



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, OKWENGU & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. 112 OF 2019

BETWEEN

KENYA MARINE FISHERIES RESEARCH INSTITUTE.....APPLICANT

AND

DR. EZEKIEL NYANGOYA OKEMWARESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (Rika, J.) dated 8th July, 2016

in

ELRC Cause No. 186 of 2013)

RULING OF THE COURT

1. The applicant seeks stay of execution of the judgment and decree of **Mombasa Employment and Labour Relations Court (ELRC) Case No. 186 of 2013 (Rika, J.)** dated 8th July 2016, as well as stay of enforcement proceedings in **Mombasa Judicial Review No. 5 of 2019**.
2. In the matter before the ELRC, the learned judge held that the respondent's summary dismissal by the applicant was unfair and unlawful, and awarded the respondent **Kshs.33,455,592** as salary arrears and **Kshs.20,000,000** in damages for unfair and unlawful termination, diminished employability, and compensation for related violations.
3. Being aggrieved by the said judgment, the applicant filed a notice appeal on 20th July 2016. The applicant filed an application for stay of the said judgment on 24th July 2019, nearly 3 years after delivery of the impugned judgment. The trial court, in giving a conditional stay, ordered that the entire decretal sum be deposited in a joint interest earning account in the names of the parties' advocates within 30 days of the ruling, which was on 7th November 2019, failing which the application for stay would stand dismissed.
4. Prior to the applicant's filing of the application for stay before the ELRC, the respondent had filed a Judicial Review application in the High Court seeking an order of mandamus to compel the respondent to pay him the sum of **Kshs.70,772,234** together with interest accrued thereon, pursuant to the judgment by the ELRC.
5. In the application before this Court, the applicant argues that it has an arguable appeal, and makes reference to the memorandum of appeal. The applicant further argues that if the orders sought are not granted, the respondent will proceed to execute the said judgment, thus rendering the appeal nugatory.
6. The respondent's replying affidavit states, *inter alia*, that the appeal was filed out of time and is therefore unsustainable; that when the applicant's application for stay of execution was argued before the ELRC, the applicant told the court that it was solvent and was in a position to deposit the decretal sum in an interest earning account, hence, the order that was given by the learned judge; that after delivery of the said ruling the applicant filed a notice of appeal expressing its dissatisfaction with the entire ruling; that it is absurd that the applicant should be dissatisfied with a ruling that granted it orders as desired and prayed for; and that this being a monetary claim, an order of stay should not be given unless such security as the court may order is given by the applicant. The respondent urged us to dismiss the application.

7. The principles that guide this Court in considering an application under **rule 5(2) (b) of this Court's Rules** are well settled. The applicant must demonstrate that the appeal or intended appeal is arguable; and that if the orders sought are not granted the appeal or intended appeal will be rendered nugatory. See **STANLEY KANGETHE KINYANJUI v TONY KETER & 5 OTHERS [2013] eKLR**.

8. Having perused the memorandum of appeal, we think that the appeal is arguable. We do not wish to say anything about the respondent's application to strike out the appeal since the application is yet to be argued.

9. As regards the nugatory aspect, the decretal sum is colossal, over **Kshs.70,000,000**. If the orders sought are not granted execution of the decree shall ensue, thus rendering the appeal nugatory, if at all it will be successful. The respondent did not state that he is capable of refunding the decretal sum in the event that the appeal is allowed and he is ordered to repay the decretal sum. But on the other hand, the respondent has a monetary decree in his favour, and the applicant told the trial court that it was solvent and financially able to deposit the decretal sum in an interest earning account in the joint names of the advocates for the parties hence the conditional order of stay that was issued. The applicant did not tell this Court why it did not comply with the order made by the trial court in terms of its prayers.

10. In order to secure the interests of both parties, we hereby order stay of execution of the judgment and decree in Mombasa ELRC Cause No. 186 of 2013 and stay of proceedings in Mombasa Judicial Review Cause No. 5 of 2019 on the following conditions:

(i) The applicant shall, within thirty (30) days from the date of this ruling, deposit the sum of **Kshs.36,000,000** into an interest earning account in the joint names of the parties' advocates with any reputable bank of the respondent's choice.

(ii) In the event of non-compliance with the order in (i) above, the orders of stay of execution and stay of proceedings aforesaid shall stand discharged and the said applications shall be deemed as dismissed.

(iii) The applicant shall bear the costs of this application.

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

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR