



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CIVIL APPLICATION NO. 27 OF 2017

BETWEEN

NAIVAS COMPANY LIMITED.....APPLICANT

AND

HENRY C. LANGAT.....RESPONDENT

(Being an application for stay of execution pending the

lodging, hearing and determination of an appeal from

the judgment of (Radido, J) dated 6th May, 2016

in

Nakuru E.L.R. CAUSE NO. 231 OF 2013)

RULING OF THE COURT

The applicant **NAIVAS LIMITED**, filed a Notice of Motion application dated 2nd March, 2017. In the main, the applicant sought an order of stay of the execution of the judgment of Radido, J. delivered on 6th May, 2016. **Henry C. Langat** was named as the respondent. The appellant's motion was supported by the affidavit of **DAVID KIMANI MUKUHA** a director of the applicant, sworn on 2nd March, 2017. In the supporting affidavit it was deponed that the respondent who was the applicant's employee stole goods from the applicant and the respondent together with others were charged in Criminal Cases No. 401 & 402 of 2012; that the respondent was found guilty and sentenced to serve 6 and 5 years respectively; that on 22nd July, 2013 the respondent filed a claim in the then Industrial Court of Kenya claiming damages for wrongful termination and **Radido, J.** awarded the respondent a total sum of Ksh.777,150/- for wrongful termination.

In opposition to the motion, the respondent swore an affidavit dated 26th May, 2017 in which he deposes that the applicant is guilty of noncompliance with procedural requirements of dismissal of an employee from employment; that the criminal convictions are subject of appeals at the High Court of Kenya in

Eldoret; that in any event the convictions are issues relating to substantive as opposed to procedural fairness; that he owns **LR NO. KERICHO/ITEMBE/1893** measuring 0.24 hectares where he has constructed residential houses that give him a monthly income of Ksh.208,000/-, the said value of the property being in excess of Ksh.5 million and hence he has the ability to refund the decretal sum should the applicant succeed in his intended appeal.

On 31st May, 2017 the motion was urged before us by **Mr. Wasuna** teaming up with **Mr. Kiiru** for the applicant and **Mr. Mugambi** for the respondent. Mr. Wasuna reiterated the averments in the supporting affidavit and contended that the applicant has an arguable appeal. On arguability, counsel urged us to find that an employer is entitled to summarily dismiss an employee once the latter has committed acts of theft and that it would be paradoxical of an employee who is found stealing to be awarded damages for the summary dismissal.

On the nugatory aspect, **Mr. Wasuna** pointed out that on 23rd October, 2014 the respondent deposed that he was a poor man and sought to be treated as a pauper for purposes of waiver of court fees to file an appeal; that LR NO. **KERICHO/ITEMBE/1893** was acquired on 7th April, 2017 and that it was not possible, given the short time span, to have built apartments for rental with an income of Ksh.208,000/- per month. He also cast doubt on the value of the property which the respondent stated that it now stands at a value of Ksh.5 million.

In his response **Mr. Mugambi** for the respondent argued that the applicant failed to comply with statutory requirements as set out in S.41 of the Employment Act on procedural fairness. On the nugatory aspect, learned counsel refuted the allegation that the respondent was a man of straw.

In granting (or not) an order for stay, this court considers whether an applicant has an arguable appeal and secondly whether if stay is not granted, the appeal, if successful, would be rendered nugatory. In this court's decision in **GOVERNORS BALLON SAFARIS LIMITED VS. SKYSHIP COMPANY LIMITED CA NO. 32 OF 2015 (UR)** it was stated:

“1. The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in exercise of that jurisdiction. These principles are now well settled. For an Applicant to succeed, he must not only show his Appeal or intended appeal is arguable, but also that unless the Court grants him an injunction or stay as the case may be, the success of the Appeal will be rendered nugatory.

2. In considering whether an arguable appeal has been made out, it is not a requirement that the Appeal will necessarily succeed. It is sufficient that the Appeal appears to be one that deserves to be fully argued before the Court. And besides, an Appeal is considered arguable even if it raises a single bona-fide point only.”

The fact of the respondent being found guilty of theft of the applicant's property is not contested. However, it is the respondent's position, that he has filed appeals against the convictions. In our view, the appeal notwithstanding, the issue of whether one is entitled to damages for unlawful termination after having been convicted of theft of the employer's property is an arguable point. Being an arguable point does not necessarily mean the appeal will succeed but all we are saying is that the issue raised by the applicant is not idle or frivolous.

On the nugatory aspect, it is on record that on 23rd October, 2014 in a bid not to pay court fees the respondent swore an affidavit deposing that he is a poor man. Further, although the respondent contended that he was a proud owner of houses constructed on **LR KERICHO/ITEMBE/1893** worth Ksh.5,000,000/- and that he draws a rental income of Ksh.208,000/- per month, there was no demonstration of this. The respondent did not produce supporting documents by way of bank statements, tax returns etc to support his contention.

The sum total of the above is that we are satisfied that the applicant has demonstrated that he has an arguable appeal and further that unless we grant an order of stay, the appeal would be rendered nugatory.

Accordingly we grant an order of stay in terms of prayer No. 2 of the Motion dated 2nd March, 2017. Costs of the motion shall abide the outcome of the intended appeal.

Dated and delivered at Nakuru this 12th day of July, 2017.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR