



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, ASIKE-MAKHANDIA & MUSINGA, JJ.A.)

CIVIL APPLICATION NO. 9 OF 2020

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

PASCAL BARASA OLAIMO & 75 OTHERS.....RESPONDENTS

(Being an application for stay of proceedings pending the hearing and determination of an intended

appeal against the Ruling of the Employment & Labour Relations Court

at Kisumu (M. N. Nduma, J) dated 31st May 2019

in

ELRC Petition No. 38 of 2016

RULING THE COURT

Upon considering the application before us, which is by way of a notice of motion dated 16th January 2020 by the applicant, and noting that it is principally predicated upon the provisions of Rule 5(2)(b) of the Court of Appeal Rules among other statutory enactments cited, the applicant in the main seeks an order of stay of further proceedings in the Employment & Labour Relations Court at Kisumu in **Petition No 38 of 2016**, pending the hearing and determination of the intended appeal, against the ruling delivered on 31st May 2019 by **Nduma, J.** and all consequential orders thereto.

Upon reading the supporting affidavit sworn on 16th January, 2020 by **Frankline Oyese Omuse** on behalf of the applicant, and grounds in support of the application which allude to the fact that the trial court dismissed the applicant's notice of motion to strike out the petition; that the applicant intends to appeal against the said ruling and order; that the intended appeal is arguable and has high chances of success as demonstrated in the grounds in support of the application that are robust, meritorious and demonstrates that the impugned ruling violated the law; that there was inordinate delay of 33 years in mounting the petition; that the petition violated Article 50 of the Constitution among other grounds; that unless the order of stay of proceedings is granted, the appeal will be rendered nugatory since the petition may proceed to hearing and the applicant may not be able to defend himself properly due to inordinate delay in filing the petition with the consequence that the trial will be unfair because it is based on the events that occurred in August 1982, and documents and witnesses cannot be found. Similarly, recollection of facts by witnesses has been eroded due to lapse of time.

Noting that the respondents did not file papers in opposition to the application and that none of the parties filed submissions in support of or in opposition to the application; and upon considering the application which gives a detailed account of the dispute before the trial court, and also the intended grounds of appeal, which includes: that the learned Judge erred in finding that a period of 33 years delay in the filing the petition did not amount to inordinate delay; that the inordinate delay had not prejudiced the applicant's defence thereby violating the applicant's right to fair hearing pursuant to Article 50 of the Constitution of Kenya as well as the plea that the intended appeal will be rendered nugatory if the proceedings are not stayed.

Cognizant of the guiding principles that the jurisdiction of this Court under Rule 5(2)(b) is discretionary, but is exercised judiciously and with reason not whimsically; that for the applicant to succeed, it is trite that he must show that it has an arguable appeal hence it is not frivolous and also demonstrate that the appeal, if successful, would be rendered nugatory in the absence of an order of stay of proceedings;

and that in the case of Stanley Kange’ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR, this Court stated *inter alia*:

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

Noting further that in determining whether the appeal is arguable or not, it should be appreciated that an arguable appeal does not necessarily mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises serious question of law or a reasonable argument deserving consideration by the court. In Dennis Mogambi Mang’are vs Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011) this Court held that: -

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

Having considered the instant application within the above parameters, we are satisfied that the intended appeal raises arguable points such as whether the decision against the applicant violated the law and in particular, Article 50 of the Constitution; and whether the judge’s holding that a delay of 33 years in mounting and prosecuting the petition did not prejudice the applicant’s defence.

On the nugatory aspect, we are satisfied that if the order of stay of proceedings is not granted, the pending petition shall proceed to hearing to conclusion. Should judgment with regard to the petition be made, it will basically render the pending appeal otiose. The appellant will have been denied the right to ventilate the issues raised in the appeal.

The applicant having satisfied the twin limbs as required by Rule 5(2)(b) of this Court’s Rules, the application must succeed, and is accordingly allowed with no order as to costs.

Dated and delivered at Nairobi this 20th day of November, 2020.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR