



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO.60 OF 2016 (UR.47 OF 2016)

BETWEEN

KENYA COMMERCIAL BANK LIMITED..... APPLICANT

AND

ROBERT KIMUTAI KORIR.....RESPONDENT

(Being an application for stay of execution of the judgment of the Industrial Court of Kenya at Nairobi (Abuodha, J.), dated 23rd October, 2015

in

Industrial Court Cause No.677 of 2013)

RULING OF THE COURT

1. This ruling is in respect of an application brought under **rules 5, 41, 42, 49 and 75 of the Court of Appeal Rules, 2010**, where the applicant is seeking a stay of execution of the judgment delivered on 23rd October, 2015 by Abuodha, J. and all consequential orders thereto, pending hearing and determination of an intended appeal.
2. In the judgment sought to be appealed from, the respondent was awarded eight months' salary as compensation for unfair dismissal, amounting to Kshs.898,542/=.
3. In his memorandum of claim before the Employment and Labour Relations Court at Nairobi, the respondent claimed that in 1998 he was employed by the applicant as a teller at a salary of Kshs.16,579/= which was increased from time to time and stood at Kshs.99,838/= as at June 2010 when he was dismissed from his employment.
4. The respondent further stated that the applicant dismissed him when he failed to resume duty after the end of his leave of absence; that the reason for failure to resume duty was as a result of illness which was stress induced.
5. In its defence, the applicant stated that the respondent applied for leave, which was approved to run from 3rd May 2010 to 17th May 2010; on 18th May, 2010 the respondent failed to return to work as

expected without any explanation; on 12th June 2010 the applicant wrote to the respondent about his prolonged absence from duty without lawful excuse and required him to report to the office not later than 16th June, 2010, failing which he would be considered to have absconded duty and would be removed from the bank's payroll.

6. As there was no response to the aforesaid letter, on 17th June 2010 the applicant wrote to the respondent and notified him of removal of his name from the bank's payroll.

7. In July 2010 the respondent appealed to his employer against the termination of his employment, stating that his failure to resume duty after the end of his leave was as a result of sickness. The respondent attached a medical report in support of his appeal. That notwithstanding, the applicant was unmoved. Its Appeals Committee deliberated on the grounds of the appeal and found no reason to warrant a change of the decision that had been made against the respondent.

8. In the impugned judgment, the learned judge held:

“12. The court is of the view that whereas the respondent had valid and justifiable reason for terminating the claimant's services initially, when it became known that he could have possibly suffered depression, his appeal ought to have been considered in that light. For this reason the court finds the refusal to reconsider the claimant's dismissal on appeal to have been unfair.

13. In conclusion, the court reduces the claimant's termination on account of desertion to normal termination as per his contract of service with the consequence that he will be paid salary in lieu of notice as per his contract of service and any other exit benefits and allowances he would have been entitled to if his services were terminated normally. The court further awards the claimant eight month's salary as compensation for unfair dismissal.”

9. In its application before this Court, the applicant, through its learned counsel, Ms Kanyiri, argued that the intended appeal is arguable and cited several grounds, among them that:

(a) the learned judge erred in law in awarding compensation to the respondent despite holding that the applicant had a valid and justifiable reason for terminating the respondent's employment; and for reducing the summary dismissal to normal termination where the respondent would only have been entitled to notice pay and not compensation;

(b) the judgment is in contravention of sections 49(4)(b) & (d) and 50 of the Employment Act, 2007;

(c) where a party makes an express admission of misconduct by way of desertion of duty, awarding him compensation is irregular and unlawful.

10. The applicant's learned counsel further submitted that unless an order of stay of execution is granted as prayed, the intended appeal would be rendered nugatory because the respondent's means or ability to refund the sum of Kshs.893,542/= is unknown.

11. Lastly, counsel indicated that the applicant was ready and willing to deposit the decretal sum in an interest earning account in the joint names of counsel for both parties pending determination of the intended appeal.

12. The respondent opposed the application. Through Mr. Mbaya, his learned counsel, the respondent contended that the intended appeal is not arguable. He denied having made any express admission of misconduct by desertion of duty.

13. The respondent further stated that the applicant wrongly refused to admit medical evidence from his doctor, despite the fact that the medical report had not been challenged.

14. Regarding the amount that had been awarded to him, the respondent stated that it was not inordinately high; that the applicant is not in a position to make comments about his ability to repay the money; rather, the applicant should demonstrate its allegations about the respondent's inability to repay the money. The respondent urged this Court to dismiss the application.

15. We have considered the application, the affidavits sworn by the parties, and the submissions by counsel. The principles governing the exercise of this Court's jurisdiction in an application of this nature are now well settled. Firstly, the applicant has to demonstrate that the appeal or intended appeal is not frivolous, and that the appeal, if successful, shall be rendered nugatory. See **GITHUNGURI V JIMBA CREDIT CORPORATION LTD [1988] KLR 838**.

16. On the first limb regarding arguability of the intended appeal, this Court has severally held that the demonstration of existence of even one arguable point will suffice in favour of the applicant. See **AHMED MUSA ISMAEL V KUMBA OLE NTAMORUA & 4 OTHERS [2014] eKLR**. Looking at the intended grounds of appeal, and particularly the sequence of events that led to dismissal of the respondent from his employment, we do not entertain any doubt that the appeal is arguable.

17. Turning to the second limb, that is, whether the intended appeal, if successful, would be rendered nugatory in the event that the orders sought are not granted, the applicant stated that the respondent's means are unknown; that the respondent is unemployed, and that the decretal sum is substantial and the respondent may be unable to repay it.

18. The respondent's counsel confirmed that the respondent is unemployed and has no regular income. However, in his affidavit in opposition to the application, the respondent argued that it was not up to him to demonstrate his ability to repay the decretal sum in the event that the appeal is successful; but for the applicant to prove that the respondent is not a person of means.

19. The position taken by the respondent is not correct in law. Once an applicant has, on reasonable grounds, stated that a respondent has no ability to repay an amount of money in dispute or stated that the respondent's financial status is unknown, the evidential burden shifts to the respondent to show that he is a person of means and that he would be in a position to refund the money if it is paid out to him and the appeal succeeds. See this Court's decision in **ABN AMRO BANK N.V. V LE MONDE FOODS LIMITED [2002] eKLR**, where the Court held:

"...all an applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal were to succeed. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on"

20. The respondent, having admitted that he is unemployed, and having failed to demonstrate his ability to repay the decretal sum, if paid out to him and the appeal succeeds, we find that the intended appeal, if successful, shall be rendered nugatory as the respondent may not be able to repay the decretal sum. Consequently, we allow this application in terms of prayer 5 thereof and order stay of execution of the trial court's judgment dated 23rd October, 2015 and all its consequential orders pending the hearing and determination of the intended appeal.

21. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 19th day of January, 2018.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR