



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL (APPLICATION) NO. 61 OF 2017**

**BETWEEN**

**LAKE BASIN DEVELOPMENT AUTHORITY ..... APPLICANT**

**AND**

**DR (ENG) KABOK PETER AGUKO ..... RESPONDENT**

*(An application for stay of execution pending the lodging, hearing and determination of the appeal from the judgment of the High Court of Kenya, Employment and Labour Relations Court at Kisumu, (Maureen Onyango, J.) dated 23<sup>rd</sup> February, 2017*

**in**

**ELR CAUSE NO. 188 OF 2016)**

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**RULING OF THE COURT**

[1] This is an application by **Lake Basin Development Authority (LBDA)** under **Rule 5(2) (b)** of the **Court of Appeal Rules** for an order that the execution of the judgment and decree of the Employment and Labour Relations Court (ELRC) delivered on 23<sup>rd</sup> February, 2017, be stayed pending the hearing and determination of the appeal.

[2] The relevant facts to this application are briefly as follows:-

[2.1] The applicant had employed the respondent since 1989. By 2011, the respondent had risen to the position of the Managing Director (M.D). In 2011, the applicant employed the respondent as Managing Director on a three year contract which expired on 5<sup>th</sup> January, 2014. On 6<sup>th</sup> January, 2014, the contract was renewed for a further three years but the renewed contract was dated 7<sup>th</sup> April, 2014. The termination date of the contract was on 5<sup>th</sup> January, 2017. On gratuity, the renewed contract provided in clause 8.3:

**“The CEO/MD shall qualify for one-off gratuity calculated at the rate of 31% of the annual basic salary. The gratuity shall be subject to tax. In the event of termination**

**from the Authority due to gross misconduct as provided for in the Employment Act, gratuity shall not be payable. In the event the CEO/MD is on secondment or is a member of some other retirement benefits scheme, he may opt to continue with the retirement benefit scheme to which he is already a member.”**

[2.2] On 8<sup>th</sup> July, 2015, the respondent was interdicted by the Ministry of Environment, Water and Natural Resources (Ministry) following the recommendations of the Board of Directors of LBDA. The interdiction was based on allegations of malpractices by the respondent. After conducting investigations, LBDA by a special board meeting held on 22<sup>nd</sup> July, 2015 recommended that the services of the respondent be terminated by summary dismissal. The decision of the board of Directors of LBDA was communicated to the Ministry by a letter dated 23<sup>rd</sup> July, 2015. This decision was communicated to the respondent.

[2.3] By a special full board meeting of LBDA held on 1<sup>st</sup> and 2<sup>nd</sup> October, 2015, it was recommended that the interdiction of the respondent be lifted and the respondent’s contract be pre-determined and he be paid the balance of unexpired term from the date of pre-determination. By a letter dated 19<sup>th</sup> October, 2015, the Cabinet Secretary in charge of the Ministry communicated the decision to terminate the contract and stated:

**“The Authority will pay you the balance of your unexpired term on the contract from the date of pre-determination on 1<sup>st</sup> October, 2015 up to and including 5<sup>th</sup> January, 2017 being the date of expiry of the pre-determined contract. This will be subject to your clearance of any liabilities arising thereof.”**

[3] By a statement of claim dated 30<sup>th</sup> June, 2016, the respondent averred that the allegations which led to disciplinary proceedings were a witch hunt but was happy to opt to take compensation in lieu of his continued position as Managing Director. He claimed that LBDA had failed to pay his terminal dues in accordance with the letter from the Cabinet Secretary of the Ministry and claimed a total of Shs. 13, 622, 211/70 as itemised in the statement of claim.

Five items formed the bulk of his claim namely:-

Salary from October, 2015 to 31<sup>st</sup> December, 2016 being 15 months’ salary at Shs. 390,000/= per month which he computed at Shs. 5,850,000/=; gratuity for 21 months on 2<sup>nd</sup> contract which he computed at Shs. 1,627,000/=; gratuity at 31% of basic pay from 1<sup>st</sup> October, 2015, to 5<sup>th</sup> January, 2017, computed at Shs.1,175,442/= and Provident Fund contributions by employer from October, 2015 to December, 2016 at Shs. 50, 531/= per month computed at Shs. 755,263,158 /=- and commuter allowance for 15, 167 months at 60,000/= per month computed at Shs. 919,000/=.

[4] The applicant LBDA filed a response to the claim. It contended that the full board meeting of LBDA held on 4<sup>th</sup> and 8<sup>th</sup> April, 2016 had considered the recommendation of the Cabinet Secretary of the Ministry in the letter dated 19<sup>th</sup> October, 2015, and resolved that the payment for the balance of the unexpired term of the contract was not supported by law, and that, the terminal dues payable to the respondent had been computed at Shs.2,509,755/20. The resolution of the board of directors of LBDA of the meeting of 4<sup>th</sup> and 8<sup>th</sup> April, 2016 formed part of the applicant’s evidence. The board made findings, *inter alia*, that as the respondent was summarily, dismissed it would be illegal to pay him up to January, 2017, and that he would be paid his dues strictly on terms of the contract.

[5] The ELRC allowed the respondent’s claim in the sum of Shs. 9,196,742/= plus Shs.194,339/= for a trip to Germany plus interest and costs. The ELRC further made a finding that LBDA could not review the decision of the Cabinet Secretary that the respondent be paid salary for the unexpired term of the contract and it was estopped from derogating from the terms of the letter. As for the payment of gratuity, the Court made a finding that the LBDA could not deduct Shs. 2,698,240/= as retirement benefit already received from the respondent’s terminal benefits.

The applicant has already filed **Civil Appeal No. 61** of 2017 against the judgment.

[6] The application is supported by the affidavit of **Dr. Tera**, the Acting Managing Director of the applicant. The applicant further relied on the written submissions and the authorities in support of the application which written submissions were highlighted by **Mr. Amondi**, the learned counsel for the applicant. **Mr Nyawara**, learned counsel for the respondent opposed the application and made oral submissions.

[7] The applicant is required to demonstrate *inter alia* that the appeal is arguable and that unless the application is allowed, the appeal, if ultimately successful, would be rendered nugatory. As regards the question on whether or not the appeal is arguable, the memorandum of appeal shows that the decision of ELRC is assailed on at least two main grounds namely, the award of gratuity and the award of salary for the unexpired term of the contract. In relation to gratuity, it is contended that the court erred in law in failing to find that the respondent did not qualify for gratuity in view of the fact that the contract was not successfully completed as it was terminated by summary dismissal. It is also contended that granting the respondent gratuity and contributions from the Provident Fund would be double compensation and contrary to **Section 35** of the **Employment Act**. On the other hand, it is contended for the respondent that the contract provided for gratuity and that the learned Judge did not make any finding on the Provident Fund.

[8] **Section 35 (5)** of the Employment Act as read with **Section 35 (1) (c)** provides that an employee whose services has been terminated by a notice is entitled to service pay for every year worked. However, **Section 35 (6)** provides that the provisions of **Section 35** does not apply where an employee is *inter alia*, a member of a registered pension or Provident Fund scheme established under the Retirement Benefits Act.

Further, **Section 18 (4)** of the Employment Act, provides that where an employee is summarily dismissed for a lawful cause, such an employee shall be entitled to be paid all monies, allowances and benefits due to him up to the date of dismissal. The record of appeal seems to indicate that the respondent was a member of the applicant's Provident Fund scheme and that his benefits under the scheme were computed as at 11<sup>th</sup> November, 2015 indicating that his net benefits payable was Shs. 2,081,628.35 while the deferred benefits were Shs. 9, 801,635, 95. In light of the foregoing, we find that the legal issue raised about the respondent's entitlement to further terminal dues in the form of service pay from the applicant is indeed arguable.

[9] On the award of salary for the expired term of the contract, it is not clear whether the termination was as a result of summary dismissal or unlawful termination for lack of notice. The remedies for wrongful and unfair termination of contract of service are stipulated in **Section 49** of the Act. The issue of the legality of the award of salary for the unexpired term of contract has been raised. The issue whether the decision of the Cabinet Secretary regarding that payment was binding on the applicant has also been raised. The issue whether the applicant could be estopped from acting in conformity with the law, as it interpreted it, arises from the impugned judgment. Again, we are satisfied that the issue of the legality of the award of salary for the expired term of contract is an arguable ground of appeal.

[10] The applicant maintains that the appeal would be rendered nugatory if the stay is not granted. It is submitted that public funds are involved and that the Court should take into account public interest which is a relevant consideration as laid down by the Supreme Court in **Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others, [2014] eKLR**. The respondent's counsel submits that the applicant has not demonstrated how the appeal would be rendered nugatory. The applicant is a government body financed by public funds. The respondent has attached its properties in execution of the decree. This will adversely affect the provision of services to the public. There is no assurance by the respondent that if the appeal is ultimately successful, the decretal sum will be recovered and if so, without further expenditure of public funds. The inability by the applicant to recover the decretal amount without additional expenditure would render the appeal, if successful, nugatory.

[11] Having considered the application, we find that the Court should exercise its discretion in favour of

the applicant. Consequently, the application is allowed. The execution of the judgment and the decree of the ELRC is stayed pending the hearing and determination of the appeal. As ordered on 14<sup>th</sup> December, 2017, the applicant shall deposit Shs. 5,000,000/= in an interest earning bank account in the joint names of the applicant's and respondent's advocates as a condition for stay of execution.

**Dated and Delivered at Kisumu this 22<sup>nd</sup> day of February, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**