



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & KIAGE, JJ.A.)

CIVIL APPLICATION NO. NAI. 53 OF 2017

BETWEEN

THE GERMAN SCHOOL SOCIETY.....APPLICANT

AND

HELGA OHANY.....RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 17th January, 2017

in

Cause No. 2197 of 2014)

RULING OF THE COURT

1. On 4th October, 2017 the Employment and Labour Relations Court (Wasilwa, J.) delivered a ruling in respect of two applications. The first one was by the respondent dated 1st February, 2017 and amended on 16th June, 2017 seeking orders for review of the court's judgment dated 17th January, 2017 on account of some mistake or error apparent on the face of the record, whose main thrust was to vary the judgment sum payable to the respondent from **Kshs.5,673,711** to **Kshs.25,301,329.05**. The second application was by the applicant seeking stay of execution of the said judgment pending hearing and determination of an intended appeal to this Court.

2. The application for review was substantially successful in that the judgment sum was enhanced from Kshs.5,673,711 to Kshs.16,866,040 plus costs of the suit. With regard to the second application, the learned judge granted stay of execution on condition that the applicant deposits half of the decretal sum in an interest-earning account in the joint names of counsel on record and the other half to be released to the claimant within 30 days from the date of the ruling. In default execution was to issue.

3. Being aggrieved by the said ruling, the applicant filed a notice of appeal and followed it up with an application for stay of execution of the trial court's judgment pending hearing and determination of the intended appeal.

4. When the application came up for hearing, **Mrs. Ameka**, learned counsel for the respondent, did not contest that the intended appeal is arguable. Therefore, the only issue that was left for this Court's consideration was whether the intended appeal, if successful, would be rendered nugatory unless the orders sought are granted.
5. Arguing the application, **Mrs. Kashindi**, learned counsel for the applicant, made reference to an affidavit sworn by one **Daniel Ratemo Matundura**, the applicant's Accountant, who deposed that the intended appeal is arguable and would be rendered nugatory and a mere academic exercise, unless this Court intervenes and grants the orders sought. Mr. Matundura added that the respondent's assets are unknown and the applicant may not be able to recover from the respondent any money paid out to him in the event that the intended appeal succeeds.
6. Mrs. Kashindi told the Court that the applicant had already paid half of the decretal sum to the respondent through his advocates, and deposited the other half in a joint interest earning account in terms of the orders issued by the trial court.
7. Counsel urged the Court to grant the orders sought, adding that the applicant was able and willing to furnish a bank guarantee for the entire decretal sum.
8. Responding to the application, Mrs. Ameka relied on a replying affidavit sworn by the respondent. The respondent contended, *inter alia*, that Daniel Ratemo Matundura, the deponent of the applicant's supporting affidavit, has no authority of the school Board to make any affidavit on behalf of the applicant. She added that there was no official resolution or minute by the school Board to institute an appeal; that the applicant is run by a school Board which is the legally responsible body and is regulated by its constitution; that the school's constitution mandates only the school Board to make statutory declarations on the school's behalf. The respondent annexed to her replying affidavit a copy of the applicant's constitution.
9. Mrs. Ameka submitted that the intended appeal shall not be rendered nugatory by denial of the orders of stay as sought by the applicant. She referred the Court to paragraph 10 of the respondent's replying affidavit where she deposed that she owns a home that is on **L.R. KIAMBAA/RUAKA/1311** whose estimated value is in excess of Kshs.30 million. The respondent also has other valuable movable assets, savings and financial investments. A copy of the respondent's Title Deed for the aforesaid property was annexed to the respondent's replying affidavit. The respondent would therefore be able to refund the one half of the decretal sum that was ordered to be paid to her, in the event that the intended appeal succeeds, counsel added.
10. In a brief rejoinder, Mrs. Kashindi said that Daniel Matundura was competent to make the applicant's affidavit, having stated that he was duly authorized to make the affidavit. As regards the respondent's ability to repay one half of the decretal sum, counsel submitted that there was no sufficient evidence in support of that averment, in that the respondent had neither attached a valuation report of her home nor other documents showing her financial worth.
11. We have carefully considered the application before us, the affidavits sworn by both parties, counsel's submissions as well as the authorities cited. The principles for consideration in an application of this nature are well settled. The applicant must show that the appeal is arguable; and that unless the court grants the orders sought the appeal or intended appeal, if successful, would be rendered nugatory. See **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR v KILACH [2003] eKLR 249.**
12. As earlier stated, the first limb of the twin principles, that is, arguability of the intended appeal, was graciously conceded by Mrs. Ameka. All we need to do is to determine whether the intended appeal, if successful, shall be rendered nugatory unless the orders sought are granted. But before we proceed to do so, we have to dispose of the issue of Mr. Matundura's competence to make an affidavit on behalf of the applicant.

13. Mr. Matundura has on behalf of the applicant sworn several affidavits before the Employment and Labour Relations Court as well as this Court. In all those affidavits he stated that he was the applicant's Accountant and had been duly authorized to make the affidavits. Although Mrs. Ameka told this Court that the respondent had raised the issue of Mr. Matundura's competence before the trial court, that is not reflected in that court's ruling dated 4th October, 2017, which forms the basis of the application now before this Court. When the learned judge determined the application on its merits, she did pronounce herself on the issue of competence of Mr. Matundura to swear the affidavit for and on behalf of the applicant.

14. In our view, it would occasion a miscarriage of justice if we were to summarily reject the application before us on the sole ground that it is the school Board that is authorized to represent the applicant and make statutory declarations in all matters legal for and on behalf of the applicant. on the applicant's behalf.

We shall therefore determine this application on its merits.

15. We now turn to consider whether the intended appeal, if successful, shall be rendered nugatory unless we grant the orders sought. In so doing, we must bear in mind what this Court said in **RELIANCE BANK LIMITED v NORLAKE INVESTMENTS LTD [2002] 1 EA 227**, that **“what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term „nugatory? has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”**

16. In this case, the High Court has already ordered that the respondent be paid one half of the decretal sum, which sum is currently held by the respondent's advocate. What is in question is whether the respondent would be in a position to refund that sum should the intended appeal succeed. The applicant says that it may not be able to recover that money. On the other hand, the respondent contends that she is a person of means and would be able to repay that sum if the intended appeal is successful. She says that her house is worth about Kshs.30 million. The respondent says she also has savings and other assets.

17. It is not enough for the respondent to simply aver that she would be able to repay the aforesaid sum of money, she must demonstrate that ability by availing to the court evidence of her financial worth. Once an applicant has, on reasonable grounds, stated on oath that the respondent will not be in a position to refund the decretal sum or part of it, if the amount is paid pending appeal, the evidential burden shifts to the respondent to show that he or she would be able to refund in the event that the appeal is successful. See **ABN AMRO BANK N.V. v LE MODE**

FOODS LIMITED [2002] eKLR.

18. The respondent has exhibited a copy of a title deed to one of her properties, which she says is worth about Kshs.30 million. In the absence of a valuation report showing the market value of the said property and a certificate of official search which would reveal whether there are any encumbrances attaching to the property, we are unable to say that the respondent had discharged her burden of proof as aforesaid.

19. But even if the said property was valued at the aforesaid sum, we do not know how easy it would be to dispose of it and refund the one half of the decretal sum together with any accrued interest in the event that the intended appeal is successful.

20. Given all the aforesaid circumstances, we are minded to order stay of execution of the trial court's order regarding payment to the respondent of one half of the decretal sum, pending hearing and determination of the intended appeal, which we hereby do. We therefore order the sums deposited in the respondent's advocates account be transferred to the interest earning account in the joint names of the advocates for the parties within 7 days of the date hereof. The costs of the application shall abide the outcome of the intended appeal. It is so ordered.

Dated and Delivered at Nairobi this 15th day of December, 2017.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR