



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & WARSAME & J.J.A)

CIVIL APPLICATION NO. 341 OF 2019

BETWEEN

RADIO FREQUENCY SYSTEMS (E.A) LIMITEDAPPLICANT

AND

NEHEMIAH KIPROP KIPLAGAT.....1ST RESPONDENT

ELISHA DONALD KOLI..... 2ND RESPONDENT

HUDSON LIHANDA..... 3RD RESPONDENT

STANLEY OIRERE MOSOMI..... 4TH RESPONDENT

GERALD KINGORI KARIUKI.....5TH RESPONDENT

ENOCH MONARI..... 6TH RESPONDENT

MUNGA EDWIN ODHIAMBO..... 7TH RESPONDENT

BENARD OWITI..... 8TH RESPONDENT

EDWIN ONGERI BOSIRE.....9TH RESPONDENT

MICHAEL MUTAHI10TH RESPONDENT

ASAPH JUMA KIVITE.....11TH RESPONDENT

VICTOR KIPKOGEL.....12TH RESPONDENT

MUNYAO ERICSON MUTUKU..... 13TH RESPONDENT

SAMMY KIRWA MUTUKU..... 14TH RESPONDENT

CLIVE OMARI RUOTI.....15TH RESPONDENT

JACQUILENE MORAA.....16TH RESPONDENT

EUNICE WAIRIMU WAITUIRI..... 17TH RESPONDENT

CHARLES KIAGE MAKORI.....18TH RESPONDENT

WARUTERE DAVID MAINA.....19TH RESPONDENT

(Being an Application for Stay of Execution of the ruling of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated

14th October, 2019

in

ELRC. No. 567 of 2019)

RULING OF THE COURT

1. Before us is an application dated 28th October, 2019 anchored under **Rule 5(2)(b)** of the **Court of Appeal Rules** wherein the applicant seeks *inter alia*, stay of execution of the ruling and Order of the Employment and Labour Relations Court (Lady Justice Wasilwa) pending the hearing and determination of the intended appeal.

2. In brief, the background leading to the filing of the application was brought about by infighting amongst the directors of the applicant company which resulted in divergent instructions being issued to two different law firms, being the firm of M.M. Gitonga & Co. and Midenga & Company Advocates. The consequence of this confusion was the adoption of a consent executed by Midenga & Company Advocates and the respondent's Advocates in settlement of the respondents' claim and a subsequent application filed by the firm of M. M. Gitonga & Co. seeking to set aside the aforementioned consent. In a ruling delivered on 14th October, 2019, **Wasilwa, J.** found that Simon Horner who was the chief executive officer, managing director and main shareholder of the applicant, as the one who authorized the consent filed before the court. Consequently, the court held that the consent filed before it was authentic and not fraudulent, hence dismissed the applicant's motion seeking to vary/set aside the consent order adopted by the court on 2nd September, 2019. Aggrieved, the applicant filed a notice of appeal against the said decision and promptly filed the application herein.

3. The grounds in support of the motion and reiterated in the supporting affidavit of **John Mwaura**, a director and shareholder of the applicant are: that the effect of the ruling which upheld the fraudulent consent executed by the firm of Midenga & Company Advocates (falsely on record for the applicant) and Omwanza & Areba Associates (on record for the respondents) is to transfer Kshs.20,238,324.27 from the applicant's bank account to an account held by the respondents' advocates in payment of alleged dues owed to the respondents; that the respondents absconded duty and/or resigned from the applicant company and accordingly could not be constructively dismissed by the applicant; that the applicant was granted 15 days stay of execution of the ruling and order on 14th October, 2019 which lapsed on 29th October, 2019; that in the event the sum is transferred to the respondents' advocates and released to the respondents, the applicant will not be able to recover the money from the respondents, in the event the intended appeal is successful; that the company and its shareholders will suffer irreparable damage and its intended appeal will be rendered nugatory, if the orders sought are granted. The respondents contend that the prayers sought cannot be granted, as there is no basis to do so.

4. We have considered the record in light of rival pleadings, authorities, submissions of learned counsel and the law. It is common ground that in determining an application under the **Rule 5(2)(b)** of the Court Rules, the Court has to satisfy itself of two principles: that the appeal is arguable appeal and that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See **Attorney General vs. Okiya Omtata Okiiti & Another (2009) eKLR**.

5. On the arguability aspect, we have perused the draft memorandum of appeal and find that the applicant's appeal is not frivolous, as it raises arguable points such as whether the court erred in law by failing to consider that the respondents resigned from the applicant company and whether there existed an employer-employee relationship between the parties.

6. As for the nugatory aspect, the applicant contends that if the amount sought to be paid to the respondents pursuant to the consent is indeed paid out, the same shall prejudice it as the respondents may be unable to pay back the said sum if the intended appeal is successful. This contention was not challenged by the respondents. As we stated by this court in **Africa Eco-camps Limited vs. Exclusive African Treasures Limited (2014) eKLR**:

It is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed...

7. That being the case, we would take it that if the consent order is enforced, the respondents will not be in a position to refund the money if they are paid and the intended appeal succeeds. In the event then, the appeal will be rendered nugatory.

8. In the end we are satisfied that the applicant has satisfied both limbs for grant of relief under **Rule 5(2)(b)** of the Court Rules. We allow the motion dated 28th October, 2019 and order that the costs of this application be in the intended appeal.

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

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR