



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, HANNAH OKWENGU, & J. MOHAMMED, JJA.)

CIVIL APPLICATION NO. 47 OF 2017

BETWEEN

LAKE VICTORIA NORTH WATER

SERVICES BOARD 1ST APPLICANT

HON. JOSEPH KIPCHUMBA LAGAT2ND APPLICANT

AND

ENG. ALFRED ODONGO AMOMBORESPONDENT

(An Application under Rule 5(2) (b) of the Court of Appeal Rules, 2010 for stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Kisumu, Employment and Labour Relations Court,

(Maureen Onyango, J.) dated 4th May, 2017

in

ELR NO. 16 OF 2017)

RULING OF THE COURT

[1] By an application dated 15th May, 2017, and mainly brought under **Rule 5(2) (b)** of the **Court of Appeal Rules**, the applicant seeks an order that the execution of the judgment of the Employment and Labour Relations Court dated 5th May, 2017, be stayed pending hearing and determination of the intended appeal.

[2] The application is based on the grounds on the body of the application and in the supporting affidavit of **Joseph Kipchumba Lagat**, the Chairman of Board of Directors of the **Lake Victoria North Water Services Board** (*1st applicant herein*). The respondent did not file a replying affidavit and his advocates **M/S Lestins & Smith Advocates** did not attend the hearing of the application although they were duly served with the application and hearing notice.

[3] The statement of claim filed by the respondent in the High Court, the interlocutory application, the

respective affidavit and the correspondence exchanged between the parties were not incorporated in the record of the application; so also the proceedings of the trial court. The record however, shows that after the impugned judgment was delivered on 4th May, 2017, the applicants' advocates filed a Notice of Appeal dated 5th May, 2017 and applied for proceedings on the same day, that is, on 5th May, 2017 to facilitate the filing of the appeal. In the circumstances, the Court will rely on the facts contained in the judgment in determining the application.

[4] The respondent is the Chief Executive Officer employed by the first applicant on a three-year contract with effect from 2nd May, 2016. At a meeting of the Board of the 1st applicant held on 19th August, 2016, the Board resolved, *inter alia*, that **M/S Naomi Jelimo**, the Manager, Human Capital and Planning, would replace **C.P.A Fredrick Toloyi**, the Finance Manager as an alternative signatory to the Board's Bank accounts with immediate effect. The respondent considering that the resolution would be in conflict with the Financial Management Systems Manual which provided that the finance manager is a mandatory signatory to Board accounts, added **Ms. Mbori Jelimo** as a signatory but maintained Toloyi as alternative signatory.

[5] On 22nd December, 2016, the 2nd applicant as the chairman of the Board issued a notice to show cause to the respondent requiring him to respond to several charges within seven days. The charges included failure to implement Board resolutions specifically, the resolution of 19th August, 2016 on review of account signatories, failure to provide the Board of Directors with laptops, blatant disobedience and insubordination. The respondent responded to the charges and by a letter dated 13th January, 2016; the Board suspended the 2nd respondent from duty "*pending investigations of the matters*" saying that his explanation was not satisfactory.

[6] On 24th January, 2017, the respondent filed a statement of claim in the trial court challenging his suspension and claimed reinstatement and damages for unlawful suspension. By an interlocutory application dated the same day, the respondent sought a stay of the suspension; lifting of suspension and reinstatement, amongst other reliefs. The applicants filed a memorandum of response to the claim and a replying affidavit. The claim and the application were consolidated and heard together.

[7] The trial court identified the issues for determination thus:

"The only issue for the Court to determine is whether the suspension of the claimant is in compliance with the law and whether the claimant is entitled to remedies sought."

The trial court proceeded to make findings that:

(1) the suspension was unlawful as there was no proof that the claimant's terms of service provided for the same.

(2) that the Chairman of the Board had admitted that the Board held a meeting on 26th January 2017 adopting resolutions of a special Board meeting held on 23rd January, 2017 at which a decision was made to terminate the claimant's employment.

[8] With respect to the second finding, the Court considered the provision of the law vis-a vis the respondent's explanation in his reply to the notice to show cause and made a finding that there was no valid reason for the suspension and declared the suspension unlawful, lifted the suspension and ordered the applicants to reinstate the respondent immediately as the Chief Executive Officer. Additionally, the court restrained the applicants from taking any further action against the respondent on the grounds contained in the notice to show cause and in the suspension letter.

[9] The applicants have sought a discretionary remedy under Rule 5(2) (b). Before the Court can exercise its discretion in favour of the applicants, they are required to satisfy the Court that the intended appeal is arguable and further that unless the order sought is granted, the intended appeal would be

rendered nugatory.

[10] Regarding the first requirement, the applicants have relied on the nineteen (19) proposed grounds of appeal in the draft memorandum of appeal. The applicants aver in the proposed grounds of appeal amongst other things, that the learned Judge erred in law for intercepting and insulating the respondent from disciplinary proceedings before disciplinary process had been concluded; for straying to the subject of termination of employment which was not pleaded; for arriving at the conclusion that the employment had been terminated without evidence of any termination; by misdirecting herself on the principle of intervention by court; by concluding that the Financial Management System Manual had the force of law without evidence; and by arriving at a decision that the respondent had a right to alter the Board resolutions without seeking the approval of the Board.

[11] It is apparent from the judgment that the claim that was brought to court related to unlawful suspension. However, as the judgment shows the superior court considered the question of termination for the reason that the chairman of the Board had admitted that the Board had adopted a resolution to terminate the respondent's employment. The applicants aver in ground 7 of the proposed grounds of appeal that the court had ordered the maintenance of status quo pending the hearing and determination of the claim and that no termination could issue when the orders of the court were in place. In essence, the applicants were denying that termination of employment had taken place.

[12] The Employment Act contains elaborate provisions relating to termination of employment and the matters to be taken into account before a remedy of reinstatement is granted. **Section 43 (1)** provides that in a claim arising out of termination of a contract, the employer is required to prove the reasons for termination and **section 43 (2)** provides that the reason or reasons for termination of a contract are matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate the services of the employee. Thus, **section 43 (2)** shows that the court is not supposed to substitute its own reasons for that of the employer in establishing whether there are valid reasons for termination. The principle in **section 43 (2)** applies in equal force to reasons for suspension.

[13] We are conscious of the fact that the Court is not dealing with the appeal at this stage and that it would be wrong for the Court to express itself on the merits of the intended appeal. However, having considered the findings of the trial court in juxtaposition with the proposed grounds of appeal, we are satisfied that the intended appeal raises several arguable points in law and fact including, whether the court had power to intervene at the suspension stage and before the disciplinary proceedings had been concluded; whether the court had power to determine the question of termination which was not before it; whether the court usurped the rights of the employer by stopping disciplinary proceedings based on the reasons that the employer genuinely believed to exist; and whether the court took into account the relevant and statutory factors before giving a remedy of reinstatement.

[14] As regards the second requirement, the applicants state that, as the applicants are seeking to challenge the lifting of suspension and the order for reinstatement, the execution of the judgment will render the appeal nugatory; execution will cause confusion and anarchy leading to interference with service delivery to the detriment of the public and, that, execution will cripple the operations of the Board. We have no doubt that those factors will render the appeal nugatory in the circumstances of this case.

[15] The applicants have sought for the stay of execution of the entire judgment of the court. The judgment comprises three parts, namely, the lifting of suspension; the reinstatement and an injunction restraining any further disciplinary action. At this stage, the Court has no power to reverse the order lifting the suspension and the order of injunction. It is after the hearing of the appeal on the merits and depending on the decision when the Court has power to reverse those orders. Nonetheless, the Court has jurisdiction at this stage to grant a stay of the execution of the order of reinstatement.

[16] For the reasons stated, the application is allowed to that extent, and, we so order that, the execution

of the order of reinstatement of the respondent with immediate effect as Chief Executive of the first applicant is stayed for a period not exceeding six months pending the hearing and determination of the intended appeal.

As the respondent will be adversely affected by the order of stay of execution, the applicants are directed to file the appeal within 30 days from the date hereof. Further, the Deputy Registrar is directed to give a hearing date on priority basis once the appeal is filed.

The costs of the application shall be costs in the appeal.

Dated and delivered at Eldoret this 14th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR