



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPLICATION NO. 31 of 2019

BETWEEN

SISTER SARAH ADIPO.....APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Being an application for injunction in the intended appeal against the judgment

and decree of the Employment and Labour Relations Court at Kisumu

(Hon. M.N. Nderi, J.) delivered on 14th March 2019

in

ELC Cause No. 306 of 2016)

RULING OF THE COURT

1. This is an application for injunction pending the hearing and determination of an intended appeal.
2. On 17th October 2016, the applicant lodged a memorandum of claim against the respondent before the Employment and Labour Relations Court "ELRC" seeking a permanent injunction restraining the respondent from suspending and interdicting her.
3. At all material times, the applicant was employed by the respondent as a teacher and was deployed and posted as the Principal to Ahero Girls Secondary School. By letter dated 6th October 2016, the respondent served the applicant with a letter of interdiction citing several grounds *to wit* insubordination, infamous conduct and forgery/corrupt deals.
4. In her memorandum of claim, the applicant asserted that the decision to interdict her was made unilaterally and unprocedurally and that no notice to show cause why she should not be interdicted was served upon her. It was alleged that she was condemned unheard and the decision to interdict her was arbitrary, unfair and capricious.
5. The respondent filed a replying affidavit opposing the claim as per the memorandum. In its affidavit, it was asserted that the applicant on numerous occasions breached the Basic Education Act and the Code of Regulations for Teachers; that the applicant by a letter dated 10th February 2016 was informed of the allegations against her and was accorded an opportunity to rebut the same; that the applicant replied to the notice to show cause by a letter dated 15th July 2016; that an inquiry was held and the respondent Commission evaluated the circumstances of the case and reached the decision to interdict the applicant for breach of the Basic Education Act, the Teachers Service Commission Act and the Code of Regulation for Teachers.
6. Before the trial court, the applicant's claim was heard on merit. By a judgment dated 14th March 2019, the court dismissed the applicant's claim. In doing so, the learned judge expressed himself thus:-

13.... The court is loath to interfere unjustifiably on the managerial prerogative of employers unless there are compelling reasons to do so.

14. The respondent has demonstrated that it has commenced a disciplinary process provided by the relevant law and regulations.

15. The claimant has failed to prove a case of unjust and unfair treatment at this early stage of the process on a balance of probabilities.

16. Therefore the court finds that the prayer sought in the memorandum is misconceived and secondly there is no merit in issuing a permanent injunction against the intended disciplinary process.

7. Aggrieved, the applicant has filed the instant application under *inter alia* **Rule 5 (2) (b)** of the Rules of this Court. The application is carefully worded as it does not seek to stay the judgment of the trial court. In any event, the trial court simply dismissed the applicant's claim; the judgment is a negative order that cannot be stayed. Nevertheless, the applicant has moved this Court under **Rule 5 (2) (b)** seeking an injunction to restrain the respondent or its agents or servants from acting on or interdicting the applicant pursuant to the Letter of Interdiction dated 6th October 2016. In other words, the applicant has come to this Court seeking an order stopping her interdiction pending the hearing and determination of an intended appeal.

8. The grounds in support of the application as stated on the face of the Motion and the supporting affidavit are that the applicant was not given a notice to show cause; that the letter of interdiction was issued unprocedurally; that **Section 146 (6)** of the **Regulations for Teachers 2015** expressly reserves the right of a teacher under investigation to be presumed innocent; that the judgment of the trial court relied on a single authority and did not mention any statute or subsidiary legislation that had been violated; that unless the injunctive order sought is granted, the applicant's livelihood, reputation and legacy as a teacher will irreparably be damaged.

9. In opposing the application, the respondent filed a replying affidavit dated 31st May 2019 deposed by Ms Lily Oriema. In the affidavit, it is averred that any injunctive order granted at this stage will reverse the judgment of the trial court; that the judge has already determined the substratum of the applicant's case; that in this application, the applicant has not demonstrated a prima facie case entitling her to the injunction sought. It is further averred that the applicant has not demonstrated any substantial loss that she stands to suffer if the order sought is not granted. The deponent cited dicta from the case of **Mombasa Seaport Free Limited – v- Kenya Ports Authority, Civil Application No. NBI 242 of 2006** where it is stated that where a cause of action is dismissed by a court, granting an order of injunction has an undesired effect of reviving an already dismissed cause of action at an interim stage without hearing the merits of the appeal; that such an application ought to be declined.

10. At the hearing of the instant application, learned counsel Mr. Francis E. Wasuna appeared for the applicant while learned counsel Mr. Allan Sitima appeared for the respondent. Both parties filed written submissions and relied on the same as well as the grounds and affidavit in support of the application and the replying affidavit.

11. While orally highlighting the submissions, the applicant urged this Court to take into account that when the suit was pending before the trial court, an injunction was issued pending the hearing and determination of the claim. That in this appeal, this Court should similarly issue an injunction restraining interdiction of the applicant pending the hearing and determination of the intended appeal.

12. Counsel for the respondent in his oral highlights reminded this Court that interdiction is simply the beginning of the disciplinary process; that in the instant matter, the grounds for interdiction of the applicant *inter alia* relate to fraud and forgery; that pursuant to the Teachers Service Commission Regulations, interdiction on these grounds means that the applicant is interdicted without pay. He asserted that the applicant has not established sufficient grounds for issuance of the injunction sought.

ANALYSIS and DETERMINATION

13. The applicant has moved this Court pursuant to **Rule 5 (2) (b)** of the rules of the Court. **Rule 5 (2) (b)** provides as follows:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.” (Emphasis supplied)

14. The Supreme Court in **Deynes Muriithi & 4 others - v - Law Society of Kenya & another [2016] eKLR** had occasion to consider **Rule 5 (2) (b)** of the Rules of this Court. The Supreme Court expressed:

*[33] This Court has had occasion to deal with applications that fall under this Rule. In **Teachers Service Commission –v- Kenya National Union of Teachers and 3 Others, Sup. Ct Application No. 6 of 2015; [2015] eKLR**, this Court considered the nature and scope of the jurisdiction under this provision, thus pronouncing itself:*

*“[23] It is clear to us that Rule 5 (2)(b) is **essentially a tool of preservation**. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years.*

.....

“[27] Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we

would not go as far as describing such discretionary jurisdiction as ‘original’ (the term ‘inherent’ more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction” [emphasis supplied].

[34] In the same case we also cited with approval (at paragraph 24), the Court of Appeal decision in **Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 Others**, Civil Application No. NAI 31/2012. The Court of Appeal in that case, examined the manner in which it exercises its jurisdiction in relation to applications brought under Article 5 (2)(b), and remarked as follows:

“[I]n dealing with Rule (5) (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge’s discretion to this Court”.

15. In **Damji Pragji Mandavia - v - Sara Lee Household & Bodycare (K) Ltd**, Civil Application No. NAI 345 of 2004, this Court observed:

“In considering an application brought under rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage, as doing so may embarrass the ultimate hearing of the main appeal.”

16. Bearing in mind the foregoing, the principles in the exercise of our discretion under **Rule 5(2) (b)** to grant an injunction are well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless the order sought is granted, the appeal or intended appeal would be rendered nugatory.

17. In **Attorney General -v- Okiya Omtatah Okoiti & another [2019] eKLR**, this Court commenting on its jurisdiction under **Rule 5 (2) (b)** observed that the discretion of this Court to grant an injunction is wide and unfettered provided it is just to do so; that in considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances; that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.

18. Further, in **Gitirau Peter Munya vs. Dickson Mwenda Kithiji & 2 Others [2014] eKLR**, the Supreme Court added a third consideration, this being whether it is in the public interest for an injunctive order to be granted.

19. In the instant matter, the applicant contends that the letter dated 6th October 2016 was issued unlawfully, unprocedurally and unfairly. This in our considered view is an arguable point. The respondent in its replying affidavit averred that the applicant has not demonstrated she will suffer irreparable loss. This is also an arguable point that points towards the intended appeal allegedly being rendered nugatory if the order sought is not granted. At this stage, we are satisfied that the applicant has demonstrated that the intended appeal is arguable.

20. The next issue for our consideration is whether the intended appeal shall be rendered nugatory if the injunction sought is not granted. We reiterate what was stated by this Court in **Reliance Bank Limited vs Norlake Investments Limited [2002] 1 E.A. 227** that:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

21. In this matter, the applicant contends that if she is interdicted, and on appeal it ends up that the interdiction was not proper, her career, legacy and reputation as a teacher will have been irreparably damaged; that interdiction without pay at this preliminary stage of the disciplinary process is bound to cause hardship and negatively impact on her source of livelihood; that loss of livelihood is an irreparable damage to her welfare and well-being. It is in this context that the applicant contends the appeal shall be rendered nugatory if the injunction sought is not granted.

22. In considering the instant application, we bear in mind what was stated in **Ahmednassir Maalim Abdullahi – v - Star Publications Limited [2019] eKLR**, that indeed, it must be understood that no amount of money can compensate a person for loss of reputation following a false statement. We have also considered that the allegations contained in the letter of interdiction dated 6th October 2016 raise issues of fraud and forgery. Such allegations are serious and if proven, would be damaging to the integrity and reputation of an individual. If the intended appeal were to succeed, the reputation and livelihood of the applicant will have been damaged. It is not easy to repair and reclaim a damaged reputation. With this in mind, we are satisfied that the intended appeal will be rendered nugatory if the injunction sought is not granted.

23. In arriving at our decision, we are reminded, persuaded and guided by the words stated in **Nduhiu Gitahi and Another -v- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -v- Safe Deposit Centres Limited [1984] 3 ALLER 198** where it was stated:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

(See also **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR**.)

24. Comparatively, in the persuasive Malawi case of **Chinomba – v - Attorney General (254 of 2016) [2016] MWHC 539 (08 July 2016)**,

the subject matter of the dispute was interdiction of the applicant on no pay as part of the disciplinary process. The High Court granted injunctive orders barring interdiction of the applicant without pay.

25. We have also considered the case of **Mombasa Seaport Duty Free Limited – v- Kenya Ports Authority, Nairobi Civil Appeal No. 242 of 2006** cited to us by the respondent. The decision is distinguishable from the instant matter. More specifically we refer to the paragraph in the decision where this Court expressed “the order for stay sought in prayer (b) of the Notice of Motion is neither an order of stay of execution or stay of proceedings nor an order of injunction envisaged by Rule 5 (2) (b).” In the instant matter, the application is for an injunction as envisaged under **Rule 5 (2) (b)** of the rules of this Court. In the Mombasa Seaport case (*supra*), there was no application for an injunction under **Rule 5 (2) (b)**.

26. With the foregoing in mind, we are satisfied that this application has merit. We hereby grant an injunction restraining the respondent by itself, its servants and or agents or any other person acting under its authority from effecting the Letter of Interdiction dated 6th October 2016 pending the hearing and determination of the applicant’s intended appeal against the judgment of the Employment and Labour Relations Court delivered on 14th March 2019 in ELRC Cause No. 306 of 2016.

27. We also issue the following order and directions: the applicant is to file and serve the record of appeal within 45 days from the date hereof. Failure to do so the injunction order issued herein shall automatically lapse. The Registry is directed to fast track and on priority basis the hearing of the intended appeal.

28. The costs of the instant application shall abide by the outcome of the intended appeal.

Dated and delivered at Kisumu this 19th day of June, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR