



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPLICATION NO. 8 OF 2016 (UR 7/2016)**

**BETWEEN**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> APPLICANT**

**THE MANAGING DIRECTOR, KENYA PORTS AUTHORITY....2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH MAKAU MUNYAO.....1<sup>ST</sup> RESPONDENT**

**ELIUS NJOKA.....2<sup>ND</sup> RESPONDENT**

**STEPHEN BAYA MWANYULE.....3<sup>RD</sup> RESPONDENT**

**MWINYI SULEIMAN SIBABU.....4<sup>TH</sup> RESPONDENT**

**BWANA MOHAMED BWANA.....5<sup>TH</sup> RESPONDENT**

*(Being an Application for stay of execution of the order of the Employment*

*& Labour Relations Court at Mombasa (Radido, J.) dated 19<sup>th</sup> February 2016*

*and amended on 23<sup>rd</sup> February 2016*

*in*

*NKR. PET. NO. 11 of 2015 Previously MSA. IND.C.PET.*

*NO. 56 of 2014 & Originally MSA.H.C.PET.No. 68 of 2012)*

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**RULING OF THE COURT**

The respondents brought an action against the applicants claiming that the latter, their employer, had violated their constitutional and contractual rights. The action was heard and determined in the Employment & Labour Relations Court (**Radido, J**). The learned Judge resolved the dispute as follows.

He found that before their interdiction, reinstatement and redeployment, the respondents were given an opportunity and heard on the allegations of economic sabotage. However, the ensuing warning issued to them was unfair for being contrary to the appellant's own internal procedures. Secondly, the learned Judge held that conditional lifting of interdiction and redeployment of the respondents from gantry operations to less "**lucrative**" departments as a result of a disciplinary process was not based on any statutory or contractual term and was also not among the forms of punishment provided for under the applicant's Disciplinary Handbook, hence amounted to unfair labour practice; and that, in any case the culpability of the respondents was not proved. Thirdly, that the redeployment of the respondents did not affect their grades or salaries; and that the alleged reduction of certain allowances such as fixed allowance, bonus and deterrent allowance, was not proved.

Regarding the surcharge of the respondents, the learned Judge found that without proof of personal culpability of the respondents, the applicant had no justification to surcharge them. The placing of the respondents on fresh probation for 24 months after the lifting of interdiction and upon reinstatement was found to have no statutory basis; and finally that the failure of the applicant to comply with the respondents' notice to produce certain documents, could only lead the learned Judge to draw, he in fact drew, adverse inference against the former, that had the documents been produced they would have proved, among other things, that there was no evidence of the respondents' culpability. Ultimately the learned Judge ordered the reinstatement of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to their previous positions as gantry operators with immediate effect, the payment of Ksh.800,000 to each respondent as general damages for unfair labour practice; that the surcharge amounting to Kshs.245,580/- be refunded to each respondent; and that costs of the suit be borne by the applicant.

The applicant was aggrieved by the decision and has filed both the notice of appeal and a draft memorandum of appeal, expressing the intention to challenge that decision in this Court. In the meantime it seeks, by a notice of motion, temporary orders of stay of further proceedings and or execution of the three orders of the court below, that is, the reinstatement of the aforesaid respondents, an award of Kshs.800,000/- as general damages and the refund of the surcharge in the sum of Kshs.245,580/- to each of the respondents. The application is premised on the grounds that the reinstatement of the two respondents as gantry operators four years after their redeployment elsewhere in the corporation was a security risk; that the learned Judge exceeded his powers by ordering the restoration of the respondents to their former positions after the 3 years limitation period allowed for doing so; that due to the technological advancement in gantry operations the respondents were unlikely to safely resume their former duties; that the applicant had lost trust in the respondents following accusation of economic sabotage; and that the award of general damages had no foundation. For these reasons and on the basis of the draft memorandum of appeal, it was submitted by **Miss Wetende** learned counsel for the applicants, that the intended appeal would be arguable.

On the nugatory aspect, the applicants submitted that apart from the security risks alluded to above, should the awarded general damages be paid over and the surcharge refunded to the respondents, the same may not be recoverable from the respondent; that once the respondents are reinstated and paid as ordered other claimants in Employment & Labour Relations Cause No. 40 of 2015 numbering 89 whose claims arose from the same circumstances as the respondents herein, would demand the same treatment with far reaching consequences to the applicants; that the respondents will not suffer any prejudice if the application was granted as they are still in the employment of the appellant. Learned counsel for the applicants cited seven authorities which we shall allude to shortly, to support the foregoing submissions.

**Mr. Aboubakar** learned counsel for the respondents opposed the application arguing that the intended appeal is not arguable; that there is no law limiting restoration of employees to their former positions to 3 years; that in any case the claim before the court below was filed within 3 years; that the learned Judge properly drew adverse inference following the applicants' failure to comply with the notice to produce; that without evidence linking the respondents to any financial loss, the learned Judge was justified to order the refund of the surcharge.

On whether the intended appeal will be rendered nugatory it was submitted that this has not been demonstrated; that the applicants could not claim that they had lost trust in the respondents yet they have

been retained in their employment, that the respondents were entitled to general damages for the wrongful actions of the applicants; and that should the intended appeal succeed after the payment of the award, the applicants will be able to recover that from the respondents' salaries.

The common thread running through the five decisions cited by the applicants on the jurisdiction of this Court under **Rule 5(2) (b)** of the Court's Rules are that, the jurisdiction is discretionary; that it is guided by two broad principles, namely, arguability of the appeal or intended appeal and the nugatory effect of the appeal or intended appeal if the application for stay is not granted; that both requirements must be satisfied; that even one *bona fide* arguable point would be enough to discharge the burden of arguability; that an arguable point is not necessarily one that must succeed on appeal; that whether the application is one for stay of execution, stay of further proceedings or injunction under **Rule 5(2) (b)** aforesaid, the two considerations remain constant; that **Rule 5(2) (b)** is a procedural innovation to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals; and that in certain circumstances the Court will take into account the amount of money the payment of which is sought to be stayed and weigh the financial hardship that may result to the party ordered to pay. See Somak Travels Ltd v Gladys Aganyo, Civil Appl. No. 288 of 2015, Kenya Kazi Security Services Limited v Kenya National Private Security Workers Union, Civil Appl. No. 108 of 2013, Total Kenya Limited v Kenya Revenue Authority, Civil Appl. No. 135 of 2012, Wells Fargo Limited v Cyprus Kioko & 48 Others, Civil Appl. No. 42 of 2015 and Maasai Mara University v Daniel K. Cheboi & 3 others, Civil Appl. No. 165 of 2015.

Applying the above principles to the facts of this case, we have no difficulty in arriving at the conclusion on the first limb that, from the pleadings, submissions and the draft memorandum of appeal, the intended appeal is not frivolous. It will raise, *inter alia*, the question of limitation of action, whether the learned Judge awarded general damages without any basis and erred in ordering the refund of surcharge, whether the adverse inference in respect of the respondents' notice to produce was justified, and whether, by redeploying the respondents to their previous station the learned Judge rewrote the contract of employment between the parties or acted within the provisions of the law.

Will the intended appeal be rendered nugatory should this application fail? The applicants took a two-pronged approach to this question. They argued that the respondents may not reconstitute the awarded damages and surcharge if paid over and the appeal or intended appeal were to succeed. Secondly, it submitted that in view of the fact that the respondents were redeployed in other departments for some 4 years, they may not be suitably qualified for the mechanized operation of the gantry and that the applicant having lost trust in the respondents, it would be a security risk to return them to that section.

We are of the view that although monetary loss is unlikely to be suffered as the applicants can always recover the damages awarded and the surcharge should the appeal or intended appeal succeed, the more persuasive reasons for granting a stay is the uncontroverted security concerns coupled with the fact of loss of trust. In any case a stay of execution pending the determination of the intended appeal will not prejudice the respondents, who are still employees of the applicant, having retained their positions and salaries. Regarding the allowances, the learned Judge found that none was lost by the deployment of the respondents to other sections.

The applicant having satisfied both requirements for the grant of a temporary stay of execution, we accordingly allow the notice of motion dated 9<sup>th</sup> March 2016, grant stay of execution of the orders of 19<sup>th</sup> and 23<sup>rd</sup> February 2016 and order that costs be in the intended appeal.

***Dated and delivered at Malindi this 29<sup>th</sup> day of July, 2016***

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**