



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E290 OF 2020

BETWEEN

PHILIP J. MAINGA.....APPLICANT

AND

PROSCOVIA VITSENGWA.....1ST RESPONDENT

THE CHAIRPERSON KENYA RAILWAY CORPORATION BOARD.....2ND RESPONDENT

THE KENYA RAILWAY CORPORATION.....3RD RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

(An intended appeal from the Ruling and Order of the Employment and Labour Relations Court

at Nairobi (Hellen Wasilwa, J.) delivered on 27th February, 2020

in

ELRC Petition No. 114 of 2019)

RULING OF THE COURT

1. Philip J. Mainga (applicant) has moved this Court by way of Notice of Motion dated 27th September, 2020 seeking orders *inter alia* that pending the hearing and determination of the intended appeal, the court grants stay sentencing of the applicant scheduled for 29th September 2020, the execution of the sentence and any further proceedings arising from the application dated 9th December, 2019 and amended in 2019.

2. The application is premised on grounds that the applicant was found guilty of contempt of court by the Employment and Labour Relations Court (ELRC), (Wasilwa J) on 27th February, 2020 following an application by Proscovia Vitsengwa (1st respondent) dated 28th August, 2019. In that application, the 1st respondent herein sought from the ELRC the suspension of advertisement by Kenya Railways Corporation Managing Director published on the 17th May, 2019 announcing 27 vacancies at the corporation and subsequently internal advertisement of 5th July, 2019 that announced 83 vacancies; suspension of the ongoing interred process and the resultant recruitment exercise undertaken by the corporation.

3. Having heard the application ex-parte in the first instance and issued orders, *inter alia*, as follows:-

“(a)

(b) That pending inter-partes hearing and determination of this application an interim order is hereby granted suspending the advertisement by Kenya Railway Corporation Managing Director published in the Standard Newspaper on 17th May 2019 announcing 27 vacancies at the corporation and subsequent internal advertisement of 5th July 2019 that announced 83

vacancies.”

Having not stopped the ongoing interviews and recruitment as prayed by the 1st respondent, the applicants herein proceeded with the exercise and conducted the interviews between 27th and 30th August. The 1st respondent moved to the court and sought committal of the applicant who is the Managing Director of the Corporation and its General Manager, Human Resource and Administration saying they had disobeyed the above orders by proceeding with the interviews.

4. When the application was placed before the Court for directions, the learned Judge made a further order to the effect,

“That the respondent shall stall any further action on the recruitment process pending the hearing and determination of the application or be barred from addressing the court.”

According to the applicant, by that time the recruitment process had already been concluded and so there was nothing to stall. The 1st respondent went back to court seeking the citing of the appellant for contempt of court, and that is how the applicant found himself in his present conundrum.

5. The application deposes that he has an arguable appeal as the order he was found in contempt of had not barred the Corporation from conducting the interviews and recruiting staff as the same only stopped the advertisement of the vacancies, which had already been done.

6. On the nugatory aspect, the applicant says that he has already been found guilty of contempt and his personal liberty is in jeopardy as he might be imprisoned if the orders sought are not granted and if incarcerated, the loss of liberty cannot be taken back. See **Commissioner of Mines & Geology & 2 Others vs Stema Alloys Enterprises Ltd [2015] eKLR.**

7. The application is opposed by the 1st respondent vide his replying affidavit sworn on 27th September 2020. The respondent maintains that by the learned Judge stopping the advertisement, it meant that the entire recruitment process had been stopped. Further, that if the orders issued by the Court was not clear, the applicant should have sought clarification from the court. He urged the court to find that the applicant deliberately disobeyed the orders of the court and he ought to be punished for his intransigence.

8. Submissions were filed on behalf of the both party with each partly expounding its position in the matter. We have considered the application in its entirety along with the said submissions and the relevant law. It is settled that for an applicant to succeed in an application under **Rule 5(2)b** of the Rules of this Court, he/she needs to demonstrate the twin principles of arguability and the nugatory aspect

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After analysing the material before us, we have no doubt that the appeal proffered by the applicant is arguable. An arguable point for instance is whether by specifically stopping the advertisement of the vacancies, (which had already been carried out), the court had stopped the consequential recruitment. The applicant needs not demonstrate any other arguable point.

9. On the nugatory aspect, obviously if a person is sent to jail for even one single day, the deprivation of liberty and whatever goes with it cannot be undone. If stay is not granted in this case and the applicant is sentenced to serve custodial sentence, his appeal were it to succeed will be rendered nugatory.

10. For the foregoing reasons, we are persuaded that the applicant has demonstrated arguability and also the nugatory aspect as required. The application is meritorious and the same is allowed with costs to the appeal.

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

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR