



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, ASIKE-MAKHANDIA & GATEMBU, J.J.A)

CIVIL APPLICATION NO. 154 OF 2019

BETWEEN

NZOIA SUGAR COMPANY LIMITED.....APPLICANT

AND

NOBERT MUHORO IKUNDO MWANYALO....RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Employment and Labour Relations Court at Kisumu (Nduma, J.) dated 4th November, 2019 in ELRC Cause No. 217 of 2015)

RULING OF THE COURT

1. In an application dated 28th November 2019, the applicant Nzoia Sugar Company Limited, seeks an order of stay of execution of a judgment delivered on 4th November 2019 by which the Employment and Labour Relations Court (ELRC) (*Nduma, J.*) dismissed a claim by the respondent, Nobert Muhoro Ikunda Mwanyalo, that his employment was unlawfully and unfairly terminated but nonetheless awarded him Kshs.3,655,573.48 in respect of salaries arrears, interest and costs. Aggrieved, the applicant lodged a notice of appeal filed on 8th November 2019 on which the present application is hinged.
2. To succeed in its application, the applicant should demonstrate that the intended appeal is arguable and that should the Court decline to stay the judgment, and the appeal succeeds, it will be rendered nugatory. See for instance *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR*.
3. Although the respondent was served with the application and notice of hearing, no replying affidavit or submissions were filed on his behalf.
4. Having considered the grounds set out the application, the supporting affidavit of Ritah Mukhongo, the applicant's acting Company Secretary and the submissions, and bearing in mind that an arguable appeal is not one that must necessarily succeed when the appeal is ultimately determined but one that is deserving of full consideration by the Court (See *China Road & Bridge Corporation (K)Ltd vs. African Gas & Oil Co. Ltd & 3 others [2016] eKLR*), we are satisfied that the intended appeal is indeed arguable. There is for instance the issue whether the ELRC failed to consider evidence tendered to the effect that the academic testimonials on the basis of which the respondent procured the employment were forged and whether a party should benefit from an illegal act. We are unable to say that the intended appeal is frivolous.
5. As to whether the appeal will be rendered nugatory if the application is declined and the appeal ultimately succeeds, it has been shown that the respondent has indeed threatened to execute the decree. The applicant asserted that the respondent will not be in a position to refund the judgment amount in the event the appeal is successful. It was submitted on the strength of the decision of this Court in *National Environment & Management Authority vs. Edward Juma Masakha [2015] eKLR* that it was incumbent on the respondent to demonstrate that he has the means to refund the judgment amount if the appeal succeeds. He did not do so in this case.
6. In the result, we allow the application in terms of prayer (b) of the application dated 28th November 2019. We order that pending the hearing and determination of the appeal there will be a stay of execution of the judgment dated 4th November 2019 of the ELRC in Kisumu case No. 217 of 2015.

7. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

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

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR