



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: NAMBUYE, OKWENGU & KIAGE, JJA)
CIVIL APPLICATION NO. 89 OF 2016 (UR 66 OF 2016)

BETWEEN
KENYA METHODIST UNIVERSITY.....APPLICANT
VERSUS
MARY KAUNGANIA..... 1ST RESPONDENT
KABERIA ISAAC KUBAI.....2ND RESPONDENT

(Application for Orders staying execution and/or further proceedings in Nyeri Employment and Labour Relations Cause No.4 of 2016 consolidated with Cause No. 5 of 2016 pending the hearing and determination of the Intended Appeal

in

Employment and Labour Relations Court Cause

No. 4 of 2016 consolidated with cause No. 5 of 2016)

RULING OF THE COURT

Before us is a Notice of Motion dated the 22nd day of November, 2016 and lodged in the Court’s sub-Registry at Nyeri on the 23rd day of November, 2016, brought under **Section 3A and 3B** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, **Rule 5(2) (b)** of the Court of Appeal Rules 2010, and all other enabling provisions of the law. One substantive relief together with an attendant order for costs is sought, namely, that pending the hearing and determination of the intended appeal this Honourable court be pleased to issue an order staying any further proceedings, further computation and/or quantification or execution of the Respondents’ claim in the Employment and Labour Relations Court in Cause No.4 of 2016 as consolidated with Cause No.5 of 2016, **Mary Kaungania Nkari & Kabaria Isaac Kubai versus Kenya Methodist University.**

The application is supported by the grounds on its body, and the supporting affidavit. It has been opposed by a replying affidavit deposited by Reverend **Mary Kaungania Nkari** on the 8th day of December, 2016

and lodged in the Courts' Sub-Registry at Nyeri on the 15th day of December, 2016.

Learned counsel **Patrick Ngunjiri** for the applicant submitted that, the respondents' engagement with the applicant was on a contractual basis of three years period each, based on secondment by the presiding Bishop of the Methodist Church of Kenya (the Bishop) and they were still so engaged when their secondment to the employment of the applicant was recalled by the Bishop. They were directed to be redeployed elsewhere. They resisted their redeployment elsewhere and instead, moved to the Employment and Labour Relations Court at Nyeri and separately filed **Causes No. 4 and 5 of 2016**, which were unsuccessfully resisted by the applicant. The applicant was aggrieved by the impugned judgment and timeously filed a Notice of Appeal on the 15th day of June, 2016 and sought a typed copy of the proceedings for appeal purposes.

It is the applicant's contention that the intended appeal is arguable on the grounds that the applicant is not the employer of the respondents as they had merely been seconded to it by the Bishop who had the power to recall any such secondment. They also intend to challenge the findings by the said court that the termination was unfair.

Mr. Ngunjiri next contends that the intended appeal will be rendered nugatory if the orders sought are not granted as the respondents have already moved the Employment and Labour Relations Court for the computation of the decretal sums due to the respondents respectively which sums are in excess of forty (40) million shillings and if execution proceeds, the applicant will suffer not only financial embarrassment, but also inability to recover the said sums if paid over to the respondents.

Learned counsel cited the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR** for the proposition that **Rule 5(2) (b)** is a procedural innovation designed to empower the court to entertain an interlocutory application for the preservation of the subject matter of the appeal in order to ensure the just and effective determination of an appeal; the case of **Nguruman Limited versus Shompole Group Ranch & Another [2014] eKLR** per Musinga, JA, that the power of the Court under **rule 5(2) (b)** to order a stay of execution, an injunction or a stay of further proceedings is only exercisable where a Notice of Appeal has been lodged in accordance with rule 75 of the Courts' Rules; and the case of **Kenya Tea Growers Association & Another versus Kenya Plantation and Agricultural Workers Union [2012] eKLR** for the holding *inter alia* that:-

"The power of the court under rule 5(2) (b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He 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.

Mr. Ngunjiri relied on the case of **Reliance Bank Limited versus Norlake Investments Limited [2002] EA 226** for the proposition that what may render the appeal nugatory must be considered within the circumstances of each particular case; the case of **748 Air Services Limited versus Theuri Munyi [2014] eKLR** for the proposition *inter alia* that the position hitherto held by the court that an appeal can never be rendered nugatory in instances where the resulting decree is a money decree no longer applies in instances where there is demonstration that the applicant will not easily recover the money if paid out, or it may be necessary to institute other civil proceedings to recover the money.

In response to the applicant's submissions, learned counsel **JN Machirah** holding brief for **Kioni** for the Respondents, submitted that the application is unmerited because; no explanation has been given as to why the intended appeal has not been processed speedily for disposal; the learned Judge committed no error when he held that once the approval for secondment was given for three years the respondents shifted their financial burden and other arrangements to serve the appellant and the intended appeal is also a non starter for non compliant with the provisions of **Rule 82 (2) and Rule 87 (1)** of the Court of Appeal Rules.

Since the Employment and Labour Relations Court is yet to make its final determination on the computation of the decretal sum due and payable to the respondents, the applicant will suffer no prejudice if the orders sought are withheld. In the alternative, the orders sought have been overtaken by events as the applicant acquiesced in the reinstatement effected as ordered by the learned Judge and the subsequent proceedings on computation of the decretal sum. Moreover, that there is no loss to be suffered by the applicant that cannot be compensated for by way of damages as the resulting decree would be a money decree.

In reply, **Mr. Ngunjiri** submitted that they have already complied with the prerequisites on the request for proceedings; there was no order for reinstatement in the orders granted in favour of the respondents by the learned Judge as all that the respondents got was a finding of unfair termination with attendant remedies. They concede they have not timeously filed their record of appeal but the failure to do so is not deliberate. It has been occasioned by the court's failure to timeously supply them with a typed copy of the proceedings. They have however lodged an application for leave to file the record of appeal out of time.

The principles that guide the exercise of this Jurisdiction have now been crystallized by case law some of which were cited by the applicant to buttress their submissions. This jurisdiction among others is said to be original, wide, independent, unfettered and discretionary. (See **Githunguri versus Jumba Credit Corporation Ltd No.(2) [1988] KLR 88**) & **Reuben & 9 Others versus Nderitu & Another [1989] KLR 459**. It is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended (see the case of **Equity Bank Ltd versus West Link NBO Civil Application No.78 of 2011 (UR)**). The jurisdiction under rule 5(2) (b) only arises where the applicant has lodged a notice of appeal. (see the **Safaricom Ltd versus Ocean View Beach Hotel Ltd & 2 others Civil Application No. 327 of 2009 UR**)

The conditions to be met before a party can obtain relief under rule 5 (2) (b) of the Rules of the Court are that the applicant has to demonstrate that the appeal or intended appeal is arguable and that if the stay sought is not granted, the appeal/intended appeal, be rendered nugatory. See the **Githunguri case (supra)**. By arguable, is not meant an appeal or intended appeal which must necessarily succeed but one which ought to be argued fully before the court and raises a bonafide issue worthy of consideration by the Court (see **Kenya Tea Growers Association & another versus Kenya Planters Agricultural Workers Union, Civil Application No. Nai 72 of 2001 (UR)** & **Joseph Gatahi Gachau & Another versus Pioneer Holdings (A) Ltd & 2 Others Civil Application No. 24/2008**). An appeal need not raise a multiplicity or any number of such points. A single bonafide arguable points is sufficient. (**Damji Pragiji Mandavia versus Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)**). **Kenya Railways corporation versus Edernan Properties Ltd, Civil Appeal No. Nai 176 of 2012 and Ahmed Musa Ismael versus Kimba Ole Ntamorua & 4 others civil Appeal No. Nai 256 of 2013**).

An appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. (See the case of **Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others, CA No. 31 of 2012** wherein this Court stated, *inter alia*, thus:

“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.”

Each case must depend on its own facts and peculiar circumstances (See **David Morton Silverstein Versus Atsango Chesoni Civil Application No. Nai 1989 of 2001**). The term “nugatory” does not mean worthless, futile or invalid. (See **Reliance Bank Ltd versus Norlake Investments Ltd [2002] IEA 227**. 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 that claim by evidence. (See **International Laboratory for Research on Animal Diseases Versus Kinyua [1990] KLR 403**).

Lastly, an applicant must satisfy the court on both limbs or ingredients before he/she can obtain a relief under rule 5(2) (b). See **Republic versus Kenya Anti Corruption Commission & 2 others [2009] KLR31**, and **Reliance Bank Ltd Versus Norlake Investments Ltd [2012] 1EA227** and **Githunguri**

versus Jumba Credit Corporation (supra)

We have applied the above principles to the rival submissions herein and considered them in the light of the record before us. It is our finding that we are properly seized of the matter as there is on record a Notice of Appeal dated the 13th day of June, 2016 and lodged in the Courts' sub-Registry on the 15th day of June, 2016. The application is therefore properly anchored and deserving of a merit determination. In support of arguability the applicant has exhibited a draft Memorandum of Appeal intending to raise four grounds of appeal.

Issues as to whether the respondents secondment to the applicant for a three year contract period was subject to recall by the Bishop before the expiry of the contracted period for secondment; whether the secondment perse gave rise to an employer/employee relationship between the applicant and the respondents; whether the learned Judge flouted the doctrine of freedom of contract and lastly, whether the learned judge fell into error when he directed parties to compute the decretal sum are all arguable points. It is now trite that no specific number of arguable points is required to be raised by an applicant before succeeding under **rule 5(2) (b)** of the Rules of the Court. Only one will suffice. The applicant has satisfied the first ingredient.

Turning to the second ingredient, it is not disputed that the respondents were granted relief for unfair termination with a rider that the damages be computed within seven (7) days of the judgment namely the 3rd day of June, 2016. The resulting figure would form the decretal figure ordered to be paid by the 1st day of August, 2016. Both sides are in agreement that the computation exercise is already ongoing though the final figure payable to each respondent is yet to be crystallized by the court. There is however no dispute that the respondents have already come up with two separate computations of what they believe would form the decretal amount in their favour. In annexure CN8, the tentative figure arrived at in favour of the 1st respondent is **Kshs.42, 220,039/=**, while that in favour of the second respondent is **Kshs.4,749,418/=**. The applicant is apprehensive that execution is imminent and that the applicant will suffer great prejudice if it were to proceed. In response to the applicant's apprehension, the respondents have simply stated both in their deposition and submission that the applicant's apprehension is unfounded as the decretal figure has not yet crystallized.

It is our view, that the moment the applicant contended that it would suffer prejudice if the intended execution process were to sail through in favour of the respondents as directed by the learned Judge, it was not enough for the respondents to simply depose in the replying affidavit and assert in their submissions that the applicants fears were unfounded. The amount involved is colossal. The respondents should have shown how that colossal amount would be secured during the pendency of the intended appeal and made readily available to the applicant if it were to succeed in the intended appeal. Lack of such a demonstration leads to a reasonable conclusion that the applicant would face undue hardship pursuing the recovery of the said colossal amount of money from the respondents should the intended appeal ultimately succeed after the said colossal sum would have been fully paid over to the respondents. The above finding prima facie supports the applicant's assertion that the intended appeal will be rendered nugatory should the stay orders sought herein be withheld.

The upshot of all the above is that we find merit in the application as the applicant has satisfied the twin ingredients for granting the relief under **rule 5(2) (b)** of the Rules of the Court Prayer 3 of the application dated the 22nd day of November, 2016 is allowed as prayed.

Costs of the application to abide the outcome of the intended appeal.

DATED AND DELIVERED AT NYERI THIS 1st DAY March, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR