



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), J. MOHAMMED & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 189 OF 2020

BETWEEN

YOUTH ENTERPRISE DEVELOPMENT

FUND BOARD.....1ST APPLICANT

THE CHAIRMAN, YOUTH ENTERPRISE

DEVELOPMENT FUND BOARD.....2ND APPLICANT

AND

MORIASI ARABU JOSIAH.....RESPONDENT

(An application for stay of execution and proceedings pending the lodging,

hearing and determination of an intended appeal from the Ruling of the Employment

and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 25th June, 2020 in Petition No. 65 of 2020)

RULING OF THE COURT

By the “**Practice Notes for the Conduct of Court Business During the Global Coronavirus Pandemic**” hearing of applications will be considered by the Court on the basis of written submissions without the necessity of an oral highlighting.

The dispute before the **Employment and Labour Relations Court at Nairobi in ELRC Petition No. 65 of 2020** involved the respondent, **Moriasi Arabu Josiah**, (as petitioner) who sued the applicants, **Youth Enterprise Development Fund Board and the Chairman, Youth Enterprise Development Fund Board** regarding the issue whether the respondent was entitled to be retained as the Chief Executive Officer of the 1st applicant. It was contended by the applicants that the respondent had been employed as such on a fixed 3 year contract; that the contract had expired by effluxion of time; that the contract had been extended for 6 months and that in the meantime the applicants had recruited a substantive Chief Executive Officer. Wasilwa, J., who heard the matter ruled on 4th May, 2020:

“THAT an order is hereby issued staying the respondents’ decision of dismissing and or terminating the Applicant/Petitioner as a Chief Executive Officer pending the hearing and determination of this Application.”

It was contended by the applicants that by the time the said order was given the respondent’s contract had lapsed and that the Cabinet Secretary in charge of youth affairs had appointed one **Benson Muthendi** as the **Chief Executive Officer** of the 1st applicant. Further, that on 7th May, 2020, in furtherance of the said court order the respondent filed an application where it was prayed that the applicants be cited for contempt of court and:

“The Applicants face the risk of punishment anytime (sic) after the lapse of 14 days stay which will expire on 9th July 2020. The application filed herein is therefore extremely urgent and should be heard immediately.”

We considered the application which was listed in the Supplementary Cause List on 22nd July, 2020 and granted interim orders of stay of execution of the orders of the trial court.

By Notice of Motion brought under various provisions of law including **rule 5(2) (b)** of the **rules of this Court** we are asked in the main to stay execution of the ruling and orders made on 25th June, 2020 pending hearing and determination of the Motion and an intended appeal. The grounds in support of the Motion and the supporting affidavit of **Dr. Victor Mwongera**, the 2nd applicant, have already been summarized in this ruling.

In a replying affidavit the respondent depones that the application is unmerited and does not satisfy the principles for grant of stay of execution of a judgment pending appeal. The respondent says that the applicants were served with a court order which they failed to comply with; that the applicants fear of jail is unfounded as they would be given a chance by the trial court to defend themselves, amongst other depositions in the said affidavit.

The principles that govern the exercise of discretion by this Court in an application like this one for stay of execution pending appeal are well set out. For an applicant to be entitled to such stay he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. If such applicant crosses that hurdle, he must, in addition show that the appeal would be rendered nugatory absent stay. These principles were very well summarized by this Court in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** 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 or 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 an 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 of the twin principles.***
- vi) On whether the appeal is arguable, it is sufficient if a single bonafide 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 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 alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.”***

A modern interpretation of the law through the liberal thinking dictated by the Constitution of Kenya, 2010, would require the Court to also consider the public interest when making pronouncements when called upon in an application or appeals brought before the Court, as part of the second limb.

We have perused the draft Memorandum of Appeal attached to the Motion. It is proposed to be argued in the intended appeal that the Judge erred by finding that the respondent's employment contract was terminated when, according to the applicants, it had lapsed. It is also argued that the Judge erred by varying and expanding the scope of the order of 4th May, 2020 without according the applicants a right to be heard. These, to our mind, are arguable points, and as already shown, one arguable point will suffice and it need not be a point which must succeed.

The applicants face the risk of punishment for contempt of court and have been summoned to court in that regard. This Court, faced with a similar situation in the case of **Dr. Christopher Ndarathi Murungaru v Kenya Anti-**

Corruption Commission & Another [2006] eKLR had this to say where criminal sanctions were imminent:

“Will the appeal be rendered nugatory if we do not grant a stay and the appeal were to succeed”? As we have said, the Applicant has already been charged before a magistrate with the offence created by section 26(2) of the Act. If the trial of the Applicant were to proceed before the magistrate, he risks being fined Kshs.300,000/- or going to prison for three years or to both fine and imprisonment.

In cases which are purely civil, this Court hardly grants a stay of proceedings on the basis that even if the proceedings to be

stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – see for example SILVERSTEIN V. CHESONI, [2002] KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.”

We are satisfied, on the material presented, that the applicants have an arguable appeal and the appeal would be rendered nugatory if we do not grant stay. In the premises we allow the Motion dated 29th June, 2020 and order a stay of execution of the ruling delivered by the ELRC on 25th June, 2020 and all consequential orders pending hearing and determination of the intended appeal. Costs of the Motion will be in the intended appeal.

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

W. OUKO, (P)

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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