



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAL, JJA)

CIVIL APPLICATION NO. 122 OF 2017 (UR 89/17)

BETWEEN

NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT.....APPLICANT

AND

JOAB INDECHE WAKHU.....RESPONDENT

(An Application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nyeri

(Ongaya, J.) dated 21st July, 2017

in

E. & L. R. C. Cause No. 227 of 2016)

RULING OF THE COURT

1. The applicant, **National Hospital Insurance Fund** (NHIF) applied to this Court on 9th November 2017 by way of **Notice of Motion** of that date under Rule 5(2)(b) of The Court of Appeal Rules for stay of execution of the judgment of the Employment and Labour Relations Court (E&LR Court) dated 21st July 2017 delivered in Cause No. 227 of 2016 at Nyeri pending the determination of the applicant's intended appeal.
2. In the said judgment by E&LR Court, **Joab Indech Wakhu**, the respondent, claimed against the applicant a declaration that the applicant had unfairly dismissed the respondent and prayed for an order for his (respondent's) reinstatement to his previous position without loss of benefits. The respondent also prayed for maximum compensation of 12 months' salary, and general damages for wrongful or unlawful dismissal and for costs of the suit.
3. The learned Judge of E&LR Court (**Ongaya, J.**) found merit in the respondent's suit and awarded him the declaration sought and an order requiring the applicant to pay to the respondent Kshs 1,905,000/= by 1st October 2017 failing (which) interest shall be payable on the amount at court rates from the date of the judgment on 21st July 2017 till full payment. The applicant was also ordered to bear the costs of the suit.
4. On 3rd August 2017, the applicant lodged a **Notice of Appeal** manifesting its intention to appeal against the whole of the said judgment.
5. The Notice of Motion came up for hearing before us on 21st November 2017 when learned counsel **Mr. Gregory Makambo** appeared for the applicant and learned counsel **Mr. Jefferson Museve** appeared for **Ms. A Guserwa** for the respondent.
6. **Mr. Makambo** urged that the applicant's intended appeal is arguable. He referred to the proposed Memorandum of Appeal and contended that there were arguable legal points in the intended appeal including the issue whether the court erred in its finding that the respondent was unfairly dismissed and whether the respondent exposed himself to conflict of interest by holding (as did his wife) directorship in a clinic in January 2012 when the employment contract entered between him and the respondent's facility was in place and prohibited such conflict.

Counsel submitted further that it is an issue of law in the intended appeal whether the court made a wrong finding when it held that the respondent was not under a duty to avoid or disclose conflict of interest, regard being had to the letter of appointment and the appellant's Human Resource Manual. Mr. Makambo urged that if stay is not granted, the appeal if successful, shall be rendered nugatory. The decretal sum, he said, is huge, (Kshs 1,905,000/=) and that there is no indication of what the respondent is worth and whether he can refund the money if paid in the event the appeal is successful if stay is not granted. Counsel contended that the respondent did not waylay the fears of the applicant about his inability to refund although, said counsel, the respondent was under a duty to do so. Counsel urged the Court to use its discretion to stay the execution in the interest of justice.

7. **Mr. Museve**, learned counsel for the respondent, opposed the application. He, however, conceded that the intended appeal is arguable but hastened to add that the appeal will not become nugatory if stay is not granted and the appeal succeeds.

8. We have perused the Notice of Motion and given due consideration to the submissions of the parties. The principles for granting orders under Rule 5(2) (b) of this Court's Rules have been stated in many cases including the recent case of **Multimedia University & Another vs. Prof Gitile N. Naituli [2014] eKLR**, in which this Court in considering an application under Rule 5(2)(b) (supra) stated again the factors to be taken into account in such application 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 vs Tony Ketter & Others [2013] eKLR as follows:

(i) In dealing with Rule 5(2) (b) the Court exercises 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 bona fide 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), 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.

(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.

9. In this application, the fear of the applicant to recover the sum of Kshs 1,905,000/= has not been waylaid. The evidential burden shifted to the respondent to show that he (the respondent) would be in a position to refund. It was not discharged. If the appeal succeeds and the applicant is unable to recover the said sum, the appeal would be rendered nugatory and purposeless. Accordingly, we find merit in the application. We allow it. We make orders in terms of prayer (c) of the Notice of Motion dated 9th November 2017. We further order that the costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 29th day of December, 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