



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, GATEMBU & MURGOR, JJA)**

**CIVIL APPLICATION NUMBER E 25 OF 2020**

**BETWEEN**

**BRITAM GENERAL INSURANCE COMPANY**

**KENYA LIMITED.....APPLICANT**

**AND**

**ABIGAIL KHASOA SIMIYU.....RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) delivered on 28th May 2020*

*in*

*ELC Cause No. 2600 of 2016)*

\*\*\*\*\*

**RULING OF THE COURT**

1. In its application dated 21st July 2020 made under Rule 5(2)(b) of the Court of Appeal Rules, the applicant seeks an order for stay execution of the judgment of the Employment and Labour Relations Court (ELC), (*Wasilwa, J.*) delivered on 28th May 2020 in which the respondent's claim for wrongful termination of employment against the applicant was upheld. The court awarded the respondent Kshs.8,558,383.72 made up as follows:

i. 3 months' salary as notice =  $733,575.74 \times 3 = 2,200,727.22$

ii. Pending 20 leave days =  $20/30 \times 733,575.74 = 489,050.5$

iii. 8 months' salary as compensation for the unlawful termination =  $8 \times 733,575.74 = 5,868,606/=$  less statutory deductions

iv. Pension dues

v. The costs of the suit plus interest at Court rates with effect from the date of the judgment

2. The advocates for the applicant state that they only became aware of the judgement on 6 July 2020 when the advocates for the respondent submitted a decree for approval as the judgment was delivered online on account of the prevailing Covid-19 pandemic conditions; that they immediately thereafter took instructions and filed a notice of appeal on the basis of which the present application is hinged.

3. It is the applicant's case that its intended appeal is arguable; that the respondent was employed as the chief claims manager of the applicant and that her employment was justifiably terminated on grounds of neglect of duty contrary to the finding by the ELRC; and that the Judge did not consider that sufficient reasons were given for the dismissal from employment and due process was followed. In that regard, the applicant has crafted some seven grounds of appeal.

4. Unless the application is granted, the applicant urged, the intended appeal, if successful, will be rendered nugatory. In the affidavit in support of the application, as well as in the submissions, it is urged for the applicant that the decretal amount is substantial; that the respondent's means are unknown; and that in the event of the appeal succeeding the respondent has not demonstrated that she is in a position to reimburse the amount; that in any event, during the pendency of the dispute before the ELRC, the applicant paid an amount of KShs.2,040,103.08 towards the claim which amount is acknowledged by the respondent.

5. In her replying affidavit, the respondent deposes that although all parties had notice of delivery of the judgment by the ELRC, the applicant did not lodge its notice of appeal on time; that to grant the orders sought will deny her the enjoyment of the fruits of her judgment given after 5 years of litigation with the applicant, her former employer; that given the applicant's "*financial muscle*", it will not suffer irreparable loss should she execute the decree.

6. J.A. Guserwa & Company Advocates for the respondent submitted that the applicant has not fulfilled the requirements for the grant of an order of stay of execution; that the intended appeal is not arguable; that a draft memorandum of appeal has not been attached; that neither has the applicant demonstrated that the intended appeal will be rendered nugatory if the application is declined and the appeal ultimately succeeds because the applicant "*has already paid the respondent KShs.2,040,103.80 which amount was outstanding and in part satisfaction of the judgment*"; that in light of the financial strength of the applicant, the judgment amount "*is a drop in the ocean and of no consequence*" and the appeal cannot therefore be rendered nugatory if the judgment is not stayed; that in any case a notice of appeal was not filed within time as acknowledged by the applicant in its application for extension of time.

7. We have considered the application, the affidavits, the submissions and the authorities cited. To grant or refuse an application of this nature involves exercise of the Court's discretion. The applicant is required to demonstrate that the appeal or intended appeal is arguable and that if the prayer for stay of execution is declined, the appeal, if successful, will be rendered nugatory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR* for an exposition of the principles.

8. Undoubtedly, for the Court to be seized of jurisdiction to entertain the application, the applicant should have filed notice of appeal in respect of the decision of the lower court sought to be stayed. In the present case the respondent contends that the notice of appeal on which the application is hinged is incompetent. However, we think that is a matter best addressed in a separate challenge. For now, we note there is on record a notice of appeal which, *ex facie*, has not been struck out.

9. As to whether the intended appeal is arguable, we bear in mind 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. See *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008 [2009] eKLR*. As already indicated, the applicant has, on the face of its application, set out seven grounds of appeal, amongst them that on the evidence, the Judge should have found that the applicant had sufficient reasons for terminating the respondent's employment and that due process was followed in terminating her employment. We think the intended appeal is arguable.

10. As to whether the intended appeal will be rendered nugatory if successful unless we grant the orders sought, the judgment amount is substantial. The applicant asserted that it does not know "*the respondent's means of reimbursing the substantial decretal sum in the highly likely event of the intended appeal succeeding.*" As the Court stated in *International Laboratory for Research on Animal Diseases vs. Kinyua, [1990] KLR 403* 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. In that regard, beyond stating the applicant has substantial means and that by its standard the amount involved is paltry, the respondent does not claim or demonstrate that she has the ability to reimburse the decretal amount in the event of the appeal succeeding, should we decline to stay the judgment in the meanwhile.

11. Based on the foregoing, we are inclined to allow the applicant's application, save in so far as the judgment relates to the respondent's pension dues in respect of which there does not appear to be a contest. Consequently, we allow the applicant's application dated 21st July 2020 and order that, with the exception of the order directing payment of pension dues to the respondent, the judgment of the ELRC delivered on 28th May 2020 is hereby stayed pending the hearing and determination of the intended appeal.

12. The costs of the application will abide the outcome of the intended appeal.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2020.***

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**