



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & SICHALE, JJ.A)

CIVIL APPL. NO. 186 OF 2016 (UR 146 OF 2016)

BETWEEN

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED..... APPLICANT

VERSUS

BENJAMIN MWENDWA NDUATI..... 1ST RESPONDENT

IBRAHIM MUGO.....2ND RESPONDENT

EVANS ABUGA.....3RD RESPONDENT

DESMOND OWIYO ONINGU..... 4TH RESPONDENT

FELIX VUNGA MUNGA MULWA..... 5TH RESPONDENT

(Being an application for stay of execution of the judgement and orders of the Employment and Labour Relations Court, (Wasilwa, J.) issued/delivered on the 18th April 2016 and stay of proceedings pending hearing and determination of an intended appeal in ELRC Nos. 1267 of 2013, 1274 of 2013, 1275 of 2013 1340 of 2013 and 1884 of 2013 (consolidated under Cause No 1267 of 2013)

RULING OF THE COURT

[1] Benjamin Mwendwa Nduati, Ibrahim Mugo, Evans Abuga, Desmond Owiyo Oningu and Felix Vunga Munga Mulwa (1st to 5th respondents) were all employees of the East African Portland Cement Company (applicant). They were all working in the finance department of the applicant until their respective contracts of employment were terminated sometimes in May 2013, on allegations of fraudulent activities. The respondents alongside others were also charged with criminal offences such as stealing by servant and fraudulent or false accounting before the Magistrates' Court at Mavoko. Upon termination of their services, all the respondents filed individual suits claiming unfair labour practices, unlawful and un-procedural termination of employment, compensation for the balance of the contract period and reinstatement. All the suits were consolidated under one file, they were heard together and by a judgement or award issued on 18th April 2016, the learned Judge held as follows;-

“I therefore find that in terms of Section 45 of the Employment Act, the termination of

the Claimants in all cases was unfair for lack of following due procedure before termination and in the case of Benjamin Nduati, Evans Abuga and Desmond Oningu for lack of adequate reasons for dismissal. It is apparent that the claimants are currently facing criminal charges at Mavoko Law Courts. In the circumstances, suspending them would have been the best option pending determination of the criminal case at Mavoko Law Courts.

As for Felix Vunga who was serving on contract and whose contract has since expired in 2015, I would order he be paid as follows;

1. 1 months' salary in lieu of notice= 35,000/=

2. Any leave due

3. Gratuity under the contract

4. 3 months salary as damages for unfair termination= 35,000/= *3 =105,000/=

The respondent to pay the costs of the suit.”

[2] The applicant was aggrieved by the aforesaid orders, therefore it filed a Notice of Appeal on the 9th day of May 2016, which was followed by the Notice of Motion dated 3rd August 2016, brought under **Rules 5 (2) (b)** of the Court of Appeal Rules. The applicant is seeking orders of stay of execution of the aforesaid orders and stay of any further proceedings until the appeal is heard and determined. The motion is supported by the affidavits of Sheila Kahuki sworn on the 3rd August 2016 and 11th November 2016 respectively. According to the applicant, the contracts of employment in respect of the 5 respondents were terminated for reasons that they were directly and or indirectly involved in defrauding the applicant company colossal sums of money over the years. When the applicant detected fraudulent activities in its finance department, the respondents were taken through the company's disciplinary procedures and complaints of fraud and theft by servant were made to the police and the respondents were charged with criminal offences at the Mavoko Magistrate Court in Criminal Case No. 518 of 2013.

[3] At the hearing of the instant application, the applicant was represented by learned counsel, Mr Muchiri who submitted that the respondents were charged with the criminal charges two days before they were issued with letters of termination. According to counsel, the applicants have demonstrated an arguable appeal because the effect of the orders made by the learned Judge, was a suspension of the respondents pending the completion of the criminal case, which leaves the applicant with no other option but to reinstate them; reinstatement of employees who have been out of office for more than three years is very difficult because the positions were filled to ensure continuity; imposing the respondents on the applicant will be burdensome and very difficult to sustain them in a work environment that may not be conducive to all the parties. The learned Judge was also faulted for not taking into account the conditions set out under **Section 49** of the Employment Act, before an order of reinstatement is issued as a matter of last resort, the suitability of other remedies provided under the law must be considered. Moreover, the respondents were taken through disciplinary procedures that are provided in the applicant's operational manual; they were given an opportunity to respond and they were heard on the various allegations of misconduct; they were given 7 days to respond to the allegations, they did not state the notice was inadequate, nor did they seek an extension of time if they felt the period given was inadequate. According to counsel, the issue of the remedy of reinstatement considering the circumstances that led to the termination of the respondents and the period of notice given, demonstrate an arguable appeal.

[4] On the nugatory aspect, if this application is not allowed, counsel submitted the respondents will be reinstated back to their positions; apart from the 5th respondent who was awarded damages which have already been paid, the 1st to the 4th respondents were working in the Finance Department which is a sensitive department of the company; moreover there will be interruption of operations that are now carried out by other employees; reinstating the respondents will require a re-structuring of the applicant and the balance of convenience favours a stay of execution, so as to give an opportunity to the applicants

to argue the appeal which challenges the findings by the learned Judge that the termination was unfair. There are also proceedings seeking to commit the applicant's managing director for contempt, thus counsel urged us to grant an order staying any further proceedings until the appeal is heard and determined. Counsel for the applicant relied on a plethora of decided cases which basically give the general principles that constantly guide this Court in determining the twin issues of whether the intended appeal is arguable and if stay orders are not granted, whether the appeal will be rendered nugatory should it be successful

[5] The application was opposed; Mr A. M. Muriithi, learned counsel for the respondents relied on the replying affidavit sworn by Benjamin Mwendwa Nduati on 22nd February, 2017, on behalf of the 2nd, 3rd and 4th respondents. The respondents admit that they are facing charges of criminal nature before the Mavoko Magistrates Court; they however blame the applicant for delaying the criminal matter for the last three years by failing to produce witnesses whenever the matter came up for hearing. According to counsel for the respondents, the applicant has failed to satisfy the twin conditions for granting orders of stay of execution. Firstly the applicants have not demonstrated how the learned trial Judge was wrong in finding the termination was unfair; secondly, the respondents were only given 9 days in which to respond and show cause why their contracts should not be terminated. Moreover, after the respondents were charged with criminal offences, the applicant has delayed the finalization of the criminal case by failing to avail witnesses in court.

[6] On the nugatory aspect, counsel for the respondents was of the firm view that an order of reinstatement was not likely to prejudice the applicant or the outcome of the appeal. The applicant is a company that can deploy the respondents in other departments or create positions for them as a consequence of their unilateral decision to terminate their contracts unfairly. As regards stay of execution, counsel submitted that there are contempt of court proceedings that are on-going due to applicant's persistent refusal or neglect to pay the respondents benefits that accrue to employees that are under suspension. Counsel urged us to dismiss the application for lacking in merit.

[7] We have given due consideration to this application, the supporting documents, the replying affidavit and submissions made before us as well as the list of authorities. What is constant in an application under **Rule 5 (2) (b)** are the twin issues of whether the intended appeal raises arguable ground(s) and the nugatory aspect of the appeal should it become successful after the hearing. In the oft' cited case of; **Butt Vs Rent Restriction Tribunal** [1982] KLR page 417, this Court while dealing with a similar issue of whether or not to grant an order of stay of execution it held:

“1. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings

4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements...”

[8] On whether the success of the appeal will be rendered nugatory; the term

“nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. **Reliance Bank Ltd v Norlake Investments Ltd** [2002] 1 EA 227 at page 232.

I) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

ii) 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. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.”

[9] Bearing in mind the above principles as well as the overriding objectives in the administration of justice as spelt out under **3A of the Appellate Jurisdiction Act**, that is just, expeditious, proportionate and affordable resolution of appeals; we have addressed our minds to the issues of whether there are special circumstances and unique requirements that warrant the granting or otherwise of the orders sought. In this regard we recognize that the respondents like any successful litigant in obtaining a judgment is entitled to the realization of the fruits of their litigation unless circumstances exist that justify denying them the immediate execution until the appeal is heard. Indeed it was confirmed the 5th respondent was paid the decretal sum due to him as ordered and that explains why he did not participate in the present application.

[10] Be that as it may, we have to establish whether there are arguable grounds. Our understanding of the learned Judge's order was the respondents were under suspension awaiting the finalization of the criminal charges. This now leads us to the question of whether there are special circumstances obtaining in this case especially in regard to the 1st to the 4th respondent who were either reinstated or suspended by the order of court, awaiting the outcome of the criminal charges? We do not wish to go into the merit of the issues, arguments and material that was before the learned Judge, which will be handled by another Bench during the appeal. Those issues will include among others the determination of whether proper procedures were observed in terminating the respondent's contracts of employment; what is a reasonable period for an employee to respond to a notice to show cause or defend himself or herself of allegations of misconduct, including in circumstances where there are allegations of criminal nature.

[11] We have also considered the decree issued which as aforesaid appears to us as if the respondents were reinstated and then suspended. We are familiar with the provisions of **Section 49** of the Employment Act which provides reinstatement or re-engagement as one of the remedies to redress summary dismissal or unjustified termination of a contract. However, as there are so many other considerations to take into account before granting the remedy of reinstatement, we say no more on whether reinstatement in the circumstances of this case was a suitable remedy lest we prejudice or embarrass the Bench that will deal with the appeal. Suffice it to state the aforementioned issues are not frivolous, they are arguable, and thus the applicant has surmounted the first hurdle.

[12] On the nugatory aspects, the respondents are facing criminal charges on various allegations of fraud and theft of the applicants' money. The respondents were working in the Finance department which is sensitive; moreover the applicants took measures to continue with operations. We are persuaded that should the appeal be successful, there is a possibility that it will be difficult for the applicant to reverse the effects of a burdensome working relationship with the respondents which may be prejudicial not only to the applicant but also to the respondents due to a difficult work environment.

[13] For the aforesaid reasons we are satisfied this application has merit.

Nonetheless, we are fully aware that issues of employment and termination thereto are very critical as they touch and affect an employees' livelihood and quality of life. It is through employment or right to work that an employee earns a living to sustain his or her life. The intended appeal therefore must be given priority, and for this reason, we are minded to direct the applicant to file and serve the record of appeal within 90 days from the date of this ruling (if it has not done so already). Secondly, the Court of Appeal Registry should fix the appeal for hearing on priority basis.

[14] Accordingly, pending the hearing and determination of the appeal, the orders by **Wasilwa J.**, made

on 18th April 2016 are hereby stayed in terms of prayers Nos. 2 and 3 of the Notice of Motion dated 3rd August 2016. The costs of this application and other consequential proceedings shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 31st Day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR