



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MURGOR & J. MOHAMMED, JJ. A)

CIVIL APPLICATION NO. NAI 26 OF 2020

BETWEEN

WILTON GATEWAY HOTEL LIMITED.....1ST APPLICANT

GRACE WANJIKU NDIRANGU.....2ND APPLICANT

VERSUS

KENYA HOTELS AND ALLIED WORKERS.....1ST RESPONDENT

WILFRED MAGUSA NYANGENYO.....2ND RESPONDENT

(Being an Application for stay of execution of the Judgement and Decree of the Employment and Labour Relations Court at Nairobi (Onyango J.) dated 22nd November, 2019 in

ELRC CAUSE NO. 2247 OF 2015

RULING OF THE COURT

Background

[1] **Wilton Gateway Hotel Limited** (the 1st applicant) and **Grace Wanjiku Ndirangu** (the 2nd applicant) filed a notice of motion dated 4th February 2020 expressed to be brought under **Rules 4, 5 (2) (b), 41, 42, 43 (1), (2) and (3) (b), Rule 47 (1), (2) and (4) of the Court of Appeal Rules 2010**. The said application is supported by the affidavit of the 2nd applicant, the widow of the late **Joseph Karanja Gitau**, the director of the 1st applicant. A draft memorandum of appeal is attached to the supporting affidavit.

[2] In the application, the relevant orders for our consideration remain the following : -

“4. That the Honorable Court be pleased to grant a stay of execution of the Judgement delivered on 22nd November 2019 by Hon. Maureen Onyango J., in ELRC No. 2247 of 2015 Kenya Hotels and Allied Workers Union vs. Wilton Gateway Hotel Limited and 2 others pending hearing and determination of the intended Appeal.

5. The costs of this Application be provided for.”

[3] The applicants contemporaneously filed a notice of appeal through which it is intended to challenge the decision of the **Employment and Labour Relations Court (Onyango, J.) in Cause No. 1615 of 2015** consolidated with **Employment and Labour Relations Court Cause 2247 of 2015**. In the case, the learned Judge found that the applicants had declared twenty-one (21) employees (the grievants) and the 2nd respondent redundant but failed to comply with the statutory requirements as set out in **Section 40 of the Employment Act**. Consequently, the learned Judge awarded compensation to all the grievants and the 2nd respondent.

[4] Dissatisfied with that decision, the applicants now pray that the execution of the said judgment and decree be stayed pending the hearing and determination of their intended appeal.

Submissions

[5] The applicants, represented by the firm of **Njenga Maina and Company Advocates**, filed written submissions. It was their submission that the intended appeal is arguable on the grounds *inter alia* that the 2nd applicant was sued in her individual capacity yet she had no nexus to the suit as she was neither a director of the 1st applicant nor its employee; and that some of the grievants in the suit were not employees of the 1st applicant yet were awarded compensation in the impugned judgment. It was counsel's further submission that the intended appeal will be rendered nugatory if the orders sought are denied and the intended appeal succeeds as vide a letter of 8th January, 2020 the decree holders indicated that they would enforce the decree should the applicants fail to pay the decretal amount; and further, should the decree holders be allowed to extract and enforce the decree, the intended appeal would be rendered nugatory as the decree holders have not demonstrated their ability to refund the decretal sum if the orders sought are denied and the intended appeal succeeds. To support their submissions, the applicants relied on decisions of this Court including **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR** and **Regnoil Kenya Limited v Winfred Njeri Karanja [2019] eKLR**.

[6] The 1st respondent opposed the application and filed a replying affidavit sworn by its Secretary General, **Wycliffe Sava Mundu** who averred that the instant application has no merit; is premature and misconceived; that the applicants have not met the threshold for grant of stay of execution and the application should be dismissed with costs; that in the event that the court deems it fit to grant the orders sought, half of the decretal amount should be deposited in an interest bearing account of the court and the other half to be paid to the aggrieved employees.

Determination

[7] We have considered the motion and the supporting affidavit, the submissions, the authorities cited and the law. **Rule 5 (2) (b) of this Court's Rules** provides that: -

"(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may: -

(a)...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

[8] It is well settled that in such an application, the applicants are required to satisfy this Court that they have an arguable appeal, and that unless an order of stay is granted, the intended appeal would be rendered nugatory. In this regard, this Court in **Stanley Kang'ethe Kinyanjui -v-Tony Ketter & 5 Others (supra)** observed that: -

"(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. See Ruben & 9 Others -v- Nderitu & Another [1989] KLR 459.

(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. Halai & Another -v- Thorntorn & Turpin [1963] Ltd (1990) KLR 365.

(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. David Morton Silverstein -v- Atsango Chesoni - Civil Application No. 189 of 2001.

(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 bona fide arguable ground of appeal is raised. Demji Pragji Mandavia -v- Sara Lee Household & Body Care (K) Ltd - Civil Application No. Nai. 345 of 2004.

(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. Joseph Gitahi Gachau & Another -v- Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2005.

(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. Demji (Supra).

(ix) The term "nugatory" has been given its full meaning. It does not only mean worthless, futile or invalid, but also means trifling; Reliance Bank Limited -v- Norlake Investments Ltd. [2002] I EA 227 at page 232.

(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 impecuniosity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal

[9] On the issue of arguability, the applicants have availed a draft memorandum of appeal in which they have set out several grounds of appeal. The grounds are *inter alia* whether the learned Judge erred in finding the 2nd applicant liable in her individual capacity yet no evidence was produced to prove that she was a director of the 1st applicant company; whether the learned Judge failed to determine a preliminary objection that had been filed on 10th March 2016 challenging the locus of the 1st respondent; and whether the learned Judge erred in awarding three employees who did not provide documentary evidence to support their claims. It is clear that these grounds raise arguable issues therefore the applicants have satisfied the first limb of arguability.

[10] On the nugatory aspect, it is evident from the 1st respondent's letter of 8th January, 2020 to counsel for the applicants that execution is imminent if the decretal amount is not paid. The applicants are concerned that should the intended appeal succeed after the decretal sum has been disbursed, the grievants and the 2nd respondent may not be capable of refunding the decretal amounts. In **Stanley Kangethe Kinyanjui (supra)**, this Court found that where an applicant is apprehensive about the respondent's economic position, the onus shifts to the respondent to prove its ability to refund. The respondents have not demonstrated that they are in a position to refund the decretal amount should the orders sought be denied and the intended appeal succeeds. In the circumstances therefore, we find that there is merit in the applicant's contention that the intended appeal would be rendered nugatory if stay is not granted and the intended appeal succeeds.

[11] In the circumstances, we are satisfied that the applicant has satisfied both limbs of the principle for granting an order of stay of execution. Accordingly, we allow the application and issue orders staying the execution of the judgment and decree of the Employment and Labour Relations Court dated 22nd November, 2019 pending the hearing and determination of the intended appeal.

[12] The costs of the application shall abide the outcome of the intended appeal.

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

M. K. KOOME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR