



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J.

MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 266 OF 2017 (UR 207/2017)

BETWEEN

NATIONAL OIL CORPORATION OF KENYA.....APPLICANT

AND

MABEL KIBORE.....RESPONDENT

(An application for conservatory orders and stay of execution of the decision of the court in Employment & Labour Relations Court in Nairobi Cause Number 1993 of 2017 pending the lodgment, hearing and determination of the intended appeal of the decision of Hon. Justice Nzioki wa Makau delivered on 8th November, 2017

in

ELRC NO. 1993 OF 2017)

RULING OF THE COURT

Background

1.This is a Notice of Motion dated 14 November, 2017 brought the under provisions of **Section 3A** of the **Appellate Jurisdiction Act** and **Rule 5(2) (b)** of the rules of this Court. The application has been brought by the intended appellant, **National Oil Corporation of Kenya**, (the applicant), against **Mabel Kibore**, (the respondent). The application seeks an order of stay of execution of the Ruling of the Employment and Labour Relations Court (ELRC) at Nairobi delivered on 8th November, 2017 pending the lodgment, hearing and determination of the intended appeal.

2.The application is premised on the grounds set out on the face of the application and on the averments deponed in the supporting affidavit of **Pauline Kimotho**, the applicant's Corporation Secretary. The application is opposed by way of replying affidavit sworn by the respondent on 8th December, 2017.

3. A brief background of the application is that on 18th May, 2015 the respondent was employed by the applicant as the Head of Human Resource and Administration. On 3rd July, 2017 the Acting Chief Executive Officer (CEO) of the applicant, MaryJane Mwangi, sent an internal memo to the respondent advising her that her responses on various queries raised by the Ag. CEO had been received and considered but that they were found not to be satisfactory. Consequently, on 30th

May, 2017 the applicant's Board of Directors resolved that the respondent should appear before the Human Resources Board Committee for a disciplinary hearing. On 2nd August, 2017 the respondent attended the disciplinary hearing and on 3rd August, 2017 she received a letter terminating her employment forthwith. On 11th August, 2017, the respondent lodged an appeal against the decision of the Human Resource Board Committee to the applicant's Board of Directors. The appeal was dismissed on 23rd August, 2017.

4.Aggrieved by that decision, the respondent filed a notice of motion dated 5th October, 2017 in the Employment and Labour Relations Court (ELRC) seeking *inter alia* an order of reinstatement. Upon hearing the application, the ELRC allowed the respondent's prayer for reinstatement with costs.

5. Aggrieved by that decision, the applicant filed a Notice of Appeal against the decision of the ELRC and also filed the instant application before us.

Submissions by Counsel

6. At the hearing, learned counsel, **Mr. Ouma**, appeared for the applicant. In his submissions, he highlighted the two principles to be considered for grant of orders under **Rule 5(2)(b)** of this court's rules (the Rules). That is that the applicant is required to demonstrate that it has an arguable appeal and that the appeal will be rendered nugatory if the orders sought are not granted and the appeal eventually succeeds.

7. Regarding whether the appeal is arguable, counsel referred us to the draft memorandum of appeal. Elaborating on the arguability of the intended appeal, counsel submitted that it is arguable whether the learned judge in allowing reinstatement at an interlocutory stage failed to comply with the provisions of

Section 49 of the Employment Act

Counsel further submitted that a further arguable ground is whether the Applicant's Board of Directors had power to entertain the respondent's appeal.

8. On the nugatory aspect, counsel submitted that the appeal will be rendered nugatory in the event the appeal succeeds and the order reinstating the respondent is not stayed. Counsel argued that as the head of Human Resource and Administration, the respondent is in charge of the Human Resource function of the applicant in the entire country; that the relationship between the applicant and respondent had irredeemably broken down; that if the applicant was successful in its appeal, its operations throughout the country will be affected by the reinstatement of the respondent without any remedy; that even before the impugned order was issued, the applicant had recruited an officer to the position of Head of Human Resource and Administration and the officer has already taken up the position.

9. In response, learned counsel for the respondent, **Mr. Mwaura**, opposed the application and referred to the replying affidavit filed on 8th December, 2017.

Counsel contended that there is no arguable appeal; that the reinstatement order is valid as it was made in compliance with the Employment Act, the Public Service Act, the Applicant's Human Resource Policy Manual and the state Corporations Act. On the nugatory aspect, counsel argued that the appeal will not be rendered nugatory as the respondent was appointed on merit and will discharge her duties effectively pending the hearing and determination of the intended appeal.

Determination

10. We have considered the application, the affidavits, the submission by counsel, the authorities cited and the law. The jurisdiction of this Court in applications under rule 5(2)(b) of the Court of Appeal Rules is original and discretionary. In the case of **Stanley Kang'ethe Kinyanjui Vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012**, this Court stated inter alia;

"That in 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." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."

See **Housing Finance Company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another [2015], eKLR**

11. We have applied the above principles to the present circumstances. In considering whether the appeal is arguable, we have considered the application, affidavits in support, the applicant's arguments and the draft memorandum of appeal.

This Court, in the case of **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** addressed what is considered to be an arguable appeal thus,

"He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision"

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicant. (See **Kenya Railways Corporation v. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No. NAI.256 of 2013**)

12. The memorandum of appeal and the submissions made by learned counsel for the applicant raised some arguable points.

These include inter alia whether in the circumstances of this case, the learned judge erred in directing the applicant to reinstate the respondent at an interlocutory stage considering the provisions of **Section 49 (4) of the Employment Act**.

In the case of **National Environment & Management Authority v Edward Juma Masakha [2015] eKLR**, this Court held that the issue of reinstatement of an employee is an arguable point.

13. This Court is minded to avoid going into the merits of the intended appeal, as this will be the preserve of the bench that will hear the main appeal. We are satisfied that the applicant has an arguable appeal as the existence of only one arguable point is sufficient.

14. On the nugatory aspect, as this Court said in **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**, the factors which could render an appeal nugatory have to be considered within the circumstances of each particular case and that in doing so, the Court is bound to carefully weigh the conflicting claims of both parties and each case must be determined on its own peculiar facts. In the circumstances of that particular case, the Court said at page 237 paragraph (e);

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

15. Counsel for the applicant submitted that the relationship between the applicant and the respondent has irredeemably broken down and that if the appeal succeeds, the operations of the applicant will have been affected without a remedy. At paragraph 13 of the affidavit supporting the application, Ms Pauline Kimotho the applicant’s Corporation Secretary averred that in the event that the appeal succeeds the respondent would not be in a position to refund the amounts paid to her as salary. In the case of **National Environment & Management Authority V. Edward Juma Masakha (supra)**, this court held as follows on the nugatory aspect:-

“As to whether the appeal may be rendered nugatory in the event it succeeds yet the stay order was refused, we hold that recovery of any sums disbursed to the respondent may entail separate, long and costly litigation. And besides, if reinstatement is not put on hold at this point, if effected then the substratum of the appeal will be gone.”

16. Further, we are guided by the case of **Kenya Revenue Authority V. Sidney Keitany Changole & 3 Others [2015] eKLR** where this Court stated:-

“If an order for reinstatement was given, and then the appeal is allowed later, this would be very disruptive to both the applicant and the respondents. This Court has a duty to balance the interests of both parties and arrive at a fair decision. See Oraro & Rachier Advocates –vs- Co-operative Bank of Kenya Ltd [1999] 1 EA 236.”

17. Accordingly, the applicant has satisfied the two limbs of Rule 5(2)(b) of the Rules of this Court and the application therefore succeeds.

18. In the circumstances of this case, we are satisfied that the reinstatement of the respondent to the same position would render the appeal, if successful, nugatory. We take cognizance

of the fact that the applicant has recruited another officer who is occupying the respondent’s former position. It is therefore imperative that we issue the orders sought pending the determination of the intended appeal to avoid duplication of roles and safeguard utilization of public funds.

19. The upshot of the above is that we allow the applicant’s Notice of Motion dated 14th November, 2017 and stay the execution of the order for reinstatement of the respondent pending the determination of the appeal. Costs of this application to abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 23rd day of February, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR