IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. 26 OF 2017

BETWEEN

NAIVAS COMPANY LIMITED…….....…….....…..…...APPLICANT

AND

PAUL THUKU GACHORA.....…….……...….....…. RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an appeal from the judgment of (Radido, J.) at Nakuru dated 6th May, 2016 in ***ELR. Cause No. 231 of 2013)***

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RULING OF THE COURT

The applicant, **NAIVAS COMPANY LIMITED,** has come to this court under **rule 5(2)(b**) of the Rules of this Court seeking an order for stay of execution of the judgment delivered on 6th May, 2016 (and decree thereof) in Employment & Labour Relations Court at Nakuru in Case No. 229 of 2013 pending the hearing and determination of an intended appeal against the said judgment.

In the judgment of the Employment & Labour Relations Court, the applicant, a former employer of the respondent, was ordered to pay to the respondent **PAUL THUKU GACHORA,** a total of shs.260,300/- representing one month pay in lieu of notice (shs.32,300/-); wages for January, 2012 (shs.38,000/-); and five months wages as compensation (shs.190,000/-).

Aggrieved by the said judgment, the applicant gave Notice of Appeal as required by **rule 75** of this Court's Rules manifesting its intention to impugn the said judgment. An initial attempt by the appellant to get stay in the Employment and Labour Relations Court was dismissed on 27th January, 2017 as unmeritorious.

In the affidavit sworn on 2nd March, 2017 by **David Kimani Mukuha** on behalf of the applicant in support of the application, the deponent avers that the respondent was dismissed for gross misconduct on account of (respondent's) theft from the applicant. The latter furnished the court with a copy of the criminal charge sheet against the respondent and the ensuing judgment of the Chief Magistrate's Court at Eldoret in Criminal Case No. 401 of 2012 against the respondent and 3 others which shows that the respondent and his co-accused in the Criminal Case were convicted of stealing from the applicant products valued at Shs.36,645,161/-. The respondent was sentenced to 5 years in prison.

The applicant's notice of motion shows that the applicant is apprehensive that the respondent may move the lower court for execution of the decree in an attempt to recover the decretal sum. The applicant contends that it has an arguable appeal against the judgment of the Employment and Labour Relations Court which awarded the respondent damages for wrongful dismissal not least because the respondent was guilty of gross misconduct on account of theft which was proved beyond reasonable doubt by dint of the conviction meted out to the respondent. In the applicant's submission, there was justification for summary dismissal of the respondent from employment and failure to give a hearing was not fatal to the summary dismissal in the circumstances as it went to procedure. The applicant also contended that if stay is not granted and the respondent is paid, the appeal, if successful, would be rendered nugatory as the respondent would not be able to repay the money.

Mr Wasuna, learned counsel appearing with **Mr T. Kiiru** for the applicant urged us to grant stay and allow the application because the intended appeal is arguable and it would be rendered nugatory if it succeeds if stay is not granted.He contended that the respondent committed a felony, a cognizable offence, and was convicted and got a custodial sentence and that as there was reason under **section 41(1)** of the Employment Act for the respondent's termination of employment and circumstances existed that justified summary dismissal, it was an error on the part of the Employment and Labour Relations Court to hold as it did, that the respondent was wrongly terminated.

Mr. Wasuna contended that the appeal will become nugatory if successful if stay is not granted. He submitted that the respondent may not be able to refund the decretal dues if he is paid as he has no resources and had owned up to this fact in his mitigation in the aforesaid Criminal Case on 10th October 2014 when he stated that he was a menial worker and had a medical condition.

Learned counsel **Mr. Mugambi** for the respondent opposed the application for stay and relied on the respondent's replying affidavit sworn by the latter on 26th May 2017. It was the contention of the respondent that the applicant does not have an arguable appeal and that if the decretal dues are paid to the respondent, the latter shall be able to refund the same in the event that the intended appeal succeeds.

We have perused the application and duly considered the submissions of both parties. For an application under **rule 5(2)(b)** of this Court's Rules to succeed, an applicant must show, first that he has appealed or intends to lodge an appeal having given a Notice of Appeal pursuant to **rule 75** of the Court Rules. Secondly, an applicant must show that he has an arguable appeal. This court has in many of its decisions under **rule 5(2)(b)** (supra) held that an arguable appeal is not necessarily one that is bound to succeed. All that an applicant has to show is that there is an arguable point or points of law in the appeal. This court has in the past held that an applicant does not have to show a plethora of arguable points. Even a single point of law will suffice. In this application, the applicant has shown that the appeal is not frivolous and that there are arguable points of law that include whether the Employment & Labour Relations Court was right in its decision on interpretation on the provisions of the Employment Act with regard to summary dismissal for gross misconduct on account of the respondent's conviction of a felony. We do not wish to delve into this for fear of embarrassing the Bench that shall hear the appeal. Suffice it to state that, in our view, the intended appeal is arguable.

Thirdly, an applicant must show that if stay is not granted, the appeal, if successful, shall be rendered nugatory. In this application the applicant has pointed out that the respondent has no resources and if the appeal succeeds, he may not be able to refund the decretal dues if the same are paid out to him before the determination of the appeal. In his reply to the application, the respondent has focused on the merits of the intended appeal and contended that it may have no merit. He has not sufficiently replied to the averment that he may not be able to refund the money if it is paid out to him before the appeal is determined should it succeed. As Lopes LJ stated in **ATTORNEY GENERAL VS EMERSON AND OTHERS 24 QBD [1889] 56** at page 59 the court- **"will grant a stay where special circumstances of the case so require."**

In that case, the special circumstances were that there was a large amount of rent in dispute between the parties and the appellant had an undoubted right of appeal which the court had a duty to ensure was not rendered nugatory if it succeeded. It was stated by C.B. Madan, JA. in **M.M. BUTT VS THE RENT**

RESTRICTION TRIBUNAL CIVIL APPL. NBI NO. 6 OF 1979] that-

> **"a stay which would otherwise be granted ought not to be refused because the judge considers that an order which in his opinion will be a better remedy will become available to the applicant at the conclusion of the proceedings."**

The remedy of stay is a discretionary remedy. It is granted to serve the interest of justice by ensuring that the appeal does not become nugatory. As stated by C.B. Madan, JA,

> "**it is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution**"

In **WILSON V. CHURCH (NO.2) 12 CH.D. [1879] 454** at page 459, Brett, L. J. held that-

> "**the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory**."

In our view, the applicant has discharged its onus under **rule 5(2)(b)** (supra) in showing that it has an arguable appeal and that unless stay is granted, the appeal if successful shall be rendered nugatory.

Accordingly, we allow the notice of motion dated 22nd March, 2017 and grant an order for stay in terms of prayer 2 of the motion. The costs of this application shall abide the outcome of the appeal.

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

G. B. M. KARIUKI SC

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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