



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI 76 OF 2016 (UR 59/2016)

BETWEEN

DALBIT PETROLEUM LIMITED APPLICANT

AND

PERIS NYAMBURA KIMANI..... RESPONDENT

(Appellant's Notice of Motion under Sections 3, 3A and 3B of the Appellate Jurisdiction Act, Rule 5(2) (b) of the Court of Appeal Rules 2010 seeking stay/ conservatory orders/ injunctive orders pending the hearing and determination of the Application as well as pending the hearing and determination of the intended appeal from the decision of the Employment and Labour Relations Court at Nairobi (the Honourable Lady Justice Monica Mbaru) dated 9th July 2015.

in

ELRC PETITION NO. 63 OF 2013

RULING OF THE COURT

1. This is a Notice of Motion application dated 29th March 2016 brought under the provisions of **sections 3, 3A and 3 B** of the **Appellate Jurisdiction Act** and **rules 5(2) (b) and 47** of the rules of this Court. The applicant, **Dalbit Petroleum Limited** is the intended appellant while the respondent is **Peris Nyambura Kimani**. The application seeks, in the main, an order of stay of execution of the Judgment and Decree of the Employment and Labour Relations Court at Nairobi dated 9th July 2015 pending the *inter partes* hearing of the application and pending the hearing and determination of the intended appeal. The applicant also seeks to be allowed to deposit the decretal amount, as per the judgment of the Employment and Labour Relations Court dated 9th July 2015 and orders issued on the 16th February 2016, in an interest earning account to be held jointly by the Appellant's and Respondent's Advocates on record pending the hearing and determination of the intended appeal. The application is premised on thirteen grounds set out on the face of the application. The application is further grounded on the supporting affidavit of **Wycliffe Osoro**, the applicant's head of human resource.
2. The application is opposed by way of replying affidavit sworn by the respondent herself.

3. In a nutshell, the respondent by way of petition sought to enforce her constitutional rights against the applicant. She sought declaratory rights under **Articles 27 and 41** of the **Constitution** relating to discrimination and unfair labour practices following her termination from employment by the applicant. The respondent alleged that her discrimination arose on account of her pregnancy and taking a sick off. The respondent also sought further liquidated claims for, *inter alia*, damages, salaries, notice, leave and pension.
4. At the interim stage, the trial judge ordered the respondent's reinstatement and she was duly reinstated albeit at a different location and no substantive work was assigned to her. This prompted the respondent to resign for the workplace had turned hostile. Upon full hearing of the petition, the trial judge dismissed the allegation of discrimination and found that the applicant's conduct amounted to an unfair labour practice. The learned judge proceeded to award damages in the sum of Shs.3.6 million in addition to issuing orders that the respondent be paid salary arrears and pension dues. In her judgment, the trial judge made a finding that the respondent's right to privacy had been breached by the applicant when they sent out an email to all the staff informing them of the respondent's termination prior to informing the respondent of such termination.
5. Aggrieved by the trial court's decision, the applicant filed a notice of appeal and the application now before us. At the hearing, learned counsel **Mr. Issa Mansur** led **Mr. Omwanza Ombati** for the applicant. Learned counsel's submissions were on the two tests of arguability of appeal and its nugatory aspect if the prayers sought are not granted.
6. On whether the appeal is arguable, learned counsel submitted that the trial judge erred in awarding damages for breach of constitutional rights not pleaded, the judge having found that the claim for discrimination on grounds of pregnancy was unmerited. Counsel referred us to **Galaxy Paint Company Limited v Falcon Guards Limited [2000]eKLR** which also applied the case of **Fernandes v People Newspapers Ltd [1972]EA 63** to the effect that a case is decided on issues arising out of pleadings. Counsel further argued that the issue of unfair labour practice had been dealt with when the respondent was reinstated. Accordingly, the applicant intends to appeal on these issues and in particular the basis for the award of damages for Shs.3.6million as the applicant has already complied with the other orders for monetary payments, added counsel. We have perused the draft memorandum of appeal and can decipher the applicant's line of argument which also alludes to alleged breaches by the respondent including in taking up other employment while she was still working for the applicant.
7. On the appeal being rendered nugatory, **Mr. Issa** submitted that the respondent has no known assets and had not demonstrated capacity to refund in the event that the intended appeal succeeds. He indicated that the applicant had paid part of the decretal sum and that the onus was the respondent's to show that she could refund the sum of Kshs.3.6 million awarded for constitutional breaches under (d) of the judgment adding that the respondent's replying affidavit did not dispute her inability to refund, counsel said that such eventuality would render the appeal nugatory. Counsel supported these arguments by relying on the cases of **International Laboratory for Research on Animal Diseases v Kinyua (1990) KLR 403** and **Printing Industries Limited & Another vs. Bank of Baroda Kenya Limited [2014]eKLR**. Counsel urged us to exercise our discretion in the applicant's favour as the respondent has sought to execute through her auctioneers who have with them a breaking order.
8. **Mr. Onyony**, learned advocate for the respondent opposed the application. He argued that no threat of execution existed as the parties have a consent staying the execution. Relying **on rule 41** of the rules of this Court, counsel submitted that the applicant should first apply to the High Court for such orders without which we lack jurisdiction to determine the application. Mr. Onyony argued further that the intended appeal was not arguable as the judgment had been misunderstood by the applicant; the trial judge had framed issues and was entitled to make a finding; the award of damages was allied to breach of **Article 41** of the **Constitution** and the judge did not specify for which constitutional violation the award of damages was attributed to. In any event, counsel

pointed out, they had in the submissions argued on the breach of confidentiality on the part of the respondent.

9. Learned counsel argued that the appeal would not be rendered nugatory as the onus is on the applicant to prove that the respondent is unable to pay, saying that the respondent is a lawyer currently engaged in work. Counsel cited **Freight in Time Limited v Rosebell Wambui Mutee [2014]eKLR** to support this assertion.

Counsel argued that the applicant's authorities were irrelevant as this case did not deal with a money decree. Counsel urged us to consider the hardship to be visited on the parties and that the respondent's fruits of her judgment should not be delayed.

10. In reply, Mr. Issa argued that **rule 41** of this court's rules is inapplicable to the present application. There was no application for stay pending before the trial court but rather a different application. Counsel pointed out that the breach of confidentiality as argued before the trial court is not the same as breach of privacy. He distinguished the **Freight in Time Limited** case (*supra*) with the present one and further argued that it was not for counsel to opine on his client's capability to refund in the absence of the respondent deponing to the matter. In concluding his submission, learned counsel argued that no hardship would be occasioned to the respondent as part of the decretal sum had already been paid to her. Counsel reiterated that the applicant contests the general damages awarded and that the applicant has an undisputed right to appeal.
11. Our jurisdiction under **rule 5(2)(b)** of this court's rules is well settled on two principles. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that it has an arguable appeal that merits to be heard (see

Githunguri v Jimba Corporation Limited (1988) KLR 838); and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. Lastly, both limbs must be demonstrated to exist before one can obtain relief under **rule 5(2) (b)**. (See ***Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31***). In addition, even the existence of one arguable point should suffice for a grant of orders under **rule 5(2)(b) Court of Appeal rules**.

12. We have applied the principles to the present circumstances. On whether the appeal is arguable, we have considered the rival arguments and the draft memorandum of appeal. In our view, the applicant raises the issue whether the trial judge exceeded her jurisdiction by making a determination on issues not pleaded. The applicant also contests the general damages awarded and the basis thereof. The respondent tries to explain this as a misunderstanding on the applicant's part.

Without inquiring into the merits of the arguments, we are persuaded that the issues raised are arguable grounds of appeal. It is not for us at this juncture to determine whether the arguable grounds may succeed or not, that being the preserve of the trial court. The existence of only one arguable point is satisfactory in considering this limb.

13. On whether the appeal could be rendered nugatory if stay orders are not granted, counsel for the applicant argued that there is an imminent execution being undertaken by the respondent through her auctioneers. The applicant is apprehensive that the respondent may not be able to refund the money should the appeal succeed. Despite Mr. Onyony's argument on behalf of the respondent, the respondent has not submitted any proof of her ability to repay Shs.3.6 million should the appeal succeed. We had expected that the respondent would have addressed this issue in her response to give some comfort to the applicant. Once the applicant raised fears on the respondent's ability to settle the decretal sum, it is incumbent upon the respondent to rebut the fear and assert her means and capacity see ***Printing Industries Ltd. vs Bank of Baroda Kenya Ltd (2014)e KLR***.

14. Does **rule 41** bar this Court from exercising jurisdiction as sought in this application? That is what

the respondent asserts. With respect, we do not agree with that assertion. The substantive rule relating to stay of execution is set out in **rule 5(2)(b)** of this Court's rules. The application is founded on the said **rule 5(2)(b)** and the same cannot therefore be overridden by **rule 41**. We draw analogy from A.B Shah J.A., (as he then was) in **Gabriel Kigi & 6 others v Kimotho Mwaura & another [1997] eKLR** when he considered the extent of rule 41 in relation to the substantive applicable rule:-

“In my humble view the fact that the High Court has a discretion (may extend) time for giving of intention to appeal cannot override the fact that the actual time for filing a notice of appeal is prescribed by rule 74 (2) of the Rules. Hence, again in my humble view, rule 4 of the Rules becomes relevant and rule 41 of the Rules does not bar an application of this nature made to this Court in the first instance.”

15.As we exercise our discretion while considering this application, we seek to balance the interests of the respective parties. The approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not unreasonably denied the fruits of judgment in their favour and their rights are safeguarded. In our view, the balance in the circumstances of this case tilts in favour of the applicant, the burden of proof being the balance of convenience.

16.The upshot of this decision is that we allow the applicant's Notice of Motion dated 8th March 2016 in terms of prayers 3 and 4, prayers 1 and 2 having been spent. Costs shall be costs in the appeal.

Dated and delivered at Nairobi this 29th day of July,2 016.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR