



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & KOOME, J.J.A)

KISUMU CIVIL APPLICATION NO. 260 OF 2019

BETWEEN

THE COUNTY GOVERNMENT SECRETARY/CHIEF

EXECUTIVE OFFICER HOMABAY COUNTY GOVERNMENT.....1ST APPLICANT

THE OFFICE OF COUNTY GOVERNOR

HOMABAY COUNTY GOVERNMENT.....2ND APPLICANT

AND

LILIAN PURITY NYAJOWI.....1ST RESPONDENT

JANET ALUOCH OYUGI.....2ND RESPONDENT

CAROLINE ADHIAMBO MBAI.....3RD RESPONDENT

WYCLIFFE AMBA ODERO.....4TH RESPONDENT

OCHIENG BOB EVANS.....5TH RESPONDENT

ROSELYDAH AUMA ONYWERA.....6TH RESPONDENT

THE SECRETARY,

HOMABAY COUNTY PUBLIC SERVICE BOARD.....7TH RESPONDENT

(An Application for stay of proceedings and consequential orders from the Ruling and Order of the Employment and Labour Relations Court at Kisumu (Nduma N. Mathews, J) dated 17th October, 2019)

in

ELRC Cause No. 36 of 2019)

RULING OF THE COURT

1. The 1st to 6th respondents herein were engaged by the applicants in various capacities having signed different contracts of employment. The contracts were supposed to run from 2nd January, 2019 to 1st January, 2022. For reasons that we cannot delve into at this point as the claim is still pending before the Employment and Labour Relations Court, (ELRC) the respondents are said to have stopped processing the respondents' salaries at the end of March, 2019. The respondents were also barred from accessing their offices and performing their duties in terms of their contracts. The applicants were also accused of having intentions to advertise the positions held by the respondents afresh and hire other officers to replace the respondents.

2. This action prompted the respondents to move to the ELRC where they filed a statement of claim on 5th April, 2019 which they later amended on 10th May, 2019, claiming several reliefs amongst them a declaration that the respondents' letters of appointment dated 14th December, 2018 were valid and enforceable contracts as against their employer and hence orders of specific performance. Contemporaneous with the statement of claim, they filed a notice of motion seeking in the interim, pending hearing and determination of their claim, that they be allowed to access their offices and/or continue with their duties and that they be paid their salary arrears for the months worked.

3. The application fell for hearing before Nduma Nderi J who after considering the material placed before him made an order as follows:-

“(a) The 1st, 2nd, 3rd, 4th, 5th and 6th claimants/ applicants be paid their arrear salary for services rendered from the date of appointment on 14th December 2018 to 9th January 2019, the date their employment was halted.”

The learned Judge directed that the rest of the suit be set down for hearing for determination of the other issues. This is the order that aggrieved the applicants prompting them to file the Notice of Appeal dated 23rd October, 2019 and thereafter this Notice of Motion which was filed on 15th November, 2019, under certificate of urgency.

4. In the notice of motion pronounced to the premised on **Rule 5(2) b** of this Court's Rules, seeking in the main an order as follows:-

“1. ... spent

2. ... spent

3. That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to grant a stay of further proceedings in or arising from Kisumu Employment and Labour Relations Court Cause No. 36 of 2019.”

5. The applicants' grievance seems to be that the learned Judge ordered that the respondents be paid their salaries between 14th December, 2018 to 9th January 2019 – a period the learned Judge found the respondents to have worked before the decision to terminate them was conveyed to them on 22nd January, 2019.

6. The respondents opposed the application vide the Grounds of Opposition filed on 26th November, 2019 with only one ground that says “that the application lacks merit and the same is an abuse of the process of the Court”. Other than that general statement, the Court has not been told why the application is an abuse of the Court process.

7. That notwithstanding, under **Rule 5(2) b** of the Rules of this Court, it behooves the applicants to demonstrate that they have an arguable appeal and further that if the order sought is not granted, the appeal were it to succeed, will be rendered nugatory. This threshold was succinctly reiterated by this Court in its decision in **Republic vs Kenya Anti -Corruption Commission & 2 others [2009] eKLR**, as follows:-

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

8. Have the applicants satisfied the two principles embodied in the above decision? As stated earlier, the main suit has not been determined and that is what the applicants are asking us to stop. Other than the prayer to stop the proceedings, there is no other prayer in the application before us. From the grounds on the face of the application and the deponements in the affidavit in support sworn by Isaya Ogwe, on 8th November, 2019, the applicants seem aggrieved by the order of payment of salary arrears to the respondents. They say that the ELRC has yet to determine if the employment was valid or not and that if the money is paid, it will be difficult to recover the same from the respondents.

9. The applicants have nonetheless not asked us in its prayers to stay that order of payment of the arrears. What therefore begs an answer is if the proceedings are stayed, how will the ELRC determine whether the impugned contracts are valid or not?

10. We have perused the draft memorandum of appeal and we are in doubt as to whether the appeal is arguable. Even if we were to find the appeal arguable, we are not persuaded that salary arrears from 14th December 2018 to 9th January 2019 payable to the respondents as ordered by the Court is an amount that cannot be recovered from them in the unlikely event that the applicants' appeal succeeds.

11. Evidently, this application fails to meet the threshold set for applications brought under Rule 5(2) b of the Rules of this Court. Accordingly, the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 18th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR