



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 73 OF 2017

BETWEEN

THE KENYA POWER & LIGHTING COMPANY LIMITED.....APPLICANT

AND

CYRUS IRERI DANIEL.....RESPONDENT

(Being an application for stay of execution of the judgment and orders of the Employment and Labour Relations Court at Nyeri pending the hearing and determination of the intended appeal from the said judgment (Ongaya, J.) dated 9th June, 2017 in E. & L. R. Cause No. 197 of 2016)

RULING OF THE COURT

1. **Kenya Power & Lighting Company Limited**, the applicant, applied to this Court on 27th June 2017 by way of Notice of Motion dated 27th June 2017 seeking under Rule 5 (2) (b) of the Rules of this Court an order for stay of execution of the judgment delivered by Employment and Labour Relations Court (**B. Ongaya, J.**), in **Nyeri ELRC Cause No. 197 of 2016**. In that judgment, the Employment and Labour Relations Court issued a declaration that the termination of the respondent's employment was wrongful, unfair and unlawful; that the respondent be reinstated in employment as Artisan Mate III in Operations & Maintenance Department based at Nyeri Branch, Mt. Kenya Region with effect from 15th June 2017 with full benefits and that the respondent reports on duty not later than 15th June 2017 for assignment of duties by the Supervisor; that the period between the date of summary dismissal on 15th January 2015 and the date of re-engagement on 15th June 2017 be treated as leave of absence without pay so that there shall be no break in the respondent's service with the applicant; in the alternative, that the applicant do pay to the respondent 8 months' gross salaries at Kshs 154,104.30 per month (making a total of Kshs 1,232,834.40) for unfair termination by 1st August 2017 failing interest (sic) to be paid thereon at court rates till full payment; that the applicant shall pay the respondent's costs of the suit.
2. The applicant states in its grounds for making the application appearing on the face of the Motion that since the dismissal of the respondent from employment two years ago, the applicant has filled the vacancy created and therefore the respondent's re-engagement is untenable; that the period of the respondent's absence from work was spent by the respondent in jail on conviction of obtaining by false pretences contrary to Section 313 of the Penal Code; and that the respondent served jail term from 15th December 2014 and was released on 12th November 2015; that the offence by the respondent related to alleged sale of electrical cables which in itself is an undertaking in conflict with the undertaking of the applicant as the employer of the respondent.
3. The applicant contends in the application, particularly in the affidavit in support sworn by **Hillary Sigei** on 27th June 2017, that the intended appeal is arguable and has high chances of success and further that it shall be rendered nugatory if the order for stay is not granted.
4. In the replying affidavit sworn on 15th August 2017 by the respondent, the latter avers that he was dismissed from employment while he was in legal custody after his conviction in Criminal Case No. 3445/2012 at Kiambu which, he states, had nothing to do with the applicant and that he appealed against the conviction in High Court Criminal Appeal No. 184 of 2014 and was acquitted. The respondent contends that the applicant's appeal has no merit and that the application should be dismissed and the applicant should obey the orders by the E & LR Court made in ELRC Cause No. 197 of 2016.
5. When the application came up for hearing, learned counsel **Mr. Hillary K. Sigei** appeared for the applicant and learned counsel **Mr. Kimathi Kiara** appeared for the respondent.

6. **Mr. Sigei** informed the Court that the appellant had lodged and served the Record of Appeal in Civil Appeal No. 121 of 2017. He contended that the status quo should be preserved pending the determination of the appeal. It was Mr. Sigei's submission that the appeal is arguable. Our attention was drawn to the draft Memorandum of Appeal which reflects issues of law including whether the learned Judge misapprehended Sections 41, 44 and 49 of the Employment Act. Counsel contended that the appeal would be rendered nugatory if it succeeds unless stay was granted as prayed in the application. It was contended by counsel that the respondent can be compensated by way of damages but if stay was not granted and payment was made as ordered by the E&LR Court, there is no guarantee that the respondent would be in a position to recoup the applicant in the event the appeal succeeds. Counsel pointed out that the respondent has not disputed that the respondent would not be able to repay if the applicant's appeal succeeds. As the respondent does not enjoy the trust of the applicant, and as the applicant has filled the position the respondent had, it was contended by counsel that reinstatement was not tenable.

7. On behalf of the respondent, learned counsel **Mr. Kimathi Kiara** opposed the application and relying on the respondent's replying affidavit contended that the application has no merit and that if stay is not granted, the applicant will not suffer any loss.

8. We have perused the application and given due consideration to the submissions made by the parties. We have also had regard to the decisions of this Court on Rule 5(2)(b). The applicant's counsel has from the Bar confirmed that the applicant has filed Civil Appeal No. 121 of 2017.

9. To succeed in an application under Rule 5(2)(b), an applicant must show that he has an arguable appeal and that unless stay is granted, the appeal, if successful, shall be rendered nugatory. In this application, it is shown that there are issues of law in the decision of the learned Judge that are arguable not least of which is the question whether, in the context of this case, the learned Judge interpreted the provisions of Sections 41, 44 and 49 of the Employment Act correctly. We do not wish to say much in that regard to avoid putting the Bench that shall hear the appeal in an awkward position. Suffice it to state that we are satisfied that the appeal is arguable. As regards the question whether the appeal, if successful, will be rendered nugatory, the circumstances show that in the event of execution and payment of the money ordered by the E&LR Court, the respondent may not be in a position to recoup the applicant in the event the appeal succeeds. The applicant has satisfied the criteria for the grant of stay under Rule 5(2)(b).

10. Accordingly, we allow the application and grant the orders prayed for. As regards costs of the application, we order that the same shall abide the outcome of the appeal. It is so ordered.

Dated and delivered at Nairobi, this 20th day of December, 2017

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR