



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MUSINGA & KANTAL, J.J.A)

CIVIL APPEAL NO. 104 OF 2020

BETWEEN

FELIX ODHIAMBO OWUOR APPELLANT/APPLICANT

AND

ELECTORAL INSTITUTE FOR

SUSTAINABLE DEMOCRACY IN AFRICA (EISA) RESPONDENT

(Being an application for stay of proceedings and an injunction pending the hearing and determination of the appeal against the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J.) dated 23rd April, 2020

in

ELRC Cause no. 2445 of 2016)

RULING OF THE COURT

1. By an application dated 4th May 2020, the appellant sought the following orders:

(i) This Court do order a stay of the judgment delivered on 23rd April, 2020 in Nairobi Employment and Labour Relations Court Cause No. 2445 of 2016, Felix Odhiambo Owuor versus Electoral Institute for Sustainable Democracy in Africa (EISA) and/or any proceedings therein by way of execution or in any other manner whatsoever pending the hearing and determination of the intended appeal.

(ii) The sum of USD 75,686.67 be hereby frozen in the respondent's account at NIC Bank Account EISA – 1 No. 1000020617 and EISa –5 No. 1002502388 pending the hearing and determination of the appeal.

(ii) The court do order the status quo ante prior to the delivery of the judgment in Nairobi Employment and Labour Relations Court Cause No. 2445 of 2016, Felix Odhiambo Owuor versus Electoral Institute for Sustainable Democracy in Africa (EISA) on 23rd April 2020 do prevail.

(iv) The court be at liberty to make any further orders in the interest of justice.

2. The brief facts that gave rise to this application are that the appellant filed a suit against the respondent, his former employer, seeking, inter alia, a declaration that the termination of his services by the respondent was wrongful and unfair; and payment of USD 227,022 being 12 months aggregate pay, outstanding salary for December 2016, and severance pay.

3. The appellant stated that following an audit to investigate alleged theft of funds by a Swedish Embassy employee, several donors terminated their bilateral agreements with the respondent and the donors required the respondent to refund unused funds at NIC Bank; that on 15th November, 2016 the respondent's Operations Director in Johannesburg informed the respondent's employees in Kenya that the Kenyan operations would not remain open beyond November 2016; that he was invited to a disciplinary hearing by the respondent on 19th December, 2016 but declined to attend the disciplinary meeting and his employment was terminated in an unlawful manner.

4. In response, the respondent argued that the appellant, who was its Company Director, compromised the integrity of his office and his conduct led to recall of funds by major donors; that the appellant was notified of a disciplinary hearing, accorded an opportunity to show cause and be heard but chose not to respond or attend the disciplinary meeting and therefore the termination of his services was lawful.

5. After a full trial, the Employment and Labour Relations Court (ELRC) held, *inter alia*, that the appellant was never declared redundant; that the appellant opted not to participate in disciplinary proceedings and thereby waived his right to claim for unfair termination; the termination of his employment was justified and procedural and therefore the appellant was not entitled to any reliefs sought.

6. Being aggrieved by the said judgment, the appellant preferred an appeal to this Court. He contends that the appeal raises several arguable points; and that if the orders sought are not granted he shall suffer irreparable loss and damage for the reasons that he will not fully recover his entitlement on account that the respondent has ceased its operations in Kenya; the money in NIC Bank may be repatriated outside the jurisdiction of the court and he may not recover his claim if the appeal succeeds; and that no prejudice will be suffered by the respondent if the orders sought are granted. The appellant also filed written submissions.

7. The respondent filed a replying affidavit that was sworn by Ihona Tip, its Treasurer; and also written submissions. Ms Tip stated that the respondent is still in operation in Kenya and is not intending to relocate its offices as alleged; that it had not terminated the services of any of its employees on account of closure of its office; that the intended appeal has no chances of success in view of the fact that the termination of the appellant's services was due to his refusal to attend disciplinary meetings; that the monies at NIC Bank which the appellant wants to be frozen are funds held in trust for donors and are allocated to specific donor projects for their implementation.

8. We have considered the application, the affidavits and submissions by the parties' respective advocates. The principles that guide this Court in an application brought under **rule 5(2)(b) of this Court Rules** are well settled. An applicant must show that the appeal or intended appeal is arguable; and that unless the order(s) sought is granted the appeal, if successful, shall be rendered nugatory. See **STANLEY KANG'ETHE KINYANJUI V TONNY KETTER & 5 OTHERS [2013] eKLR**.

9. Before we consider whether the twin principles aforesaid have been satisfied by the applicant, we must reiterate that under **rule 5(2)(b) of this Court's Rules**, the court can only grant three orders namely; stay of execution, stay of further proceedings or an order of injunction. The ELRC did not issue any positive order capable of being stayed; it simply dismissed the appellant's claim in its entirety. It is trite law that a negative order cannot be stayed, see

WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES V ORANGA & OTHERS (1976-80) 1 KLR. It follows therefore that prayer

(i) that seeks stay of the trial court's judgment cannot be granted. Likewise, prayer (iii) that seeks an order of maintenance of the status quo prior to the delivery of the impugned judgment cannot also be granted.

10. Is the appellant's appeal arguable? An arguable appeal is not one that must succeed, it is one that can sustain an argument, not frivolous. Looking at the appellant's grounds of appeal, we think that the appeal is arguable.

11. Turning to the second limb, we are not persuaded that unless prayer (ii) that seeks an order to freeze the respondent's funds held at NIC Bank is granted the appeal, if successful, shall be rendered nugatory. The respondent is still carrying on operations in Kenya, as stated by Ms Tip. In any event, the said funds are held by the respondent in trust for various donors and are for implementation of identified projects. In the circumstances, we cannot injunct the respondent from utilizing the funds for the intended projects.

12. All in all, we find this application bereft of merit and dismiss it with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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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