs an insurance agency therefore he shall be able to pay back the amount.

In the case of **Africa Eco-camps Limited -Versus- Exclusive African Treasures Limited (2014) eKLR**, this Court stated as follows;-

“As was observed by this Court in National Credit Bank Ltd. v. Aquinas Francis Wasike and another (supra), a legal duty is placed on the applicant to prove the allegation that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal. This requirement is however not absolute. It is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed, since that is a matter likely to be peculiarly entirely within the knowledge of the respondent.”

At paragraph 9 (ix) of the Replying Affidavit, the respondent deposes as follows:-

“9...ix. I am a business man (sic) running my insurance agency firm and I am not a man of straw”

This contention was not challenged at all by the applicant. That being the case, we would take it as it is that the respondent is in a position to pay back the money in the event that he is paid and the intended appeal succeeds. In the event then, the appeal will not be rendered nugatory.

The applicant having failed to satisfy one of the two limbs required in applications of this nature, the application fails and is dismissed with costs.

Dated and delivered at Nairobi this 10th day of July, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR