IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 107 OF 2016

BETWEEN

DAVID ENGINEERING LIMITED …….……..…… APPLICANT

VERSUS

NATHAN OGADA ATIAGAGA ……....…… RESPONDENT

(An application for stay of execution pending appeal from the ruling and order of the Employment and Labour Relations Court at Nairobi (Monica Mbaru, J) delivered on 2nd March, 2016

in

ELR Cause No. 419 of 2014)

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RULING OF THE COURT

By the Motion on notice brought under **rule (5) (2) (b)** of this **Court's Rules**, **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and all other enabling provisions of the law, the applicant **David Engineering Limited** prays in the main for an order to stay the orders of the Employment and Labour Relations Court in **Employment and Labour Relations Court No. 419 of 2014** issued on the 21st of September, 2015 pending the hearing and determination of an intended appeal.

In the grounds in support of the application it is stated *inter alia* that the respondent **Nathan Ogada Atiagaga** moved the Employment and Labour Relations Court by a memorandum of claim citing wrongful and unlawful dismissal and non payment of his dues. It is stated that the applicant entered appearance and filed a statement of defence and that the suit was set down for hearing on 27th July, 2015 and a hearing notice dated 2nd December, 2014 was duly served on the advocates for the applicant by the advocates for the respondent. Further, that the advocates for the applicant did not enter that date in their diary as they were yet to acquire a diary for the year 2015. Further, that the relevant file at the applicant's advocates office was inadvertently filed away and that even after they acquired a diary for the year 2015 their clerk failed to diarize the date in respect of the hearing then set for 27th July, 2015. It is therefore said that when the hearing took place on that date neither the applicant's advocates nor the applicant were present in court and the claim was heard without their participation. Further that the applicant's advocates stumbled upon the matter at the lower court when they attended court on 12th August, 2015 and noticed the matter listed for a mention. The applicant moved that court seeking a stay of further proceedings but

were unable to prosecute that application. That in the premises exparte judgment was entered against the applicant on 21st September, 2015 but the applicant's advocates did not become aware of that entry of judgment until a bill of costs was served on them by the respondent's advocates. They then filed another application seeking to set aside judgment but that application was dismissed and that is the basis upon which the intended appeal is to be filed.

It is stated at paragraphs 16 and 17 of the grounds:

> ***"16. That the Applicant being aggrieved by the said ruling has filed a Notice of appeal against the entire ruling of the said Superior court on the 10th March 2016 which appeal has high chances of success and will be rendered nugatory if this Honourable court fails to issue the stay orders sought as the Respondent has proceeded to tax his Bill of Costs dated 8th October 2015. As such there is threatened execution of the decree.***
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> ***17. That the Learned Judge failed to consider the authorities and texts cited by the Applicant and failed to refer and/or distinguish the said authorities at all hence failed to adhere to the doctrine of Stare decisis."***

The appliant further states that the learned judge of the Employment and Labour Relations Court failed to appreciate that the defence filed raised triable issues and that the applicant has an arguable appeal with good prospects of successs and if execution takes place the intended appeal if successful will be rendered academic making the intended appeal nugatory.

Also in support of the motion is an affidavit of one **Gilbert Meo** who says that he is the **Human Resource Officer** of the applicant. That affidavit which basically repeats the matters set out in the grounds appears to offend **Order 19** of the **Civil Procedure Rules**. This is because the deponent, Mr. Meo makes depositions on matters the source of which he does not disclose. For instance, he says that a hearing notice was served on his advocates but the hearing date was not entered in the diary and that the advocate's file was filed away and that even when a diary for the year 2015 was acquired the advocate's clerk failed to enter the hearing date in the diary. He also says that his advocates were unaware of the scheduled hearing and attended other courts for other matters. Mr. Meo cannot say this because he does not say that he works in the law firm of his advocates. How would he know whether a diary had been acquired or how the clerk or advocate operate on an issue of entering matters in an advocates diary? How would he depone to which courts his advocates attend? As we have said the affidavit appears to offend procedural requirements but because we have not been addressed on this issue we shall leave it to lie.

A brief background although already captured in the grounds we have set out above will suffice.

The respondent filed a memorandum of claim at the then Industrial Court of Kenya claiming various reliefs after his employment with the applicant was terminated. The applicant duly filed a defence. The respondent's advocates **Messrs Waiganjo Wachira and Company Advocates** served a hearing notice on the applicant's advocate's **Messrs Mohamed Madhani and Company Advocates** for a hearing that was to take place on 27th July, 2015. That hearing notice was dated 2nd of December, 2014. The record shows and this is common ground that by a letter of 17th December, 2014 the applicant's advocates wrote to their client the applicant notifying the applicant of the said hearing date and requiring the applicant to send witnesses to the advocate's chambers two weeks before the hearing date for pretrial preparations. That letter also required the applicant to ensure that their witnesses attended court for hearing. Come the hearing date and neither the applicant nor their advocate was present in court. The matter was heard with only the respondent's side giving evidence and in a judgment delivered on 21st September, 2015 (M. Mbaru, J) the learned judge noted that the applicant had been duly served with a hearing notice on 5th December, 2015. There was an affidavit of service on record evidencing service of a hearing notice. The learned judge noted in the preliminary part of the judgment that the matter was heard and there was a mention to confirm whether written submissions had been filed and that at that mention the applicant's counsel was present and sought to re-open the trial but that the court directed that there should be a formal application because judgment was due. The learned judge also noted that at the time the judgment was

delivered no formal application had been filed. Judgment was duly entered for the respondent.

A multiplicity of applications then followed asking for judgment to be set aside; that judgment be arrested; that a stay be granted and the matter be heard *de novo;* that the applicant be heard during court vacation and there were other applications. We need not go into these applications as we are concerned only with the application for stay pending appeal which is before us.

The principles that guide this court in a consideration of an application for stay such as the current one are now well settled. It is trite law that we exercise a discretionary jurisdiction and the law enjoins us to exercise such discretion judicially and not to do so by whim, caprice or sympathy but with sound legal reason. See the case of **Githiaka v Nduriri [2004] 2 KLR 67**. A useful discussion on the principles that an applicant needs to satisfy to be entitled to an order of stay under **rule (5) (2((b)** of this **Court's Rules** can be found in **Ruben and 9 Others v Nderito and Another [1989] KLR 455** where the following observation is made:

> ***"In dealing with Rule 5(2) (b) applications, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court; the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (a new) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial Judges discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful would be rendered nugatory. See Stanley Munga –Githunguri versus Jimba Credit Corporation Limited Civil Application Nai 161 of 1985."***

In **Bob Morgan Systems Limited & Another versus Jones [2004] 1KLR 194** at page 195, this Court had this to say:

> ***"The powers of the Court under Rule 5(2) (b) aforesaid are specific.***
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> ***The Court will grant a stay or an injunction as the case may be if satisfied firstly that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly that unless a stay or injunction is granted his appeal or intended appeal if successful will be rendered nugatory."***

So an applicant to be successful and to be entitled to protection under the said rule must firstly demonstrate that the appeal, if filed, or the intended appeal, is arguable and if that limb is met such an applicant has the added responsiblity to demonstrate that if a stay is not granted the appeal, or as the case may be, the intended appeal would be rendered nugatory absent stay.

In submissions before us when the motion came for hearing on 11th July, 2016 **Mr. James Rimui** learned counsel for the applicant readily admitted that his law firm had been served with a hearing notice but that the date had not been entered in their diary because they were yet to acquire a diary for the year 2015. He further admitted that this was an oversight and a mistake but that these were excusable. Learned counsel stated that upon noticing the matter on a cause list listed for mention he decided to prepare an application for setting aside of proceedings. That application was not prosecuted but judgment was entered for the respondent in any event. They then filed another application to set aside the judgment but that the same was dismissed. According to counsel it is arguable in the intended appeal whether the learned judge was right to hold as she did that the applicant's counsel had not given any reason for not attending court. Learned counsel further faulted the learned judge for making conclusions on counsel's absence which according to counsel were not based on facts tendered on the point. Learned counsel cited the case of **Yellow Horse Inns Limited v A.A. Kawir Transporters Limited and 4 Others [2014] eKLR** for the proposition that to satisfy the first limb of the principles under **rule (5) (2) (b)** of this **Court's Rules** an applicant need not cite various arguable points as one point will suffice. On the second limb learned counsel submitted that the respondent cannot refund the sum of about Shs.1.5 million in the decree but

counsel confirmed that this was a statement from the bar as it was not set out in the grounds in support of the motion or even in the affidavit of the applicant's manager.

Mr. Waiganjo Wachira learned counsel for the respondent submitted that the applicant's advocates knew about the hearing date as evidenced by the letter we have referred to where the advocate informed the applicant of the hearing date. Because the applicant and their advocate knew of the hearing date Mr. Wachira was of the view that there was no arguable appeal. On whether the appeal would be rendered nugatory if stay of execution was not granted, learned counsel submitted that it had not been shown that stay should be granted. Learned counsel for the respondent was of the view that in a case like the case before the trial court involving money where it had not been demonstrated that the money could not be paid back if the intended appeal succeeded, stay should not be granted.

That is the material that was placed before us on the basis of which we have considered the Motion, the grounds, the apparently irregular affidavit, the whole record and the law and upon which we have taken the following view of the matter.

In the ruling delivered on 2nd March, 2016 the learned judge analysed the material placed before her and reached the conclusion that the applicant had not demonstrated any reason why the judgment entered should be set aside. The learned judge expressed herself in the following way in part of the ruling:

> ***"16. The Respondent in the application dated 18th January 2016 has not given reasons as to why there was no attendance at the scheduled hearing date despite service and acknowledgement. In the affidavit of James Rumui, he opts to start his explanations from 26th August 2015 where he avers that it came to his attention that the matter had proceeded ex parte on 27th July 2015 and judgment reserved for 16th September 2015. From paragraph 1 to 20 of the affidavit, there is nothing at all to support the application seeking to set aside the proceedings held on 27th July 2015. I find the matters set out in the grounds and affidavits in support of the application deliberately chose to dwell on peripheral issues not directly related to the orders sought.***
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> ***17. Even where I may allow chance for error, upon the Court hearing the Claimant on 27th July 2015 noting the Respondent was properly served, the matter was reserved for mention to confirm the filing of written submissions on 12th August 2015. The Respondent was represented in Court where counsel made presentation that they were not aware of the purpose of the mention and further asked for leave to file application for the matter to be re-opened for purposes of defence hearing. Court reserved judgment for 16th September 2015. Where indeed the hearing notice was served on 5th December 2014 and counsel for the Respondent was in Court on 12th August 2015 for mention, it must have been evident from his file that there existed a hearing notice for 27th July 2015. Such hearing notice should have alerted counsel that immediate action was necessary and prudent to secure the Respondent interests even before he appeared in Court on 12th August 2015 allegedly for a mention that he did not know its purpose. Where the mistake was to fail to diarise the hearing date, there was no mistake in the filing of such a notice in the relevant file. On the prompting for mention on 12th August 2015, it would have been apparent that the Respondent was one step behind and remedial action necessary. To then appear and seek to re-open proceedings in such circumstances does not speak of justice, rather it would be an injustice to the claimant.***
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> ***18. On this basis, I take it as of 12th August 2015, the Respondent were aware that the Claimant was heard in their absence and judgment had been reserved for 16th September 2015. I have heard (sic) chance to see application dated 26th August 2015 filed by the Respondent. For reasons best known to the respondent, this application though filed before the current one has not been prosecuted.***
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> ***19. The ripple effect of it is that, there are no reasons as to why the Respondent failed to attend***

hearing on the due date. Court proceeded and heard the Claimant who had diligently attended and there was no reasons as to why the Court would fail to attend to him. There are lawful proceedings herein, such proceedings took place with the knowledge of the Respondent and judgment delivered. Such can only be disturbed on good cause which does not exist herein."

The learned judge went on to hold that a party who acts in a manner that does not aid the cause of justice should not be a beneficary of the discretion of the court.

We have perused the draft memorandum of appeal.

The applicant intends to argue in the intended appeal that the learned judge did not consider the defence filed by the applicant; that the learned judge failed to consider facts set out in some affidavits and failed to consider submissions in support of the application to set aside judgment.

We have perused the judgment delivered on 21st September, 2015. With respect, we do not agree with the submission of learned counsel for the applicant that the learned judge did not consider the defence filed on behalf of the applicant. The learned judge indeed not only considered that defence but set out part of it in the judgment and found that it was not a tenable defence. The learned judge did not stop there. She revisited the issue of the applicant's defence in the ruling to be appealed against part of which we have set out in this ruling, and reached the same conclusion. We must now leave that issue to the bench that would hear the intended appeal.

Whether or not failure to diarize a hearing date by an advocate and thereafter failure to atend court at a hearing in a situation like here where the advocate becomes aware that a hearing has taken place before judgment is delivered and that advocate does not thereafter ask to participate in the proceedings is to us not an arguable point. The learned judge considered all the reasons that were advanced and did not find them valid and thus dismissed the application. The learned judge was exercising a judicial discretion and we do not perceive at this preliminary stage that that discretion was wrongly exercised. We do not believe that the applicant has demonstrated the existence of any arguable point in the intended appeal. Having taken that view we do not need to go into the second limb on whether the intended appeal will be rendered nugatory. The Motion fails accordingly and is dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 29th day of July, 2016.

P. KIHARA KARIUKI, (P.C.A.)

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JUDGE OF APPEAL

F. SICHALE

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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