



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME, & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. 135 of 2019 (UR 125/19)

BETWEEN

ENERGY REGULATORY COMMISSION.....APPLICANT

AND

JOHN SIGURA OTIDO.....RESPONDENT

(Being an application for stay of execution of the judgment and order of the

Employment and Labour Relations Court at Milimani, Nairobi (Ongaya, J.)

dated 10th April 2019 in ELRC Cause No. 294 of 2018)

RULING OF THE COURT

1. The applicant is a State Corporation established under the **Energy Act, 2006** whose mandate *inter alia* is to regulate the energy sector. At all material times in this suit, the respondent was employed by the applicant as Head of Security. By letter dated 6th September 2017, the respondent was interdicted. The cause of interdiction as stated in the letter is that complaints had been received from some of the applicant's licensees that the respondent was engaged in extortion and intimidation.

2. Subsequent to interdiction, the applicant, **Energy Regulatory Commission**, invited the respondent, **John Sigura Otido**, to attend a disciplinary process and a hearing to determine the veracity of the complaints. Before the disciplinary process could be concluded, the respondent filed two separate suits before the Employment and Labour Relations Court seeking injunctive orders to stop his interdiction. The first suit was **ELRC Case No. 1851 of 2017**. In the suit, the respondent lost an application for injunctive relief. Thereafter, the respondent filed a second suit **ELRC No. 294 of 2018** which is the subject matter of this application. In the second suit, the respondent did not disclose to the trial Judge that a previous suit had been filed on the same cause of action. The applicant asserts that it is in this second suit that the respondent misled the trial court to issue injunctive orders which were contradictory to the orders in the first suit. In the first suit, the learned Judge required the respondent to undergo disciplinary process. In the second suit which is the subject of the instant application, it is alleged that the Judge erroneously rather than allow the respondent to undergo the disciplinary process opted to hear and determine the dispute between the applicant and the respondent.

3. On the disciplinary process initiated by the applicant, the respondent failed to attend. Consequently, the disciplinary panel made a decision to terminate and dismiss the respondent from employment. Subsequent to the dismissal, the respondent lodged a claim against the applicant *inter alia* for unlawful interdiction, unfair dismissal, compensation for salary in lieu of notice and twelve (12) months' gross salary for unfair termination.

4. The learned Judge in a judgment dated 10th April 2019 made a finding that the applicant had not established the respondent was culpable of the allegations levelled against him; that the interdiction and termination of employment was unfair; that there was no improper conduct on the part of the respondent that would operate as a bar to reinstatement and that the respondent was entitled to all allowances, salary and dues from the date of interdiction. The learned Judge issued the following orders:

(1) the respondent to be reinstated to the position of Head of Security effective 11th April 2018.

(2) the applicant to pay the respondent all due salary and allowances held from the date of interdiction i.e. 6th September 2017 up

to 11th April 2018.

(3) The applicant to pay the respondent all dues, salaries and allowances from 11th April 2018 to the date of the judgment and to continue paying the monthly salaries, allowances and benefits and thereafter in accordance with the contract of service and without break in service consequential to the order of reinstatement.

(4) The respondent to compute and serve the schedule of the dues under order 2 and 3 above within seven days and the sum to be included in the final decree and any disagreement on computation to be resolved by the Deputy Registrar of the Court.

(5) The respondent to pay the applicant the decretal sum as ordered by 1st June 2019 failing interest to be payable at court rates from the date of judgment till payment in full.”

5. Aggrieved by the judgment and final orders of the learned Judge, the applicant filed a Notice of Appeal to this Court. By way of a Notice of Motion dated 29th April 2019 the applicant is seeking stay of execution of the judgment and decree of the court. In particular, the applicant seeks an order to stay reinstatement of the respondent and payment of the decretal sum pending the hearing and determination of the intended appeal. The applicant further seeks an order staying any further proceedings before the ELRC pending the hearing and determination of the intended appeal.

6. The grounds in support of the application is that the intended appeal raises cogent points of law the determination of which substantially affects the rights of the parties herein. That the intended appeal is arguable and will be rendered nugatory if the stay orders sought are not granted. The application is supported by an affidavit dated 29th April 2019 and a supplementary affidavit dated 25th June 2019 both deposed **Ms. Mueni Mutunga**.

7. The respondent in opposing the instant application filed his replying affidavit dated 24th June 2019.

8. At the hearing of the instant application, learned counsels **Mr. Gershon Otachi** and **Mr. Dennis Muyuri** appeared for the applicant. Learned counsel **Mr. Isaiah Mandala** appeared for the respondent.

APPLICANT'S SUBMISSIONS

9. The applicant rehashed the background facts leading to the dispute between the parties. It was submitted that the office of Head of Security at the applicant's company is sensitive and the occupant must be beyond suspicion and reproach. That the duties of Head of Security entails management of all security matters including policy and strategy implementation, protection of the applicant's assets against theft, terrorism and sabotage as well as investigations into security breaches, collecting and analyzing intelligence on current trends on crime and security matters that could adversely affect the applicant's operations, staff and stakeholders.

10. It was submitted that the allegations against the applicant touch on extortion of third party licensees of the applicant and possible adulteration of fuel which poses grave danger to consumers of petroleum products in Kenya. That the respondent's duty as Head of Security involved interaction with third party licensees some of whom complained about intimidation and extortion and lodged complaint against the respondent. That due to the complaints, the trust between the applicant and respondent as employer employee has waned.

11. The Directorate of Criminal Investigations (DCI) investigated the complaints against the respondent. The DCI in a report dated 11th December 2017 recommended that no criminal act had been committed by the respondent. Counsel for the applicant submitted that the intended appeal is arguable as the learned Judge erred in failing to appreciate the distinction between the standard of proof required in criminal and civil proceedings thereby misconstruing the report by DCI. That the learned Judge erred in relying on the DCI report thereby illegally curtailing the applicant's right to determine its own internal disciplinary, administrative and organizational structure as enshrined and guaranteed in **Article 41 of the Constitution**. That the Judge exceeded his jurisdiction by reserving the position of Head of Security for the respondent despite his earlier ruling setting aside any injunctive and preservation orders.

12. It was further submitted that the intended appeal is not frivolous as it raises arguable points of law including the legality of a court sitting on its own appeal; the burden of proof and discharge thereof by the litigants and jurisdiction of the trial court. It was further submitted the learned Judge erred in disregarding credible testimony of the applicant's witnesses.

13. The applicant further submitted that the intended appeal shall be rendered nugatory if the orders sought are not granted. To buttress its submission, counsel referred to the supplementary affidavit dated 25th June 2019 deposed by **Mr. Mueni Mutunga** averring that the respondent had been interdicted for over two years and was out of his position. That during the interdiction period, restructuring of the applicant's organization and administrative structure took place and there is now a practical impossibility of reinstating the respondent to the position of Head of Security as ordered by the trial court. That the institutional migration of the organizational and administrative structure of the applicant was approved by the Public Service Commission. That under the new structure, the position of Head of Security no longer exists.

RESPONDENT'S SUBMISSIONS

14. The respondent vide his own replying affidavit opposes the instant application. He avers that the applicant had initially filed an application for stay of execution before the trial court and the application was withdrawn by consent of the parties. That once the application was withdrawn, the applicant cannot file the instant similar application before this Court.

15. It was submitted that the argument that two suits had been filed before the trial court had no merit. That the applicant had raised the issue

of the two suits and *res judicata* before the trial court and this was dealt with in a ruling delivered

on 22nd June 2018 by the learned Judge. That in dismissing the argument on *res judicata*, the judge held that the previous suit had not been heard on merits and so there exists no final determination on the dispute to invoke the doctrine of *res judicata*.

16. Counsel submitted that the instant application has been overtaken by events as the applicant had already reinstated the respondent to the position of Head of Security. That the respondent is already receiving in full his monthly salary. That the instant application has also been overtaken by events as both the applicant and respondent have appeared before the Deputy Registrar and are participating in computation of dues payable to the respondent as ordered in the impugned judgment.

17. It was further submitted the applicant had not demonstrated the substantial loss it will suffer if the respondent continued to report on duty with full payment of any allowances, dues and salary.

18. It was urged that the intended appeal is frivolous and does not satisfy the principles for grant of stay order by this Court. That it is the respondent who will suffer prejudice if stay is granted as this will mean loss of employment after reinstatement. That if stay is granted, three years within which reinstatement can be ordered as per **Section 12 (3) of the Employment Act** may lapse and this will prejudice the applicant and take away the remedy of reinstatement.

19. Counsel emphasized that the applicant company is a public institution and an order for reinstatement does not make the company suffer any prejudice. It was urged that the learned Judge accurately considered the evidence on record and correctly entered judgment against the applicant. It was submitted the restructuring of the administrative and organization structure of the applicant company had nothing to do with the respondent's claim and cause of action.

20. The applicant denied that reinstatement had taken place and further refuted that the instant application had been overtaken by events. In countering the assertion that reinstatement had taken place, it was submitted the applicant is a law abiding person; that since there has been no stay of the judgment of the trial court, the applicant did not wish to disobey court orders; that all that has happened is the applicant has allowed the respondent to report to work and perform no duties. That the position of Head of Security is sensitive and delicate and with the complaints and allegations on the respondent, the mutual trust and confidence between employer and employee and the third party licenses has diminished. That it is not in public interest to reinstate the respondent taking into account the administrative and managerial restructuring of the applicant company.

ANALYSIS and DETERMINATION

21. This is an application for stay of the execution of the judgment and decree of the trial court. Before us is a Notice of Motion dated 29th April 2019 filed by the applicant seeking three distinct orders for stay. First, stay of execution of the judgment and decree of the trial court dated 10th April 2019. Second, an order to stay reinstatement of the respondent and payment of the decretal sum and third, an order staying any further proceedings before the Employment and Labour Relations Court pending the hearing and determination of the intended appeal.

22. The application has been brought pursuant to the provisions of **Rule 5 (2) (b)** of the Rules of this Court. In **Stanley Kang'ethe Kinyanjui - - Tony Ketter & 5 Others, Civil Application No. NAI 31/2012**; this Court examined the manner in which it exercises its jurisdiction in relation to applications brought under **Article 5 (2) (b)** of the Rules of this Court 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”

23. In **Reliance Bank Ltd (In Liquidation) - v - Norlake Investments Ltd Civil Appl. No. Nai. 93/02 (UR)**, it was stated thus: -

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely: -

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal;

2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

24. This being an application under **Rule 5 (2) (b)** of the rules of this Court, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).**

25. In the first instance, we consider if the intended appeal is arguable. As to whether an intended appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. (See **Damji Pragji Mandavia -v- Sara Lee Household & Bodycare (K) Ltd, Civil Application No. NAI 345 of 2004**). Further, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; and one which is not frivolous. (See **Joseph Gitahi Gachau & Another -v- Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008**).

26. In the instant application, the applicant in its submissions urged that the intended appeal is arguable. Conversely, the respondent

submitted the intended appeal is frivolous and not arguable.

27. In the present application, it is stated the arguable points in the intended appeal include the legality of a court sitting on its own appeal; the burden of proof and discharge thereof by the litigants and jurisdiction of the trial court. It is further alleged that the learned Judge erred in disregarding credible testimony of the applicant's witnesses. That the procedure at which two suits were filed by the applicant before the trial court is an abuse of court process.

28. In denying that the intended appeal is arguable, the respondent submitted that the trial Judge properly evaluated the evidence on record and applied the applicable law.

29. We find that in this matter, it is contestable whether the learned judge properly evaluated the evidence on record and correctly applied the applicable law. This *per se* is an arguable point to be considered and determined in the intended appeal. We are thus satisfied that the applicant has demonstrated to our satisfaction that the intended appeal is arguable.

30. On nugatory aspects, the applicant submitted that the intended appeal shall be rendered nugatory if the stay orders sought are not granted. Central to this submission is that the Judge erred and exceeded his jurisdiction. That the applicant has restructured its management and administrative structure and the position of Head of Security no longer exists. That the position of Head of Security is sensitive and the mutual trust and confidence between the employer and employee has waned. That if the stay orders sought are not granted, the applicant will be prejudiced as it will be forced to keep the respondent as its employee when the position of Head of Security no longer exists and trust and confidence has evaporated.

31. Conversely, the respondent submitted that no prejudice will be suffered by the applicant as it is a public body capable of keeping the respondent on its pay roll. That if the orders sought are granted, it is the respondent who will be prejudiced as he will suffer loss of employment and ability to earn a living.

32. We have considered the submissions by the applicant and respondent on the nugatory aspects. This Court in **National Industrial Credit Bank Ltd- v-Aquinans Francis Wasike, Civil Application No. 238/2005**, stated that the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory if stay is not granted. The applicant in its submissions has not lucidly demonstrated how the intended appeal shall be rendered nugatory if the stay orders sought are not granted. Nevertheless, the contestation that the learned judge exceeded his jurisdiction and that the two suits filed by the respondent border on abuse of court process are grounds that may render the intended appeal nugatory if the orders sought are not granted. We are thus satisfied the applicant has *prima facie* established the intended appeal may be rendered nugatory if stay is not granted.

33. An important criterion that we must consider in an application for stay order is public interest and balance of convenience. In this context we are guided by the Supreme Court dicta in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** where it was stated thus:

“[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.”

34. In this matter, the trial Judge ordered reinstatement of the respondent to the position of Head of Security. The applicant asserts that an order of reinstatement is inappropriate in public interest given the sensitive and delicate nature of the duties and responsibilities of the office; that trust and confidence between the applicant and respondent as employer and employee has dissipated; that the position of Head of Security no longer exists.

35. We are conscious that in an application for stay of execution, we must refrain from determining an issue that is a ground of appeal. On our part, we are *prima facie* convinced that the duties and responsibility of Head of Security at the applicant company is sensitive and delicate. Taking this into account, we are satisfied that public interest and balance of convenience dictates that the stay orders sought in the instant application should be granted.

36. For the foregoing reasons, we hereby issue an order for stay of execution of the judgment and decree of the trial court dated 10th April 2019. For avoidance of doubt, we hereby issue an order to stay reinstatement of the respondent and payment of the decretal sum pending the hearing and determination of the intended appeal. We further stay all proceedings before the Employment and Labour Relations Court (and the Deputy Registrar of the ELRC) pending the hearing and determination of the intended appeal.

37. The final order is that the Notice of Motion dated 29th April 2019 has merit and is hereby allowed with costs.

Dated and delivered at Nairobi this 19th day of July, 2019

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR