



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR J.J.A.)

CIVIL (APPEAL) APPLICATION NO. NAI. 104 OF 2020

BETWEEN

WS INSIGHT LIMITED..... APPLICANT

AND

ADAM MILLER..... RESPONDENT

(An application for stay of all further proceedings against the ruling of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) dated 12th May 2020

in

Nairobi ELRC No. 1393 of 2017)

RULING OF THE COURT

This Notice of Motion dated 27th May 2020 is made under **rules 5 (2) (b)** of the ***Court of Appeal Rules***, and has been brought in the main for orders that there be a stay of the proceedings in ***Employment and Labour Relations Cause No. 1393 of 2017, Adam Miller vs WS Insight Limited***, pending the hearing and determination of the application and appeal and that costs be provided for.

The motion was supported by the affidavit of the applicant’s Managing Director, Ashton Towler, dated 27th May 2020, wherein it was deponed that the respondent had filed a claim in the Employment and Labour Relations Court against the applicant, where prior to the hearing of the claim, the applicant had filed a preliminary objection wherein it asserted that the Employment and Labour Relations Court did not have jurisdiction to hear the claim as it was not based on an employer/ employee relationship, and further that the claim sought to enforce an illegal contract, and was therefore caught up by the requirements of the maxim ***exturpi causa oritur non axtion***.

Upon considering the preliminary objection and the parties’ submissions, the court (***M. Onyango, J.***) determined that the objection was unmerited and accordingly dismissed it.

The applicant contended that its appeal is arguable, for the reason that if the claim proceeded in the Employment and Labour Relations Court, it would have subjected itself to a court that did not have jurisdiction to hear the suit, and as a result it would have expended time, expenses and resources, on proceedings that were a nullity.

In a replying affidavit sworn on 23rd July 2019 (which perhaps should have been “2020”), Patricia Muma, the respondent’s counsel, rebutted the assertion that the applicant had an arguable appeal for the reason that no grounds of appeal were advanced, and neither was it stated how the applicant’s appeal would be rendered nugatory in the event that it were to succeed; that in its determination of the preliminary objection, the trial court had merely observed that since the matters in

contention were issues of both law and fact, the court would only be in a position to determine the question of jurisdiction after the parties adduced their evidence; that furthermore, it was the respondent and not the applicant who stood to suffer extreme prejudice in the event that the proceedings before the trial court were stayed.

Both parties filed written submissions which largely reiterated the contents of their affidavits.

In determining an application under **rule 5 (2) (b)** of this Court's Rules, it is well established that, two principles guide the Court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See the case of **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, [2013]eKLR** We would also add that when determining applications under **rule 5 (2) (b)**, the Court exercises a distinct jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See **Ruben & Others vs Nderitu & Another (1989) KLR 459**.

With respect to whether the appeal is arguable, the applicant did not file a draft memorandum of appeal, and therefore as far as we can discern, the complaint turns on the question of jurisdiction. In this regard, the applicant has contended that the trial court was wrong to dismiss the preliminary objection on jurisdiction, since the dispute between the parties did not disclose an employer-/ employee relationship, and therefore the court did not have jurisdiction to entertain it. But a consideration of the trial court's ruling makes it clear that the learned judge did not make a determination on jurisdiction. Instead, the judge concluded that in view of the intricate issues of law and fact involved in the dispute, a determination of jurisdiction would be better made following a trial. Clearly therefore, the question of jurisdiction is a matter that is yet to be determined, and as a consequence, we find that at this juncture, an arguable issue cannot be said to have arisen, which would mean that the first limb has not been satisfied.

In the case of **Republic vs Kenya Anti- Corruption Commission & 2 others [2009] eKLR**, it was stated that;

“In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb will not avail him the order sought if he fails to demonstrate the other.”

With the first limb having failed, we need not go into considering the second limb.

In sum, the motion dated 27th May 2020 is unmerited, and is dismissed with costs to the respondent.

It is so ordered.

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

R. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

