



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & KANTAI, JJ.A)

CIVIL APPLICATION NO 288 OF 2015 (UR 246/2015)

BETWEEN

SOMAK TRAVELS LTD.....APPLICANT

AND

GLADYS AGANYO.....RESPONDENT

(an application for stay of execution pending hearing of an intended appeal from the judgment of the

Employment and Labour Relations Court at Nairobi (Mbaru, J.) dated 12th November 2015

in

ELRC No 413 of 2014

RULING OF THE COURT

The applicant had employed the respondent herein as a customer service officer. On 31st March 2012, it terminated her employment. Aggrieved with her termination, the respondent filed a claim before the Employment and Labour Relations Court alleging that it was unfair because the respondent had offered no reason for her termination. The respondent sought various reliefs, among them compensation for unlawful termination, pay in lieu of notice, severance pay and amounts due to her arising out of deductions on her medical cover. The applicant opposed the claim, and in its defence, the applicant admitted having employed the claimant as described in the claim, but denied that it terminated her unfairly. It alleged that it had experienced a down turn in business and as a result, it had no longer been tenable to keep the respondent in employment. The applicant's position was that it followed the law and the contract terms between itself and the respondent, that it offered to settle her dues in full, and to this end, it forwarded the sum of Kshs 389,394.03 to her advocates.

Upon hearing the claim, the Employment and Labour Relations Court found in favour of the claimant, declaring that her termination was unfair and awarding her the total sum of Kshs 1,383,002.50 as well as half the amount of costs. Being aggrieved with that decision, the applicant has filed a notice of appeal dated 20th November 2015. It intends to appeal against a part of the judgment of the court, that is against the award of compensation amounting to the sum of Kshs 569,110.00 and award of Kshs 387,000.00 being deductions made from the respondent's dues towards her medical cover.

The applicant also filed the present motion under rule 5(2)(b) of this Court's rules and dated 1st December 2015 in which it has prayed for an order of stay of execution of the judgment and decree of the Employment and Labour Relations Court pending the lodging, hearing and determination of the appeal.

In an application of this nature, the Court is guided by two broad principles: the first being that for an applicant to succeed he must show that his appeal or intended appeal is arguable or differently stated, that it is not frivolous. The second principle, is that the applicant must show that unless he is granted an order of stay of execution, the success of his appeal or intended appeal will be rendered nugatory. It is also well established that for the applicant to succeed, it must satisfy both conditions.

To demonstrate that it has an arguable appeal, the applicant submitted that the trial court erred in finding that the respondent was entitled to a refund of any money that she had made towards medical coverage for herself and her family. In the applicant's view, this was an erroneous finding because the parties had a contributory medical scheme in place, which scheme had never been objected to by the respondent. The applicant contends that the trial court misapplied section 34 of the Employment Act, and argued that this Court will be asked to determine whether or not an employer is liable to provide medical cover to its staff as well as its spouses where such a provision is not contained in the contract of employment.

The second issue raised by the applicant is that the trial court misapprehended the provisions of section 40 of the Employment Act and erred in finding that the respondent had violated the law and engaged in an unfair labour practice. The respondent on the other hand is of the view that the intended appeal will amount to a waste of the Court's time. She faults the applicant for failing to annex a draft memorandum of appeal to prove the merits of the intended appeal.

It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed. We have carefully considered the rival submissions of the parties and we find that the issues raised by the applicant are arguable.

The applicant argues that if the orders sought are not granted, the appeal will be rendered nugatory because there is no evidence from the respondent that she would be able to refund the decretal amount if the appeal succeeds. The applicant also claimed that to have to pay the decretal amount in full will cause it undue hardship due to the fact that it is operating in a difficult economic environment, and that it is currently surviving on bank drafts and loans to keep afloat.

In determining whether the intended appeal, if successful, would be rendered nugatory if we do not grant the orders sought, we are alive to the fact that we must balance the competing claims of both parties and make orders that best suit the interests of justice.

On the one hand, the respondent is in possession of a valid court order and she is entitled to enjoy the benefits of that order. On the other hand, if the order of stay of execution is refused, the applicant will be required to settle the full amount awarded by the superior court. If its appeal is successful, then it may be difficult for the applicant to secure a refund of the amount, thereby rendering the intended appeal nugatory.

Having considered the competing claims of the parties, we find that the balance of convenience favours the applicant. We therefore grant an order of stay of execution of the judgment and decree of the Employment and Labour Relations Court in Cause No 413 of 2014 pending the lodging, hearing and determination of the intended appeal against the said judgment. The costs of this application shall abide the outcome of the appeal.

Dated and Delivered at Nairobi this 8th day of April 2016

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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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