



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MURGOR & ODEK, J.J.A)

CIVIL APPLICATION NO 138 OF 2019 (UR 29/2019)

BETWEEN

TEACHERS SERVICE COMMISSIONAPPLICANT

AND

EZEKIEL MUCHESI.....RESPONDENT

(Being an application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the judgment of the Employment & Labour Relations Court at Nairobi (Wasilwa, J.) dated 4th October, 2018

in

Cause No 1001 of 2018)

RULING OF THE COURT

[1] By an award issued in a judgment delivered on 4th October, 2018 the *Teachers Service Commission* (applicant) was ordered to pay *Ezekiel Muchesi* (respondent) the following:-

“1. Unpaid salary during the period of interdiction being salary from 10th September, 2004 to 11th October, 2006=30,917 x 25m,onths = 777,925/=.

2. Damages for unfair and unlawful termination = 12 months x 30,917 = 371,004/=

TOTAL= 1,143,929/=

3. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.”

[2] Dissatisfied with the said orders, the applicant filed a Notice of Appeal on the 16th October, 2018 followed several months later, by the notice of motion dated 10th April, 2019 seeking principally an order of stay of execution of the aforesaid judgment and all consequential orders pending the hearing and determination of the intended appeal. The application is supported by the grounds stated in the body thereto, which are elaborated further by the matters deposed in the supporting affidavit sworn by *Mary Rotich* on 10th April, 2018. According to the applicant, the intended appeal is arguable because the applicant maintains that as the employer it had demonstrated through evidence that the respondent was dismissed from service for having engaged in professional misconduct for which he was liable to disciplinary action.

[3] Further, the applicant intends to challenge the conclusion by the learned Judge awarding the respondent Ksh.1,143,929 being unpaid salary during the interdiction period and damages for unfair termination; that the applicant was entitled to a salary during the interdiction period in accordance with the Code of Regulations for Teachers which every teacher ascribes to. On the nugatory aspect, the applicant posited that if the decretal sum is paid to the respondent and the appeal is successful, the applicant will never be able to recover the said sum from the respondent in the event that the appeal is successful. On the other hand the applicant being a Constitutional body established under **Article 237** with perpetual succession, it is capable of satisfying the decree whenever called upon to do so.

[4] During the plenary hearing, *Ms. Manyasa* learned counsel for the applicant underscored the same points about the appeal being arguable for reasons that there was an offence that was committed where the respondent was alleged to have embezzled funds leading to disciplinary

proceedings before a properly constituted disciplinary committee. That as demonstrated by the draft memorandum of appeal, the applicant intends to show that a charge under the criminal law is distinguishable from disciplinary proceedings for professional misconduct; that the Judge merely juxtaposed criminal investigations or lack thereof to a disciplinary proceeding between an employer and employee and thereby arrived at a wrong conclusion.

[5] Counsel for the applicant went on to submit that on the nugatory aspect, if the stay order is not granted and the entire decretal sum is paid to the respondent and the appeal were to be successful, the applicant would have no means of recovering the sum; that the respondent is no longer in the service of the applicant, his financial status or ability to refund the decretal sum is also not known therefore should the appeal be successful, it would be impossible to recover the amount paid out.

[6] **Miss. Mumbi** learned counsel for the respondent did not file a replying affidavit but responded on points of law. Counsel submitted that the present application was filed after an inordinate delay of about eight (8) months since the judgement was entered, therefore the applicant is not deserving of an exercise of discretion. Counsel further submitted that on the criminal proceedings which formed the basis of the disciplinary action, it was terminated on a *nolle prosequi* application and therefore there was no merit hearing. Moreover, it is instructive that the trial court recognised the respondent's employment was terminated according to the laid down procedure, but the reason for termination was found to be unfair. The award of salaries and damages was also reasonable and based on sound reasoning and the Judge cannot be faulted on her exercise of judicial discretion. Counsel was of the view that if this Court was inclined to grant an order of stay, the entire sum awarded and costs should be deposited in a secure account as an indication of seriousness that the applicant will file and prosecute the appeal without unreasonable delay.

[7] We have considered the application and deliberated on the submissions; for an applicant to succeed on an application for stay of execution under **Rule 5 (2)**

(b) of this Court Rules, he or she must satisfy us:-

i) That the appeal is arguable and not frivolous and

ii) That if the stay order sought is not granted the appeal will be rendered nugatory.

See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd - Civil Application No. Nai 157 of 2006 (unreported)** where the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [1988] KLR 838.)”

[8] We also need to throw a caution that an arguable appeal is not one that must necessarily succeed but one which merits to be argued fully before Court. Looking at the summary of the material that was presented before us, and the rival submissions made before us, we are satisfied that there are some arguable points that have been demonstrated for determination in the intended appeal. Among the issues raised by the applicant which we think merit consideration by this Court is whether the dismissal of the respondent based on the allegations that formed the basis of a criminal case that was dismissed was fair; whether the Judge juxtaposed the criminal proceedings into disciplinary proceedings between employer and employee and whether the award was justified. Therefore on whether the applicant has established an arguable appeal, our answer is in the affirmative.

[9] As regards whether the appeal, if successful, will be rendered nugatory, should the applicant succeed on appeal, it is plainly obvious to us that in the event that the applicant will be successful in the appeal, it is more probable than not that it may not be able to recover the sum paid out to the respondent for reasons that he is no longer in their employment and his ability to repay the same is also not known. It is instructive that he did not file any replying affidavit. On the other hand, the respondent deserves to be assured that the applicant will proceed to file the appeal expeditiously and, further that he be assured by the deposit of a security in the event the applicant's intended appeal fail or succeeds partially. Considering all the circumstances of this application and that the relationship is that of employer employee, the order that best commends itself to us is to grant stay of execution on condition that the applicant do deposit a sum of Ksh. 500,000 in an interest earning account in a reputable bank in the names of joint advocates within sixty (60) days. The applicant is also ordered to file an appeal within ninety (90) days from the date of this order and in default the order of stay will lapse. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

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

M. K. KOOME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. OTIENO ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR