IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPLICATION NO. 4 OF 2017 (UR 3/2017)

SOTIK HIGHLANDS TEA ESTATES LIMITED …….....APPELLANT

AND

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION..... ……RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the judgment of the High Court at Kericho

(Njagi Marete J.) dated 14th November, 2016.

In

ELR.C. No. 12 of 2014)

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RULING OF THE COURT

The applicant Sotik Highlands Tea Estates Limited filed a Notice of Motion on the 11th day of January, 2017 seeking an order of stay of execution of the judgment of the ELC Court delivered on the 14th November, 2016 pending the hearing and determination of an intended appeal.

The application is predicated on **Sections 3A** and **3B** of the Appellate Jurisdiction Act, Cap 9 of the laws of Kenya, **Rule 5 (2) (b)** and **103** of the Court of Appeal Rules 2010, and all enabling provisions of the law. It is anchored on the grounds in its body and a supporting affidavit. It has been opposed by a replying affidavit deposed by **Francis Atwoli** and filed on the 21st day of February, 2017.

Mr. Geoffrey Nyakundi, learned counsel for the applicant submitted that the intended appeal is arguable and that it is proposed to raise eleven (11) grounds of appeal. Among these are complaints that the learned Judge fell into an error when he ordered reinstatement after the time for reinstatement stipulated in **section 12(3)(vii)** of the Employment and Labour Relations Court Act had lapsed; by failing to take into consideration the circumstances in which the termination took place and the fact that the respondent caused or significantly contributed to the said termination; in failing to consider the

evidence adduced by the applicant's witnesses; and also in failing to find that the respondent failed to discharge the burden of proof placed on him to the required threshold.

On whether the success of the intended appeal would be rendered nugatory if the application is not granted, **Mr. Nyakundi** submitted that this too had been satisfied as the applicant's contention that reinstatement will give the wrong impression to the respondent's members of staff regarding the consequences of failing and/or refusing to obey lawful and proper commands and behaving in a manner insultive to their superiors and the inability to refund the sums that may have been paid over to the respondent should the appeal succeed had not been cotroverted by the respondent.

In response to the applicant's submissions, learned counsel **Mr. Samuel Aduda** conceded that the intended appeal was arguable. On the nugatory aspect, it was **Mr. Aduda's** view that any monies paid over to the respondent is refundable, should the intended appeal succeed.

We have given due consideration to the rival pleadings and submissions. The principles that guide the exercise of the above jurisdiction have now been crystallized by a long line of decisions of this Court. We take it from **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR** where in this Court while considering an application under **Rule 5 (2) (b)** expressed itself as follows:

> "**When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5 (2) (b) the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR as follows:**
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> ***i. In dealing with Rule 5 (2) (b) the Court exercised original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court.***
>
> ***v. The discretion of this Court under Rule 5 (2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.***
>
> ***vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
>
> ***vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.***
>
> ***viii. An applicant must satisfy the Court on both the twin principles.***
>
> ***ix. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.***
>
> ***x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.***
>
> ***xi In considering an application brought under Rule 5 (2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
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> ***xii The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
>
> ***xiii Whether or not an appeal will be rendered nugatory depends on whether or not what is***

sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.

We have applied the above principles to the rival interests herein. In our view, the first prerequisite on the arguability of the intended appeal has been satisfied as this has been conceded by the respondent. We have also perused the draft memorandum of appeal annexed to the application and confirm that it indeed raises triable issues some of which have already been highlighted above. It is now trite that one does not need a litany of arguable points in order to satisfy this prerequisite. Only one would suffice. We agree that those highlighted by Mr. Nyakundi in his submissions are not frivolous.

The second prerequisite has been satisfied as the respondent conceded that inability to refund any monies paid over to the respondent raised in paragraph 5 of the applicant's supporting affidavit had not been controverted by the respondent in his replying affidavit. Neither was the negative impact of the intended reinstatement on the staff of the applicant controverted.

We also take into consideration the assurance given from the bar by **Mr. Nyakundi** that the respondent is on paid leave pending the determination of the intended appeal; and second, that the appeal has already been filed.

In the premises, we are inclined to allow prayer 3 of the application dated the 9th day of January, 2017 on terms that the appeal which is already filed is processed through case management and set down for hearing within sixty (60) days of today's ruling. In default the stay order shall be discharged without further application to the Court.

Dated and delivered at Nyeri this 1st day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..……..

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