



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), NAMBUYE & KIAGE J.J.A.)

MOMBASA CIVIL APPLICATION NO. 36 OF 2020

BETWEEN

ATTORNEY GENERAL.....APPLICANT/INTENDED APPELLANT

AND

RACHAEL MUTHEU NDAMBUKI..... RESPONDENT

(Being an application for stay of proceedings and execution pending appeal of the ruling of the Employment and Labour Relations Court (Hon. J. Rika, J.) dated 25th October 2019)

in

Mombasa ELRC Constitutional Petition No. 2 of 2019)

RULING OF THE COURT

1. **HAVING** perused the Notice of Motion dated 2nd June 2020, substantively brought under **Rule 5(2)(b)** of the rules of this Court, seeking an order that this Court be pleased to grant an order of stay of the execution and proceedings of the Employment and Labour Relations Court at Mombasa in Constitutional Petition No. 2 of 2019 pending the filing, hearing and determination of the intended appeal; an order that the hearing on 23rd September 2020, all other proceedings and consequential orders issued be stayed pending the filing, hearing and determination of the intended appeal; an order that this Court be pleased to stay the payment and execution of the fine of kshs. 250,000 and other consequential orders related to the fine pending the filing, hearing and determination of the intended appeal; and lastly, an order that costs of the application be in the cause; and
2. **UPON** appraising the grounds in the body of the application and the affidavit of **John W. Njogu** sworn on 2nd June 2020 in support of the application together with annexures thereto; and
3. **UPON** appraising the replying affidavit of **Rachel Mutheu Ndambuki**, the respondent, erroneously titled "*further affidavit*" sworn on 19th June 2020 together with annexures thereto; and
4. **UPON** appraising the applicant's written submissions dated 7th October 2020 together with legal authorities relied upon by the applicant in support of the application; and
5. **UPON** appraising the respondent's written submissions dated 9th October 2020 together with legal authorities relied upon by the respondent in opposition to the application; and
6. **HAVING** considered the principles that guide this Court in determining applications under **rule 5(2)(b)**, of this Court's rules as summarized in **Stanley Kang'ethe vs. Tony Keter & Others [2013]eKLR**, we are satisfied the applicant's draft memorandum of appeal annexed to the application contains arguable points and has therefore satisfied the first of the twin principles required to be met for grant of relief under the above rule; and

7. **UPON** applying the same test to the rival pleadings and written submissions with regard to satisfaction of the second of the twin principles for granting of relief under the said rule, namely, that if the relief sought is not granted, the intended appeal if successful will be rendered nugatory, we find this has not been established for the reason that what is threatened is payment of a fine imposed for the alleged contempt of court orders. There is nothing in the applicant's supporting evidence to suggest that once the fine is paid the same will not be recoverable should the intended appeal ultimately succeed; and

8. **HAVING** reached that conclusion, we make an order as follows:

1. **The applicant's application dated 2nd June 2020 is dismissed with costs to the respondent.**

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

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR