



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G. B. M. KARIUKI & SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI. 181 OF 2016 (UR. 141/2016)

BETWEEN

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY..... APPLICANT

AND

BENJAMIN LAGWENRESPONDENT

(An application for stay of the Orders pending the lodging hearing and determination of an intended appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Monica Mbaru, J.) dated 30th May, 2016 in ELRC No. 2046 of 2013)

RULING OF THE COURT

1. Before us is an application brought pursuant to **Rule 5 (2) (b)** of the Court of Appeal Rules (the Rules). The applicant seeks stay of execution of the judgment of the Employment and Labour Relations Court (herein after referred to as ELRC) dated 30th May, 2016 in ELRC Cause No. 20146 of 2013 pending the hearing and determination of the intended appeal. It also seeks stay of the proceedings therein. The application is premised on the grounds that the intended appeal is arguable and the same would be rendered nugatory unless the orders sought are granted.

2. In brief, the pertinent facts to this application are that the respondent was employed on 7th April, 2004 as the applicant's Deputy Director of Compliance and Enforcement. He ultimately rose up the ranks to the Director of Compliance and Enforcement. On 19th November, 2013 he was interdicted on account of several anomalies which arose in the issuance of various Environmental Impact Assessment licenses. Subsequently, he was served with a notice to show cause where charges against him for negligence in performance of his duty were particularized. He was asked to respond, which he did. The matter then proceeded for a disciplinary hearing and upon its conclusion, the disciplinary committee was convinced that the charges against the applicant had been proved. Consequently, the respondent was summarily dismissed on 16th December, 2013.

3. Adamant that his dismissal was not only unfair but illegal, the respondent filed suit in the ELRC praying for several reliefs. The trial court found that the procedure followed by the applicant was flawed. It also found that in as much as the respondent was culpable to some extent for the anomalies in the issuance of the licenses, the disciplinary action which was taken was too harsh. In the impugned judgment, the trial court held that his dismissal was unfair and issued orders in the following terms:-

a. A declaration that the termination of the employment was unfair;

b. The claimant is hereby reinstated back to his position without loss of benefits and any lawful entitlement to be paid within 30 days; and

c. The claimant shall report back to work on 2nd June, 2016 at 8:30 hours to the chief officer for deployment; and

d. Costs of the suit.

In the alternative to the above;

a. The respondent shall pay the claimant salaries due for 3 years;

b. Compensation amounting to 12 months' salary at the last gross salary due on 30th November, 2013;

c. The claimant is awarded costs.

4. Aggrieved with the decision, the applicant filed a notice of appeal and the current application before us. Mr. Nyaberi, learned counsel for the applicant, elaborating on the arguability of the intended appeal, submitted that there was no legal basis for the alternative remedies issued by the trial Judge. He submitted that at the time the impugned judgment was delivered, the respondent had been dismissed for a period of over three years. Furthermore, the applicant had recruited a replacement more than two and a half years prior to the judgment. As such, the order of reinstatement was spent. According to him, the orders issued were confusing. On the nugatory aspect, he argued that the intended appeal would be defeated if the respondent was reinstated or paid the amount set out in the alternative remedy.

5. On his part, Mr. Mungla, learned counsel for the respondent, submitted that the intended appeal was not arguable, nor would it be rendered nugatory if the orders sought were not granted. He argued that there was no evidence that the respondent would not be able to refund any payment received if the intended appeal succeeds. He urged us to dismiss the application.

6. We have considered the application, submissions by counsel and the law. The principles governing the exercise of the Court's jurisdiction under **Rule 5 (2) (b)** are well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and secondly, this Court should ensure that the appeal, if successful, should not be rendered nugatory. See **Housing Finance Company of Kenya -vs- Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR.**

7. From our perusal of the application and the grounds on the face of the application, affidavits in support thereof and the draft memorandum of appeal, we are convinced that there are several arguable points that have been raised. These include: whether in the circumstances of this case, an order for reinstatement of the employee was the most viable or appropriate remedy, considering the provisions of the **Employment Act** as well as judicial authorities; and whether the learned Judge erred in issuing the alternative order.

8. In determining whether the intended appeal will be rendered nugatory, we remind ourselves that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See **Reliance Bank Ltd -vs- Norlake Investments Limited (2000) 1 EA 227.** This Court was faced with a similar situation in **Kenya Revenue Authority -vs- Sidney Keitany Changole & 3 Others [2015] eKLR.** It observed and correctly so, that -

“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.”

9. In our view, the balance tilts in favour of the applicant. We say so because we are satisfied that in the peculiar circumstances of this case, reinstatement of the respondent to the same position would render the appeal, if successful, nugatory. It is more prudent for the respondent to wait for the intended appeal to be determined instead of being reinstated, only for his hopes to be shattered later in the event that the appeal was to succeed. We also take note that the applicant has since recruited another officer who is occupying the respondent's former position. To avoid multiplication of roles and safe guard utilization of public funds, it is imperative that we issue the orders sought pending the determination of the intended appeal.

10. In the result, we find that this application passes the threshold required for applications of this nature under **Rule 5 (2) (b)** of the Rules of this Court. Accordingly we allow the application. Costs of the application shall abide the outcome of the intended appeal.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR