



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & ODEK, J.J.A)

CIVIL APPLICATION No. 105 of 2018 (UR 87/2018)

BETWEEN

DIRECTOR GENERAL NATIONAL

INTELLIGENCE SERVICE..... 1st APPLICANT

THE HON. ATTORNEY GENERAL..... 2nd APPLICANT

AND

VINCENT KONGA CHELIMORESPONDENT

(Being an application for stay of execution of the judgment of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 6th March 2018 in ELRC Cause No. 256 of 2016)

RULING OF THE COURT

1. The respondent, **Vincent Konga Chelimo**, was recruited into the **Kenya Police Force** on 11th May, 1988. On 1st July, 1999, he joined the **National Security Intelligence Service** (NSIS) and was promoted to the level of Senior Intelligence Officer. On 18th January 2011, he was arraigned before the Chief Magistrate's Court and charged with the offence of theft contrary to **Section 275** of the Penal Code. Following his appearance in court, he was served with an interdiction letter dated 24th February 2011. On 13th November 2013, while the criminal case was on going, he was served with a suspension letter. By a ruling delivered on 17th December, 2014, the trial magistrate held that he had no case to answer. He was acquitted. Subsequently, on 30th June, 2015, he was served with a letter of dismissal terminating his services at the National Security Intelligence Service.

2. Consequent to his dismissal, the respondent filed a claim before the Employment and Labour Relations Court contending that his dismissal was an unfair termination of employment. He claimed *inter alia* compensation for unpaid leave, unpaid commuter allowance, unremitted pension, unremitted retirement medical scheme contribution and unconditional reinstatement as well as general damages for loss of employment and loss of earning capacity.

3. In response to the claim, the applicant herein (NSIS) averred that when the respondent took up the position of an intelligence officer, he agreed to abide by all regulations laid down for officers of the National Security Intelligence Service (NSIS). That a complaint of alleged theft was received against the respondent; he was notified and given particulars of the alleged offence; that he admitted to wrongfully withdrawing money from the Police SACCO; that a disciplinary panel found him guilty and he was dismissed from service. That by letter dated 30th June 2015, the respondent was notified of the decision to dismiss him from service; that he was informed of his right to appeal; that he appealed and his appeal was dismissed. That a valid, fair and procedural process was followed in arriving at dismissal of the respondent from service.

4. Upon hearing the parties, the trial Judge delivered a judgment dated 6th March 2018 *inter alia* reinstating the respondent to his employment. In ordering reinstatement, the learned Judge expressed herself thus:

“34. Of course, the respondents have submitted that they do not want the claim allowed. However, going by the fact that the claimant served the respondent for over 30 years and that he cannot easily get another job in a similar establishment at his age it is my finding that the only remedy which will put back the claimant in a position to compensate him for the wrong done to him is reinstatement. I therefore allow the claimant's claim and order immediate reinstatement of the claimant with no loss of benefits from the date of dismissal on 30th June, 2015.”

5. Aggrieved by the judgment of the trial court, the applicant filed a Notice of Appeal and has lodged the instant application seeking stay of execution of the judgment of the trial court.

6. At the hearing of the application, learned counsel Ms. Oyugi appeared for the applicant while learned counsel Mr. Hillary Sigei appeared for the respondent. Both relied on affidavits filed in this matter.

APPLICANT'S SUBMISSIONS

7. At the risk of repetition, by Notice of Motion dated 5th April 2018, the applicant seeks an order of stay of execution of the judgment of the Employment and Labour Relations Court delivered on 6th March 2018 pending the hearing and determination of an intended appeal. The Motion is supported by the grounds stated on the face thereof and in an affidavit dated 5th April, 2018 deposed by **Major General (Rtd) Phillip Wachira Kameru**.

8. The grounds in support are that the intended appeal is arguable as the Judge erred in issuing orders for unconditional reinstatement of the respondent; that the Judge erred by not considering that acquittal in a criminal case is not a bar to internal administrative processes being instituted against an employee; that the Judge erred in not considering **Rule 2.1 (xv), (xvii) and xx** of the **NSIS Disciplinary Rules and Regulations and Rule 10.1 (ii)** which stipulate that "even when an officer has been acquitted by a court of law, this shall not lead to his automatic reinstatement"; that the Judge erred in law by not considering the provisions of **Section 49 (4)** of the **Employment Act**; that the Judge erred in not taking into account the respondent had been paid his dues from 23rd February 2011 to 30th June 2015 amounting to Ksh. 5,842,800/= less a KCB loan of Ksh. 2,200,000/= and P.A.Y.E Ksh. 1,752,840/=.

9. Counsel cited the case of **Chris Munga N. Bichage -v- Richard Nyagaka Tongi & 2 others [2013] eKLR** to buttress the submission that it is not necessary for an applicant to demonstrate a certain number of arguable issues for the court to find that the intended appeal is arguable. The applicant stressed that the Judge erred in not giving a satisfactory reason why the respondent should be reinstated.

10. In further submissions, the applicant urged that the intended appeal shall be rendered nugatory if the stay order sought is not granted; that no prejudice will be suffered by the respondent if stay is granted; that there is no evidence the respondent will be able to reimburse and pay back the decretal sum in the event the intended appeal succeeds. Counsel cited dicta from the case of **National Industrial Credit Bank Limited -v- Acquinas Francis Wasike [2006] eKLR** where it was stated that once an applicant expresses concern that an appeal would be rendered nugatory because the respondent would not be able to pay back the decretal amount, the evidential burden shifts to the respondent to show what resources he has. The applicant submitted that in the instant matter, the respondent has not shown the assets that he has that will enable him pay back any sums paid to him.

RESPONDENT'S SUBMISSIONS

11. In opposing the instant application, the respondent in a replying affidavit averred that the applicant stands to suffer no prejudice if the stay order sought is not granted; that the intended appeal is not arguable and stands very little chance of success; that an order of reinstatement is immediately self-executory and the same is not amenable to an order of stay of execution pending appeal; that the trial Judge correctly made a finding that the respondent was not taken through fair administrative action; that the Judge did not err in making an order for reinstatement because reinstatement is one of the remedies provided for in law; that the applicant has not demonstrated any irreparable loss it stands to suffer if stay is not granted; that a stay order will prevent the respondent from enjoying the fruits of his judgment. Counsel cited the case of **Housing Finance Co. of Kenya Limited -v- Sharok Kheri Mohamed Ali Hirji & another [2015] eKLR** to support the submission that the presence of a strong ground of appeal does not by itself justify an order for stay of execution.

12. In concluding his submissions, the respondent's counsel urged that if this Court is inclined to grant an order for stay, the same should be a conditional stay wherein the appeal should be heard within a given timeline and the respondent should be paid at least half of the monies due and owing to him in form of salary arrears. In response to the submission that the respondent may not be in a position to refund any monies paid to him, the respondent urged that any monies paid to him will be for services rendered and the same will be compensation for work or services performed. Thus the intended appeal shall not be rendered nugatory for the monies paid will be compensation for services rendered.

ANALYSIS and DETERMINATION

13. We have considered the Notice Motion seeking stay of execution, the grounds in support and opposition thereto, submissions by counsels and the authorities cited. In **Stanley Kang'ethe Kinyanjui -v- 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"

14. 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.”

15. 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 -v- Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. -v- Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) -v- Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.

16. In the first instance, we consider if the intended appeal is arguable. As to whether the 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**)

17. On the face of the Motion and in the affidavit in support thereof, the applicant has itemized several grounds that it intends to urge in the appeal. For instance, the applicant submitted that the learned Judge erred in issuing an order for unconditional reinstatement of the respondent; that the Judge erred in not considering that an acquittal in a criminal case is not a bar to internal administrative processes being instituted against an employee. On his part, the respondent submitted that the judge did not err in making an order for reinstatement; that the trial judge correctly made a finding that the respondent was not taken through any administrative action. In this context, both the applicant and respondent have raised issues that are arguable. We thus find the intended appeal is arguable.

18. A stay order will not be granted unless it is *prima facie* established that the intended appeal shall be rendered nugatory if the order is not granted. 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. In **Sicpa Securities Sol. Sa -v- Okiya Omtatah Okoiti & 2 others [2018] eKLR**, this Court reaffirmed the principle that in considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.

19. In the instant application, the applicant submitted that he intended appeal shall be rendered nugatory if a stay order is not granted because the respondent has not demonstrated he is in a position to pay back any decretal sum paid to him. Conversely, the respondent submitted any monies paid to him will be and is in compensation for services rendered. The respondent further submitted the applicant has not demonstrated any irreparable harm or loss it will suffer if the stay order is not granted. Conversely, the applicant submitted the respondent has not demonstrated the prejudice he will suffer if the stay order sought is granted.

20. We have considered the rival submissions on the nugatory aspect. The applicant submitted that the respondent was dismissed in 2015 and he has been out of employment since then. That the position he occupied has already been filled by another person. That in these circumstances, it is impractical to reinstate the respondent. That the trust and confidence of employer employee between the applicant and respondent has waned. We are satisfied that the intended appeal shall be rendered nugatory if the stay order sought is not granted as the respondent has not *prima facie* demonstrated he is in a position to pay back any monies paid in satisfaction of the decree.

21. In arriving at our decision, we are guided by the Supreme Court dicta in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others [2014] eKLR** where it was stated that public interest is one of the considerations in granting an order for stay of execution of a judgment of court.

22. In the instant matter, the respondent occupied the position of Senior Intelligence Officer at NSIS. The trial judge ordered reinstatement of the respondent. The applicant submitted that the trust and confidence between the applicant and respondent as employer and employee has waned and reinstatement is an inappropriate remedy. That in any event, the position of Senior Intelligence Officer has been filled by another person.

23. 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 a Senior Intelligence Officer 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.

24. In penultimate, we are obliged to comment on the respondent’s submission that an order for reinstatement is self-executing and not amenable to a stay order by a court. There are numerous judicial decisions where orders for stay of execution of reinstatement has been made. It is thus incorrect to urge that a court cannot stay a reinstatement order.

25. For the foregoing reasons, we hereby issue an order for stay of execution of the judgment and decree of the trial court dated 6th March, 2018. 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. The applicant to file and serve the Record of Appeal within sixty (60) days of the date hereof. The upshot is that the Notice of Motion dated 5th April, 2018 has merit and is hereby allowed with costs.

Dated and delivered at Nairobi this 8th day of November, 2019

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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