



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), WARSAME & KANTAI, JJ.A)

CIVIL APPLICATION NO. 187 OF 2012

BETWEEN

EMIRATES AIRLINE LIMITEDAPPLICANT

AND

STEPHEN CHASE KISAKARESPONDENT

(An application for an order of stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 12th March 2015

in

Employment and Labour Relations Cause No. 25 of 2015)

RULING OF THE COURT

1. Stephen Chase Kisaka, the respondent herein, was until the 27th October 2014, the Sales and Marketing Manager of Emirates Airline Limited, the applicant herein. On that date, the respondent’s employment was terminated and the applicant embarked on the process of recruiting a new candidate for the position of Sales and Marketing Manager.
2. Aggrieved by the termination of his employment and the move by the applicant to fill his former position, the respondent filed suit in the Employment and Labour Relations Court. In that suit, the respondent claimed that his dismissal was unfair, irregular and malicious, and that it did not follow the disciplinary processes and procedures of the applicant. In addition to his statement of claim, the respondent also sought an order of temporary injunction to restrain the applicant from advertising or recruiting for the position of Sales Manager pending the hearing and determination of his claim before the Employment and Labour Relations Court.
3. The application for temporary injunction was determined in the respondent’s favour by Wasilwa, J., who issued orders restraining the respondent from taking any steps to recruit candidates for the position of Sales Manager. The applicant is aggrieved with this order and has filed an appeal against it. In the meantime, it has brought the present application under **Rule 5(2)(b)** of this Court’s rules seeking orders that pending the hearing and determination of its appeal, this Court do

stay the orders granted by Wasilwa, J., and that the applicant be allowed to appoint a Sales Manager.

4. The grounds in support of the application were argued by Mr. M. Sumba, learned counsel for the applicant. Counsel contended that the appeal, which has already been filed, raises several arguable points. The first is that the learned judge erred in giving orders of injunction without considering that the applicant had already embarked on and completed the process of recruiting a new sales manager, and was only left with the step of appointment of a successful candidate. In addition, counsel argued that the learned judge did not apply the proper principles for establishing a *prima facie* case, and that the learned judge did not consider the irreparable damage that would be visited upon the applicant.
5. Mr. Sumba further argued that to let the order of the Employment and Labour Relations Court stand would render the intended appeal nugatory since a candidate to fill the respondent's former position had already been identified. He further urged that the applicant stands to suffer irreparable harm as the applicant cannot continue its operations without a sales manager.
6. In opposition to the application, Mrs. Muchiri, learned counsel for the respondent, submitted that the appeal did not raise any arguable appeal. The respondent's position is that the holding of the learned judge of the Employment and Labour Relations Court was proper because the respondent had established that he was unfairly dismissed. The respondent further argues that the intended appeal is incompetent and not arguable, and that if the orders sought in this application are granted, the applicant will be allowed to continue with the process of recruitment which will result in the prayer of reinstatement in the Employment and Labour Relations Court being overtaken and thus render redundant his statement of claim in that court.
7. The jurisdiction of this Court under **Rule 5 (2) (b)** is discretionary, and must therefore be exercised judiciously. As was stated by this Court in **Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31:**

“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2)(b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially.”

8. To benefit from the discretion of the Court, the applicant must demonstrate to the court two principles. The first is that the appeal is arguable, and the second is that if the orders sought are not granted, then the appeal would be rendered nugatory. It falls upon the applicant to satisfy the twin principles. See **Republic v Kenya Anti-Corruption Commission & 2 others (supra)** where the Court rendered itself thus:

“The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.”

9. In support of the proposition that the appeal is arguable, the applicant contends that the trial court erred in not considering that the respondent did not establish a *prima facie* case, that the termination of the respondent was procedural and lawful, and that the decision of the trial court was correct. The respondent on the other hand contends that the appeal is not arguable since his employment was terminated contrary to laid down procedure and the law.
10. We are cognizant that we must not make any definitive findings that would embarrass the bench that would eventually hear and determine the appeal. This has been stated by this Court time and again, for example in **Stanley Kangethe Kinyanjui v Tony Ketter & 2 Others [2013] eKLR**

wherein the Court held that:

“In considering an application brought under rule 5(2) (b), 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.”

(11) From our perusal of the ruling from giving rise to the applicant’s appeal, as well as the memorandum of appeal, we can see that the applicant takes issue with the learned judge for failing to consider that it will be prejudiced by the orders of injunction that were granted. Bearing in mind that an arguable appeal is one that raises a *bona fide* issue that deserves the consideration of this Court, we find that the appeal is arguable. The applicant has therefore satisfied the first limb for the grant of an order of stay of execution.

12. We now turn to consider whether or not the intended appeal would be rendered nugatory in the event that the orders of stay of execution are not granted. In determining whether or not the intended appeal would be rendered nugatory, the Court must consider what would happen if the orders sought are not granted, and whether damages would adequately compensate the aggrieved party. See ***Stanley Kangethe Kinyanjui v Tony Ketter & 2 Others (supra)***.

13. We have considered the applicant’s submission that it had already commenced the recruitment process, and has already identified a candidate to fill the position of sales manager. We do not agree with the respondent that if the position is filled, his claim before the Employment and Labour Relations Court would be rendered redundant. Under **section 12 (3)** of the Industrial Court Act, the Employment and Labour Relations Court has jurisdiction to award damages and we think that any damage to the respondent could be made good by an award of damages.

14. In ***Martin Nyaga Wambora V County Assembly of Embu & 6 Others [2015] eKLR (Civil Application No. Nai. 46 of 2015 (UR 40 of 2015))***, this Court correctly noted that depending on the circumstances of each case, the balance of convenience may be taken into account in considering whether or not the appeal would be rendered nugatory if the orders sought are not granted. In the present application, we find that the balance of convenience lies in favour of the applicant. The applicant’s motion is meritorious and we hereby allow it. The orders of the Employment and Labour Relations Court are hereby stayed pending the hearing and determination of the appeal. Costs of this application shall abide the outcome of the appeal.

15. We so order.

Dated and Delivered at Nairobi this day 5th of February, 2016.

P. KIHARA KARIUKI, (PCA)

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR