



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & MAKHANDIA, J.J.A)

NYERI CIVIL APPLICATION NO. 23 OF 2020

BETWEEN

THE BOARD OF TRUSTEES NATIONAL

SOCIAL SECURITY FUND.....APPLICANT

AND

CAROLINE WANJIRU KARORI.....RESPONDENT

*(Being an application for stay of execution pending the lodging,
hearing and determination of the appeal from the Judgment and
Decree of the Employment and Labour Relations Court of Kenya
at Nakuru (Monica Mbaru, J.) dated and delivered on the 24th
October 2019 and all other consequential orders issued on
6th day of February 2020 in ELRC Cause No. 439 of 2017)*

RULING OF THE COURT

1. By a Notice of Motion dated 27th February, 2020 brought under **Rule 5(2)(b)** of this Court's Rules, the applicant seeks orders of stay of execution pending the hearing and determination of the intended appeal from the judgment of the Employment and Labour Relations Court (ELRC) in Nakuru (Monica Mbaru, J.) In the impugned judgment, the respondent was awarded damages in the sum of Kshs. 6,391,532.91 for unfair summary dismissal plus interest at court rates and costs of the suit.
2. The application, is supported by an affidavit sworn by one Austin Ouko, the applicant's acting General Manager – Corporate Affairs/ Corporation Secretary, which sets out the background of the motion and the grounds upon which it is anchored. He has also annexed various documents in support thereof.
3. According to the deponent, upon delivery of the impugned judgment, the applicant filed an application seeking orders for stay of execution before the ELRC which application was dismissed on grounds that the applicant had failed to demonstrate what loss shall be suffered or what prejudice shall follow if stay is not granted.
4. It is averred that since the said application was dismissed, there is impending danger of execution of the judgment and decree hence the applicant's intended appeal will be rendered nugatory. Further, that irreparable loss shall be occasioned upon the applicant in the event the intended appeal succeeds.
5. Mr. Ouko deposed that the decretal sum of Kshs. 6,391,532.91 plus interest and costs is a colossal sum and if it were to be paid to the respondent, she may not be in a position to refund the same to the applicant in the event that the intended appeal succeeds.

6. Further, the applicant is willing to secure the decretal sum of Kshs. 6,391,532.91 by depositing the same in Court or a joint interest earning account between the respondent's advocates and the Federation of Kenya Employers (FKE), who are handling the matter, pending the hearing and determination of the intended appeal.
7. He averred that there has been no inordinate delay in filing the instant application which he says is meritorious as the intended appeal has high chances of success and no prejudice will be occasioned to the respondent if the orders sought are granted.
8. The respondent has opposed the application vide her replying affidavit sworn on 5th June, 2020. She deposes that the applicant has not demonstrated how the intended appeal would be rendered nugatory. That considering her position and remuneration in the applicant's organization, the applicant's allegations that the decretal sum is so colossal that the respondent would be unable to refund it in the event the appeal succeeds lacks basis.
9. On the applicant's averment that it is willing to secure the decretal sum of Kshs. 6,391,532.91 by depositing the same in court or a joint interest earning account between the respondent's advocates and the Federation of Kenya Employers (FKE), the respondent states that half of the said decretal sum should be paid to her forthwith and the other half be deposited in a joint interest earning account pending hearing and determination of the intended appeal.
10. In conclusion, the respondent deposes that the applicant has failed to demonstrate that it has an arguable appeal and that if orders are granted as prayed, the same would be prejudicial to her as she would be denied her right to enjoy the fruits of her judgment.
11. The application was canvassed virtually by way of written submissions with no oral highlights following the Court's Practice Directions to mitigate the COVID 19 Pandemic.
12. In the submissions on the limb on arguability, learned counsel for the applicant, citing **Multimedia University & Another v. Professor Gitile N. Naituli (2014) eKLR** urged that the learned Judge disregarded the oral and documentary evidence adduced by the applicant which proved that the respondent's summary dismissal was lawful and was based on the applicant's independent investigation and resultant report.
13. Further, that the learned Judge disregarded the applicant's evidence demonstrating that the respondent was afforded a fair hearing in accordance with the applicant's rules and **section 41 and 43(2)** of the Employment Act, 2007.
14. Citing **section 43(2) and 44(4)(g)** of the Employment Act, 2007 counsel submitted that the learned Judge failed to apply the correct test and legal threshold of proof in determining what constitutes legal and fair grounds and procedure for termination of employment. He maintained that the respondent was in breach of her terms and conditions of service in relation to matters of integrity contrary to Chapter 6 of the Constitution.
15. Counsel also faulted the learned Judge for awarding the respondent compensation which was not sought in her pleadings. He maintained that it was trite that parties are bound by their pleadings.
16. On the nugatory aspect, citing **Stanley Kang'ethe Kinyanjui v. Tony Ketter & Others (2013) eKLR**, counsel submitted that the decretal sum is a colossal amount and the respondent has not demonstrated that she is able to make restitution in the event the intended appeal succeeds, having lost her job, which was her only source of income, in October 2017. He maintained that the applicant is apprehensive that if stay is not granted, the intended appeal shall be rendered nugatory and the applicant stands to suffer irreparable loss.
17. Counsel concluded by submitting that no prejudice would be occasioned to the respondent, that cannot be compensated in damages, in the event the application is allowed. Further, that the applicant is agreeable to depositing the decretal sum into a joint account between the respondent's advocates and FKE.
18. Opposing the application, learned counsel for the respondent maintained that the intended appeal is not arguable. On whether the intended appeal would be rendered nugatory, citing this Court's decision in **Stanley Kang'ethe Kinyanjui v. Tony Ketter & Others** (supra), counsel submitted that the award is a monetary one which can easily be reimbursed if the intended appeal succeeds. Further, that the fact that the applicant previously held a senior position and was on high remuneration while in the applicant's employment, demonstrates that she is a person of means.
19. We have considered the application, the depositions in the rival affidavits and the law. The law in this area is settled as amplified in this Court's decision in **Peter Gathecha Gachiri v. AG and 4 Others, Civil Application NAI 24 of 2014 (unreported)** where the Court expressed itself as follows:-

“Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410.

“It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous, that it is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the

appeal, if successful, will be rendered futile if stay is not granted.” (Emphasis supplied)

20. Applying the above parameters, all we need to satisfy ourselves is whether the applicant’s draft memorandum of appeal discloses at least one arguable ground of appeal. The applicant raises *inter alia* grounds that the learned Judge erred: by misinterpreting **section 41** and **43(2)** of the Employment Act hence wrongly finding that the respondent’s termination and/or summary dismissal lacked justifiable cause; in finding that the respondent was not afforded a fair disciplinary hearing; by misapprehending the evidence led by the parties hence arriving at erroneous findings of fact; by awarding the respondent inordinately excessive damages which were not justifiable and; granting an award of compensation yet it was not pleaded.

21. A cursory reading of the aforementioned grounds reveals that they are arguable grounds by the standards of **Stanley Kang’ethe Kinyanjui v. Tony Ketter & Others** (*Supra*); to the effect that:-

“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.”

We are persuaded that the applicant’s intended appeal is not idle or frivolous.

22. On whether the intended appeal would be rendered nugatory, counsel for the applicant argued that the decretal sum is so colossal that if paid, the respondent would not be in a position to refund it in the event the intended appeal succeeds.

23. On the other hand, the respondent maintains that she is capable of refunding the money if the appeal succeeds.

24. Having considered these submissions, it is evident that there is need to balance the interests of both parties. On the one hand, the respondent has a judgment in her favour and she is entitled to the fruits of her judgment. On the other hand, the applicant’s apprehension that the respondent may not be in a position to refund the entire amount if the same is paid out before the appeal, in the event the appeal succeeds is not totally unfounded. Other than the claim that she was highly remunerated while in the applicant’s employment, which employment she left three years ago, there is no other evidence placed before us to demonstrate the respondent’s ability to refund the entire sum were the appeal to succeed.

25. We appreciate the fact that as a sign of goodwill, the applicant has offered to deposit the decretal amount in a joint bank account in the names of counsel for both parties.

26. Balancing the interests of both parties, we are inclined to allow the application on condition that the applicant pays directly to the respondent KShs.3 million within 30 days from the date hereof; the balance of the decretal amount be deposited in an interest earning joint account in the names of counsel for both parties within 45 days from the date hereof pending the hearing and determination of the intended appeal. In default, the Notice of Motion dated 27th February, 2020 will stand dismissed. Costs of the application to abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR