



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NAI 34 OF 2017

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....APPLICANT

VERSUS

LEONARD GETHOI KAMWETI..... RESPONDENT

(Being an application for stay of execution of the Judgment/Decree of the Employment and Labour Relations Court at Nairobi (Hellen Wasilwa, J.) dated 12th October, 2016

in

Cause No. 273 of 2014)

RULING OF THE COURT

1. On 12th October, 2016, the respondent was awarded Kshs.8,050,728/= being 12 months' salary as damages for unfair termination by the applicant. The applicant, being dissatisfied by the said decision, filed a notice of appeal and a draft memorandum of appeal, arguing, *inter alia*, that the award was excessive as the respondent had already received compensation for early retirement.
2. The applicant further filed an application dated 1st March, 2017 seeking stay of execution of the judgment, pending the hearing and determination of the intended appeal.
3. When the application came up for hearing, **Mr. Wena**, learned counsel for the applicant, submitted that the intended appeal is arguable, in that payment of the judgment sum would amount to double compensation, the respondent having been paid over Kshs.16 million by the applicant for early retirement; that if the trial court found that the termination was unfair, it ought to have factored the amount paid earlier.
4. Counsel further submitted that the trial court erred in finding that the termination was unfair when the applicant's Human Resources Manual expressly provides for the option of early retirement from the age of 50 years either at the Bank's discretion or at the employee's request; and that in the respondent's case, he was 50 years old and the applicant exercised its discretion to retire him and he was paid his lawful benefits.

5. Mr. Wena further argued that there was wrongful admission of evidence in the form of tape recording of proceedings of a Directors' meeting by the respondent.
6. On the nugatory aspect, counsel submitted that the sum awarded by the trial court was fairly high and the respondent may not be able to refund it, if paid, and the intended appeal is successful. He added that the applicant is ready and willing to deposit the judgment sum in an interest earning account in the joint names of the applicant and the respondent.
7. **Mr. Kamweti**, appearing in person, opposed the application. He submitted that the intended appeal is not arguable; that the applicant had earlier filed an application for stay of execution before the trial court which was dismissed; that the trial court established that his early retirement was not normal; and that the admission of the impugned evidence was proper in law.
8. Lastly, the respondent submitted that the intended appeal shall not be rendered nugatory; that the applicant was holding title documents for his unencumbered property valued at Kshs.25 million.
9. In reply, Mr. Wena stated that the respondent had been advanced some money by the applicant; the loan was secured by a charge over one of the respondent's properties, and the Bank was not holding any free property of the respondent.
10. In an application brought under **rule 5 (2) (b) this Court's Rules**, the court exercises original and discretionary jurisdiction. The twin principles that the Court must consider in the exercise of that discretion are well known. The Court must be satisfied that there is an arguable appeal or intended appeal; and that the appeal would be rendered nugatory if stay is not granted and the appeal eventually succeeds.
11. On the first limb, this Court has severally held that the demonstration of existence of even one arguable point will suffice. See **AHMED MUSA ISMAEL v KUMBA OLE NTAMORUA & 4 OTHERS [2014] eKLR**.
12. Having considered the draft memorandum of appeal as well as the appellant's counsel's submissions, we are satisfied that the appeal is arguable. We need not say much regarding that issue at this juncture.
13. As to whether the appeal will be rendered nugatory if orders of stay of execution are not granted, we have taken into consideration the rival arguments by Mr. Wena and Mr. Kamweti. As this Court stated in **RELIANCE BANK LTD v NORLAKE INVESTMENTS LIMITED [2002] 1 E.A. 232**, what may render an appeal nugatory must be considered within the circumstances of each particular case. Long delay and/or inconvenience in recovering money that has already been paid out is a relevant consideration.
14. Although the respondent submitted that the applicant is holding a title to one of his unencumbered properties that is valued at Kshs.25 million which is a good security in the event that he fails to repay the judgment sum, that was not proved. The respondent did not exhibit any evidence to that effect.
15. On the other hand, the applicant is ready and willing to deposit the decretal amount in an interest earning account in the joint names of the parties, which we think is reasonable and secures both parties.
16. We are satisfied that the applicant has satisfied both limbs that the Court is required to consider in an application of this nature. Consequently, pending hearing and determination of the intended appeal, we hereby allow the applicant's application for stay of execution of the judgment of Wasilwa, J. dated 12th October, 2016 on the following terms:

(i) The applicant shall, within 14 days from the date hereof, deposit the sum of Kshs.8,050,728/= in an interest earning account in the joint names of the applicant and the respondent. The said sum shall be deposited with any reputable bank of the respondent's choice. In default the orders of stay of execution shall stand discharged.

(ii) The applicant shall file the intended appeal within the next 60 days from the date hereof.

17. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 23rd day of June, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU,FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR