



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & KIAGE, JJ.A)

CIVIL APPLICATION NO. 265 OF 2017 (UR 206/2017)

KENYA AIRWAYS PLC.....APPELLANT

AND

ALEX WAINAINA MBUGUA.....RESPONDENT

(An application for stay of execution of the Judgment and Decree of
the Employment & Labour Relations Court of Kenya at Nairobi

(**Monica Mbaru, J.**) dated 7th day of November, 2017 in

ELRC No. 430 of 2013)

RULING OF THE COURT

The applicant “**Kenya Airways PLC**” took out a motion on notice dated 13th November, 2017 against the respondent “**Alex Wainaina Mbugua**” seeking that this Court orders or grants stay of execution of the judgment and decree of the Employment & Labour Relations Court “**ELRC**” delivered on 7th November 2017 in **Cause No. 430 of 2016- Alex Wainaina Mbugua v Kenya Airways Ltd** pending the hearing and determination of an intended appeal against the said judgment and decree. The respondent had been in the employment of the applicant as a Group Finance Director until 19th January, 2016 when his employment was terminated. Following the termination the respondent instituted a claim against the applicant seeking a declaration that termination of his employment was unfair, payment of terminal benefits and dues or in the alternative, reinstatement to his previous position.

After the plenary hearing, the Judge found and declared the respondent’s termination of employment unfair and ordered that he be reinstated to his position as the Group Finance Director. In the alternative, the Judge ordered that the respondent be paid salary for 3 years and compensation amounting to 12 months’ salary at his last gross salary. At the time of his termination, the respondent was earning a gross salary of Kshs. 2,950,132.56 per month. Aggrieved by those findings, the appellant is desirous of mounting an appeal before this Court and has to that end filed a Notice of Appeal dated 7th November 2017. Before the filing, hearing and determination of the intended appeal, the applicant has filed the present application.

The application is expressed to be brought pursuant to rule **1 (2)** and **5 (2) (b)** of the Court of Appeal Rules and is premised on the grounds that the applicant has an arguable appeal with good chances of success and that if this Court refuses to grant the stay order, the applicant will suffer substantial loss and irreparable damage thus rendering the intended appeal nugatory. **Mr. Sebastian Mikosz**, the Chief Executive Officer and Managing Director of the applicant swore an affidavit dated 13th November 2017 in support of the application. In the affidavit, he deposes that the intended appeal raises serious and pertinent issues of fact and law and is not frivolous. As proof, the applicant has exhibited a draft Memorandum of Appeal showing it intends to impugn the learned Judge’s determination on some 20 grounds. The applicant states that matters affecting the applicant are of great public interest as it is a public company. Further, that it was currently implementing a complex and delicate restructuring process which involves numerous banks and other parties which process will be jeopardized by the execution of the judgment.

The deponent explained that the respondent had tried to return to work pursuant to the judgment and sought payment of his unpaid salary. That the respondent was however sent on a 21 days leave from 8th November 2016 and had instituted contempt of court proceedings against the applicant for failing to comply with the terms of the judgment which had stipulated that he reports back to work on 8th November 2017 for allocation of duties. He deposed further that the applicant was unsuited to hold the position of Group Finance Director and had in fact scored the lowest compared to other directors according to a Board Evaluation Report. That given the acrimonious relationship of the parties,

complete lack of trust and confidence in the respondent, the applicant stood to suffer grave loss and damage that cannot be quantified if the respondent was reinstated to his position. This, he swore, was because the respondent would access sensitive and confidential information and so, according to the applicant it would be impractical to reinstate him. He stated that the entire top management has now changed and the reintroduction of the respondent into the management of the applicant would interfere with the '*philosophy and ethos of management*' that the deponent is seeking to inculcate in the applicant.

More relevant to this application, the applicant states that if the respondent was paid salary for 3 years as well as compensation for 12 months as ordered by the Judge, then he would be paid a colossal sum of Kshs. 141, 606,363/- exclusive of the costs of the suit. The applicant was apprehensive that the amount could not be recovered from the respondent in the event that it was paid to him and the appeal eventually was successful. According to the applicant, therefore, the intended appeal would be rendered nugatory unless the stay order sought was granted.

The respondent on his part swore a lengthy affidavit in opposition to the application. He went to great lengths to trace the events that led to his termination and what transpired even after. He gave reasons why he should not have been fired and how the termination process itself was unfair or illegal. He denied poor performance on his part as alleged. According to the respondent, a stay order would in effect end his career since by the time the intended appeal is heard and determined, his position would have been filled by someone else. He denied that the applicant had demonstrated substantial loss and irreparable damage it would suffer by him being reinstated. He stated that he had not earned a livelihood since December 2015 when he was laid off and a stay order would cause undue financial hardship on him and his dependants.

The respondent deposed further that the intended appeal is frivolous, malicious and does not raise any serious issues of law and fact. He stated that the appeal is not arguable since the draft grounds of appeal were adequately dealt with by the trial Judge in her judgment. The respondent contended that whereas the applicant had a right of appeal, he on the other hand had a right to enjoy the fruits of his judgment and the appeal therefore ought to be heard and determined when he is in office. Pertinently, the respondent raises the issue that the law stipulates that the time limit within which an employee can be reinstated is three years and if the stay order was granted, it would mean his reinstatement would then have become null and void by operation of law. According to the respondent, the appeal will not be rendered nugatory if he was reinstated to his job since in the unlikely event of the appeal succeeding then he would be bound by the judgment and decree and the applicant would be free to recruit his replacement. In the meantime, he stated that he had a right to work and earn a living and be protected from unemployment as per Article 23 of the Universal Declaration of Human Rights.

Contrary to what was advanced by the applicant that his return to work would upset the restructuring process currently being pursued and undertaken by the applicant, the respondent was of the view that the applicant ought to have tendered such evidence before the trial court for consideration. Furthermore, he deposed that he started the process of restructuring and considering his career experience, it was in the applicant's best interest that he be returned to the airline without further delay. The respondent went to great lengths to demonstrate how the Board Evaluation Report showed he had performed better contrary to the allegations by the applicant.

During the hearing of the application, learned counsel **Mr. Ohaga** appeared on behalf of the applicant submitted that the memorandum of appeal raises arguable points and the intended appeal was not therefore frivolous. Further, that the respondent was invited for a performance review but upon failure to attend, his services were terminated. He reiterated that the intended appeal would be rendered nugatory or a mere academic exercise if the respondent was paid his dues amounting approximately to Kshs. 141 million but was unable to repay in the event the appeal was successful. According to counsel, the respondent has no means to reimburse the amount. Counsel submitted that the applicant was in the process of restructuring and was not in a position to pay the afore-stated amount. On the respondent's reinstatement to the position of Group Finance Director, counsel submitted that he was completely unsuited for the position and alleged that it was during his tenure that the applicant suffered huge financial losses. He added that the appellant was also a potential suspect in the massive theft and loss that the applicant suffered during his tenure in the office.

Learned counsel, **Mr. Richard Kamotho** appeared for the respondent and submitted in opposition to the application. Counsel contended that the intended appeal had no chance of success as it was frivolous and without substance. He argued that the intended appeal will not be rendered nugatory unless the stay orders are granted since the applicant was interested in being reinstated. As such and according to counsel, the question of compensation does not arise and the applicant would not suffer if the respondent is reinstated. In the same vein, counsel argued that the question of trust or lack of it does not arise. In his view, the authorities relied on by the applicant in support of the application were distinguishable as they involved massive theft of funds which was not the case presently as the applicant committed wanton violation of the respondent's rights.

The sole issue for consideration is whether the applicant deserves or has proved there is need to stay the execution of the judgment and decree. This Court is being called upon to exercise its discretionary powers under rule 5 (2) (b) of the Court of Appeal Rules. As already stated, after a plenary hearing, the Judge declared the respondent's termination by the applicant unfair and ordered that he be reinstated to his position as Group Finance Director without loss of benefits and or entitlements within 30 days of the delivery of judgment. In the alternative, the learned Judge ordered the respondent to pay the respondent salaries due for 3 years and compensation amounting to 12 months' salary at the last gross salary applicable on 19th January 2016 when he was terminated. The applicant calculates and gives the amount it would pay, in the alternative, to the respondent's reinstatement as totaling approximately Kshs. 141, 606, 363 exclusive of costs of the suit.

Seeking to enjoy the fruits of his litigation, the respondent reported for duty on 8th November 2017, but was however sent on a 21-day immediate leave. Five (5) days later, on 13th November 2017, the applicant filed a Notice of Appeal under rule 75 of the Court's rules evidencing its intention to appeal against the entire decision of the learned Judge and invoked the jurisdiction of this Court. Now in applications of this nature, what suffices or what an applicant is tasked to do is prove what is commonly referred as the two limbs. As the first limb, the applicant must prove, that the intended appeal is not frivolous or, put in another way, the applicant must show that it has an arguable appeal. As to the second limb, the applicant must show that if the stay orders are not granted by Court, the intended appeal will be rendered nugatory and would be in vain. Those two limbs are well settled and have been restated many times in this Court's decisions. See for instance, **Madhupaper International Limited v Kerr [1985] KLR 840**, **Githinji v Amrit & Another [2004] eKLR**, **National Bank of Kenya Limited & Another v Geoffrey Wahome Muotia [2016] eKLR**.

To satisfy the first limb the applicant has annexed and exhibited in its application a draft Memorandum of Appeal with grounds upon which it intends to impugn the trial courts judgment. For an appeal to be said to be arguable, the applicant is required to show that the intended

appeal raises at least one arguable point. It has been held that an applicant does not have to establish a multiplicity or a plethora of arguable points to satisfy this ground, even a single point of law will suffice. See **Naivas Company Limited v Paul Thuku Gachora [2017] eKLR**. In the prosecution of its application, the applicant has gone off at a tangent and raised issues which for purposes of this application are irrelevant and which are mainly the preserve of the main appeal. Such would include attempts to justify its position that the respondent was fairly terminated or was not well suited for the position he was employed for. Issues to do with the applicant's lack of confidence or trust on the respondent's part go to the merits of the intended appeal and do not fall for consideration by this Court. However, the applicant has stated that it intends to challenge the trial court's exercise of its jurisdiction. Through its draft Memorandum of Appeal, the applicant intends to fault the court on the basis that it exceeded its conferred jurisdiction under section 49 of the Employment Act, 2007 by purporting to award the respondent salaries due for 3 years.

By awarding the respondent 3 years' salary compensation, it indeed would be an arguable point on appeal whether the learned trial judge exceeded her jurisdiction. Though that one arguable ground would suffice for purposes of showing the appeal is arguable, the applicant indicates that it also intends to impugn the Judge's failure to find that the respondent's deliberate refusal to attend before Board Evaluation Committee for assessment was a gross insubordination that necessitated or justified the respondent's termination. Further, that the trial judge erred in ordering reinstatement of the respondent and ought to have taken into consideration the practicability of the respondent's return to his position. After all, the applicant has argued that it was in the process of restructuring and would be greatly prejudiced by the respondent's reinstatement. All these are arguable points. It should be remembered that an arguable point is not one that will necessarily succeed on appeal; just one that is not frivolous.

Having found so, will the intended appeal be rendered nugatory if this Court does not grant a stay as prayed? In its many averments, the applicant has only raised the relevant ground, that were it to pay the respondent approximately Kshs. 141,606,363 as the decretal amount, the latter, whose present earning or income capacity is unknown might fail to refund the same to it in the event the intended appeal was successful. In his response to the application, the respondent has not challenged that deposition, instead the respondent has focused on the merits of the intended appeal and contended that it may have no merit or why he was still fit for the job and ought to be reinstated. He has not sufficiently replied to the averment that he may not be able to reconstitute if money was paid out to him in the event the appeal is determined in the applicant's favour. In **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR** it was observed that where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim.

The decretal sum is not a small amount, it's a colossal sum and therefore one understands the applicant's apprehension or argument that the respondent might not be in a position to repay the amount. The respondent has not established his current financial position. It is also apparent that the respondent is keener on executing the trial court's order of reinstatement rather than pursue compensation which was granted as an alternative. The respondent is of the view that reinstatement to his position would be untenable after three years since his termination in light of section 12 (3) (vii) of the ELRC Act which empowers the court to order reinstatement of an employee within three years of dismissal. According to him therefore, a stay order would lock him out of reinstatement. On the other hand, the applicant demonstrated the impracticability of reinstating the respondent based on the restructuring currently being undertaken, lack of trust and confidence, and lastly, the fact that he is a potential suspect in an ongoing criminal investigations.

These factors need to be weighed against each other since it is settled that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause. However, this Court is also bound to ensure that the intended appeal will not be in vain. The nugatory aspect must also be considered. It was held in **CFC Stanbic Bank Limited v John Kung'u Kiarie & Dyer &**

Another [2016] eKLR that, if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay, on terms. In **Nation Newspapers Limited v Peter Baraza Rabando [2007] eKLR**, this Court in determining whether or not to issue a stay of execution observed as follows,

“....The respondent's is a money decree. In Kenya Shell Limited v Kibiru & Another [1986] KLR 410, this Court held that normally a stay of execution would not issue in money decrees. However, recent decisions of the Court are to the effect that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory, and the court granted a stay in those cases.”

This Court's core mandate is to ensure justice to both parties. The remedy sought is also equitable and will therefore be granted only in deserving cases. In determining the application, the Court's discretion is unfettered. Ultimately, the application will have to fall or succeed on its own peculiar set of facts and circumstances. In **Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227** this Court in deciding whether to grant a stay observed as follows;

“For an application under rule 5(2) (b) to succeed, the Applicant had to satisfy the Court that the appeal was arguable, that is, that it was not frivolous, and that if the order were not granted, the appeal, were it eventually to succeed, would be rendered nugatory.

In determining the second limb of the test, the court in Oraro and Rachier Advocates v Co-operative Bank of Kenya Limited (supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case (Oraro and Rachier Advocates v Co-operative Bank of Kenya (supra) explained and followed). Rule 5(2) (b) conferred on the court original jurisdiction based on the exercise of discretion by the judges of the court. In the exercise of that discretion, certain principles had been developed to guide the court, the scope of which took account of evolving circumstances as they arose in various cases. In this instance, the circumstances showed that it would be too onerous to require the liquidator of the Applicant to deposit the money in court. A refusal to grant a stay would cause the Applicant such hardship as would be out of proportion to any suffering the respondent might undergo while awaiting the hearing and determination Applicant's

appeal.”

In the circumstances of this case, a stay of execution ought to issue in favour of the applicant. This will ensure that the appeal is not rendered nugatory in the event that it succeeds and the respondent is unable to refund the decretal amount.

On the question of reinstatement, we note that since the respondent was terminated in December 2016, three (3) years will lapse at the end of 2018 and so the order of reinstatement will still be available to the respondent if the appeal proves successful. In our view, the appeal will be rendered nugatory if the order of reinstatement is also stayed since its viability will be questioned in the intended appeal. The appeal should however be heard and determined on a priority basis to ensure that the respondent, if he succeeds, is not locked out of reinstatement by operation of law. The application is thus allowed in terms of prayer 2 of the notice of motion.

Costs shall abide the outcome of the main appeal.

Dated and delivered at Nairobi this 26th day of January, 2018.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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

DEPUTY REGISTRAR