



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KOOME & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. 153 OF 2020

BETWEEN

AGRICULTURAL DEVELOPMENT CORPORATION.....APPLICANT

AND

RICHARD KIPKOECH AIYABEIRESPONDENT

(Being an application for stay of execution of the ruling and order of the Employment and Labour Relations Court at Nairobi (H. Wasilwa, J.) dated 1st April 2020 and 4th June 2020 in Nairobi Petition No. 46 of 2020

REASONS FOR THE RULING OF THE COURT

On 22nd July 2020, the Notice of Motion dated 16th June 2020 came up before us for hearing and determination. The motion is brought under section 3A and 3B of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya and Rules 5(2)(b) and 42 of the Court of Appeal Rules, 2010 and all other enabling provisions of the law. The motion substantively sought orders that:

“3. That the honourable court be pleased to issue an order for stay of execution of the ruling and order of the Employment and Labour Relations Court at Nairobi by the Honourable Lady Justice Hellen Wasilwa in Nairobi ELRC Petition No. 46 of 2020 dated and issued on the 1st April 2020 and extended on 4th June 2020 Pending the hearing and determination of the applicant’s intended appeal.

4. THAT the Honourable Court be pleased to issue an order for stay of further proceedings in the Employment and Labour Relations Court at Nairobi by the Honourable Lady Justice Hellen Wasilwa in Nairobi ELRC Petition No. 46 of 2020 pending the hearing and determination of the Applicant’s intended appeal.

5. That the applicant be at liberty to apply for further orders and/or directions as the honourable court may deem fit and just to grant.

6. That costs of this application be provided.”

The application is supported by grounds on its body and a supporting affidavit sworn by **Mohamed Bulle** together with annexures thereto. The application was not opposed by any replying affidavit from the respondent as none has been traced on the record, except by way of written submissions which by their very nature respond only to issues of law. The application was canvassed by the applicant’s sole pleadings, written submissions of the applicant, and the respondent and legal authorities relied upon by the respective parties in support of their rival positions. The set for the applicant is dated 29th June 2020, while that for the respondent is dated 16th June 2020.

On 22nd July 2020 when the application came up for hearing before us, we considered the applicant’s sole pleadings, the respective parties’ rival submissions and legal authorities at the conclusion of which we granted orders as follows:

- 1. Prayers 3 and 4 are granted as prayed.**
- 2. Reasons for the ruling to be delivered on 6/11/2020.**
- 3. Costs of the application to abide the ruling on reasons.**

We reserved reasons for the ruling which we now proceed to render as hereunder.

The background to the application is that the respondent had a one-year contract of employment with the applicant which according to the applicant lapsed on the 31st March 2020 by sheer effluxion of time, the same not having been renewed by the applicant's Board for the respondent's failure to apply for its renewal six (6) months prior to the expiry date as was required of him pursuant to the terms stipulated for in the said contract. He is alleged to have sought its extension vide his letter dated 21st March 2020 long after the expiry of the six (6) months period stipulated for in the contract, which request was declined by the applicant's Board.

Aggrieved, the respondent filed a claim against the applicant before the Employment and Labour Relations Court (ELRC) on which he anchored a Notice of Motion dated 31st March 2020, substantively seeking an order of injunction restraining the applicant from interfering with the execution of his employment duties with them. The matter was placed before **Wasilwa, J.** on 1st April 2020. The learned Judge upon consideration of the respondent's sole pleadings placed before the Court granted an interim injunction and directed the application to be served. Parties were directed to appear before the learned Judge on 15th April 2020 for mention for further directions on *inter partes* hearing of the application.

Upon service on them of those orders, the applicant failed to comply, citing lapse of the respondent's one-year contract of employment with them by sheer effluxion of time; and second, that the applicant's board had already appointed another person to the said position. The order was therefore incapable of enforcement in the circumstances.

Aggrieved, the respondent moved back to the same forum and filed an application dated 8th April 2020 which was also heard *ex parte* resulting in the orders issued on 8th April 2020 for: Break-in and change of locks to the respondent's former physical office in the applicant's establishment to facilitate the respondent's access to his former office; citing the applicant and its officers to be punished by way of imprisonment for six (6) months for contempt of the Court orders issued on 1st April 2020 and lastly, that the officer commanding Central Police Division, Nairobi, do ensure compliance with the Court orders issued on 1st April 2020.

The applicant filed an application dated 15th April 2020 seeking to set aside the *ex parte* orders issued on 1st April 2020. The application was placed before the same learned Judge on 4th of June 2020, who declined to hear the applicant on their application until they purged their disobedience to the orders granted on 1st April 2020 subsequently extended on 4th June 2020.

Aggrieved, the applicant filed a Notice of Appeal dated 9th June 2020 seeking to appeal against the court's orders issued on 1st April 2020 and extended on 4th June 2020, on which they anchored the application under consideration resulting in the interim orders granted on 22nd July 2020.

Supporting the application, the applicant relied on the case of **Banking Insurance and Finance Union (R) vs. Hon. Justus Aloo Ogeka & 9 Others [2015]eKLR** and **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112, [2002] E. A 503** and submitted that the intended appeal is arguable because the *ex parte* orders issued on 1st April 2020 and subsequently extended on 4th June 2020 had the effect of illegally extending the respondent's contract of employment with them which had expired on 31st March 2020 by sheer effluxion of time, and which action in the applicant's opinion was outside the mandate of the Court as in law the appointment of a Managing Director for the applicant is the sole preserve of the Cabinet Secretary for the time being in charge of Agriculture pursuant to **section 5(2) of the Agricultural Development Corporation (ADC) Act, Cap 444 Laws of Kenya.**

Second, that in law parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. Lastly, that the extension of the orders granted on 1st April 2020 for eighty (80) days beyond the requisite fourteen (14) days without hearing the opposite party on merit or with the consent of both parties was not only erroneous but null and void and cannot therefore be sustained.

On the second prerequisite, the applicant relied on the case of **Reliance Bank Limited vs. Norlake Investments Limited [2002] 1E.A 227** as applied in **Katangi Developers Limited vs. Prafula Enterprises Limited & Another [2018]eKLR** and submitted that if the orders of stay sought are not granted, the intended appeal will be rendered nugatory because, in their opinion, although the break-in order may be reversed, the order on committal to jail for six (6) months as punishment for the alleged contempt of the orders of 1st April 2020 is irreversible.

In rebuttal, the respondent submitted that the impugned orders of 1st April 2020 are totally distinct from those issued on 4th June 2020 as they emanate from two distinct applications. It therefore follows that the notice of appeal filed on 12th June 2020, seventy-three (73) days later purporting to appeal against the orders of 1st April 2020 contravenes the prerequisite in **Rule 75 (1) and (2)** of this Court's Rules which requires such a notice of appeal to be filed within fourteen (14) days from the date of the order and served within seven (7) days from the date of the lodging of the notice of appeal pursuant to **Rule 77(1)** of this Courts' Rules. The notice of appeal is therefore incompetent and cannot therefore form anchor for the application under consideration. It should be struck out.

The respondent also submits that no prejudice will be suffered by the applicant if the orders sought were withheld as the intended appeal arises from an interlocutory application which is yet to be heard *inter partes* before the trial Court.

On costs, the respondent relied on the case of **Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 Others [2014]eKLR** and submitted that costs usually follow the event and since the application under consideration does not lie, the same should be struck out with costs to them.

Our invitation to intervene on behalf of the applicant has been invoked under **sections 3A and 3B of the Appellate Jurisdiction Act** as well as **Rule 5(2)(b)** of the Court of Appeal Rules. **Sections 3A and 3B of the Appellate Jurisdiction Act** enshrine the overriding objective principle of the Court. The principles that guide the Court on the invocation and application of this principle have been crystallized by numerous case law. For instance, in the cases of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)**; and **Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**, which all support the

proposition that the purpose of the overriding objective principle is first, to enable the Court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, to embolden the Court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

The substantive provision for accessing the relief sought is **Rule 5(2)(b)** of the Court of Appeal Rules. It provides:

“5(2)(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

The principles that guide the Court on the parameters for exercise of the Court’s discretionary mandate under the said provision now form a well-trodden path, as crystallized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR** and which we fully adopt.

However, before we delve into the merits of the application, we find it prudent to dispose of a preliminary issue raised by the respondent in his submissions namely that the application under consideration is incompetent for the applicant’s failure to comply with the mandatory requirements in **Rule 75 (1) and (2)** of this Court’s Rules. It provides:

75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

2. Every such notice shall, subject to rules 83 and 84, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

Our take on the above provision is that a party intending to appeal against an order/ruling and or a judgment is required by the above rule to file and serve the Notice of Appeal within fourteen (14) days of the order/ruling and or judgment intended to be impugned as the case may be and cause the lodged notice of appeal to be served on the opposite party within seven (7) days of such lodging. It is in light of the above that the applicant appears to have based his computation of time for lodging the notice of appeal from 4th of June 2020 when the interim orders of 1st April 2020 were extended. That is why the respondent has contended that the notice on which the application is anchored was filed seventy-three (73) days from 1st April 2020 without leave hence his assertion that it is incompetent.

The procedure for faulting an incompetent Notice of Appeal is provided for in

Rules 83 and 84 which provide *inter alia* as follows:

“83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

Our take on the above rules is that there is no provision in the said rules for an oral application made either orally in Court or through submissions, whether oral or written. No cross application has been filed by the respondent seeking to strike out the notice of appeal on which the application under consideration is anchored in terms of the procedure laid down in either **rules 83 or 84** of the rules of the Court as the case may be. The above being the correct position in law for faulting a defective notice of appeal, we decline the respondent’s invitation through his written submissions for us to fault the notice of appeal on which the application is anchored. We therefore find the application properly laid before us. We proceed to render our reasons on merit for granting the interlocutory orders of 22nd July 2020.

On the first limb of the prerequisite under **Rule 5(2)(b)** of this Court’s Rules, the memorandum of appeal raises nine grounds of appeal. In summary, the applicant intends to argue on appeal that the learned trial judge failed to appreciate and consider that the respondent’s fixed term of employment with them had long expired on 31st March 2020 by sheer effluxion of time before the intended impugned orders were issued; the orders granted on 1st April 2020 were final in nature and there is therefore nothing left to adjudicate at the trial; failing to consider **section 49(4) and 50 of the Employment Act, 2007 and rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules 2016** before granting the said orders was not only erroneous but also highly prejudicial to the applicant; in issuing the orders of 4th June 2020 which purported to assume the powers of the Board of the applicant and grant the respondent an illegal extension of his already expired contract with the applicant was outside the mandate of the Court; the orders of 4th June 2020 in so far as they purport to advance an illegality by forcefully installing another Managing Director for the applicant are contrary to the constitutional statutory provisions and principles on good governance of State Corporation; and lastly, that the learned Judge erred by failing to consider the applicant’s application dated 15th April 2020. We find all the above grounds of appeal arguable notwithstanding that they may not ultimately succeed.

On proof of establishment of the second prerequisite under the same rule, we find this also satisfied because what is threatened is the execution of a break-in order to install the respondent back to his former offices in disregard of the applicant’s uncontroverted allegation that there is already an occupant of that office procedurally installed to that office in accordance with the applicable statutory provisions and

policy. Second, also threatened is civil jail for disobedience of the intended impugned orders which in our view, if executed are irreversible.

In light of the above assessment and reasoning we make orders as follows:

1. We affirm the interim orders we issued on 22nd July 2020, granting Prayers 3 and 4 as prayed for in the application of 16th June 2020 and directing the registry to liaise with the parties with a view of processing the appeal for speedy hearing and disposal.

2. Costs of the application to abide the outcome of the intended appeal.

Dated and Delivered at Nairobi this 4th day of December, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR