



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPLICATION NO 58 OF 2020

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY.....APPLICANT

AND

CHARLES KIPKORIR MISIK & 11 OTHERS.....RESPONDENTS

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

Employment and Labour Relations Court at Nairobi (D.K.

Marete, J.) dated 17th December, 2018 in E.L.R.C Cause No. 1386 OF 2014)

RULING OF THE COURT

BACKGROUND

1) By way of a notice of motion dated 28th February, 2020, the **Export Processing Zones Authority** (the applicant) seeks orders that this Court grants:

- a) a stay of execution of the judgment of the Employment and Labour Relations Court(ELRC) dated 17th December, 2020 (the impugned judgment) and any decree thereof pending the hearing and determination of the application *inter partes*;
- b) A stay of execution of the impugned judgment and any decree thereof pending the filing, hearing and determination of the intended appeal;
- c) Costs of the application.

2) In this motion that is filed under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules of this Court), **Charles Kipkorir Misik & 11 Others** are the respondents herein. The respondents who were the claimants in the ELRC sought for damages for unlawful termination of employment and terminal benefits against the applicant herein (the respondent at the ELRC). The learned Judge found *inter alia* that the respondents became permanent employees of the applicant by virtue of their long continued service with the applicant; that the respondent's employment was wrongfully, unfairly and unlawfully terminated and accordingly awarded the respondents 12 months' salary compensation and damages.

3) Aggrieved by this decision, the applicant filed a Notice of Appeal and the instant application. The motion was supported by the affidavit of **Winnie Sang**, the applicant's Legal Officer, sworn on 28th February, 2020 in which she deponed that the intended appeal is arguable on the grounds *inter alia* that the learned Judge erred: in finding that the respondents became permanent employees of the applicant despite the applicant leading evidence that the respondents were casual employees; in awarding twelve (12) months compensation to the respondents which award was without lawful justification and contrary to the provisions of Section 49 of the Employment Act; and in awarding damages to the respondents which were not proved.

4) The applicant further deponed that the intended appeal will be rendered nugatory if the orders sought are not granted and the appeal

succeeds as the respondents were casual labourers earning a daily wage of Kshs 400/ per day; that each respondent was awarded an average of Kshs 656,000/; that the respondents are men of humble means and do not have the means to refund the decretal sum if the appeal succeeds thus rendering the intended appeal nugatory. It was the applicant's further contention that the applicant is a State Corporation and a public entity which draws its resources from public funds and it is in the public interest that the orders sought be granted to prevent the payment of public funds to persons from whom it would be difficult to recover. It was the applicant's further contention that the payment of the judgment sum will cause it extreme hardship as it will disrupt and paralyse its financial operations. Further, that payment of the total decretal sum of Kshs 7,872,000.00 is substantial and its payment will negatively impact its operations and result in adverse impact including its failure to deliver its mandate as a State Corporation which will be impossible to restore if the appeal succeeds.

It was the applicant's further contention that the decretal sum is substantial and payment of the same will cause substantial diminution of the applicant's operations which disruption of its statutory obligations will be irreversible if the appeal succeeds. Finally, the applicant contended that the respondents will not suffer prejudice if the orders sought are granted as they will be paid the decretal amounts if the intended appeal fails.

5) The respondents filed a replying affidavit dated 29th June, 2020, sworn by **Collins Obonyo Wasike**, the 4th respondent herein who contended that the respondents had worked for the applicant for periods ranging between 6 and 14 years; that the respondents have suffered substantially after their respective services were terminated in November, 2014; and that the amount awarded to the respondents by the ELRC is about Kshs 656,000/ per respondent which amount is not colossal.

DETERMINATION

6) We have considered the application, the rival submissions, the authorities cited and the law. The jurisdiction under **Rule 5(2)(b)** of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

7) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled as was observed by this Court in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR (Civil Application Nai. 258 of 1999)** where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

8) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

9) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)** where this Court described an arguable appeal in the following terms:

“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.”

10) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable *inter alia* whether the remedies granted to the respondents comply with Section 49 of the Employment Act. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

11) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others (supra)** this Court stated that:

“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 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 impecuniness, the onus shifts to the latter to rebut the allegation.”

12) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, we note the applicant's contention which was not rebutted by the respondents that the respondent's employment with the applicant was terminated in 2014 and that their financial position is not known; that

the respondents may not be in a position to refund the amounts awarded if the application sought is denied and the intended appeal succeeds which will render the intended appeal nugatory. On the other hand, the applicant is State Corporation and a public entity with the means to pay the decretal amount in the event that the intended appeal is unsuccessful. We therefore find that the respondents may not be in a position to refund the amounts paid and if the intended appeal succeeds, it will therefore be rendered nugatory.

13) In the circumstances, the applicant has satisfied both limbs of the requirements under **Rule 5(2)(b)** of this Court's Rules. We therefore grant a stay of execution of the judgment and decree of the Employment and Labour Relations Court dated 17th December, 2018 pending the hearing and determination of the intended appeal. The Notice of Motion dated 28th February, 2020 is hereby allowed. Costs of the application to abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 7th day of August, 2020

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

J. MOHAMMED

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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.

Signed

DEPUTY REGISTRAR