IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, J. MOHAMMED & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI 177 OF 2014

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

MOI UNIVERSITY...APPLICANT

AND

ERIC KIMANI..1ST RESPONDENT

BENARD NZIOKA...2ND RESPONDENT

LYDIA SAYA...3RD RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the Industrial Court of Kenya at Nairobi (D.K. Njagi, J.) dated 21st day of February, 2013

in

INDUSTRIAL CAUSE NO. 900 OF 2010)

****

RULING OF THE COURT

[1] Erick Kimani, Bernard Nzioka and Lydia Saya, 1st, 2nd and 3rd respondents, respectively were employees of Moi University. The applicant, Moi University had employed the respondents, until the 22nd March 2006 when the University terminated the respondents' employment with immediate effect. All the respondents protested against the dismissal from employment by invoking several mechanisms such as an internal appeal against the dismissal which appears to have been unsuccessful. The respondents also filed a reference with the Ministry of Labour through KUDEIHA UNION who demanded to be furnished with reasons for dismissal. The fate of the proceedings through the Union is not clear from the scanty documents accompanying this application, but perhaps that process did not yield any results for the respondents.

[2] It would seem, sometimes in 2010, the respondents filed a suit before the Industrial Court of Kenya (now Employment and Labour Relations Court) which fell for hearing before Marete, J. who considered the evidence and in a judgment dated 21st February, 2013 the learned judge found the respondents were wrongfully, unfairly and unlawfully terminated from employment and made the following orders:

> **"1. That I make a declaration that the dismissal of the three claimants by the respondent was unlawful, unfair and wrongful.**
>
> 2. **That I also make a declaration that the dismissal of the claimants by the respondent was null and void for lack of compliance with the law and procedure.**
>
> 3. **That the claimants be and are hereby reinstated to their former positions and employment without any loss of benefits, seniority, salary or privileges.**
>
> 4. **That the respondent be and is hereby ordered to pay the claimants their salaries, benefits and other emoluments for the entire period of unlawful termination from employment.**
>
> 5. **That the claimants are ordered to report to their jobs and duty station tomorrow, 22nd February, 2013 for deployment.**
>
> 6. **That the cost of this cause shall be borne by the respondent."**

[3] The University intends to appeal against the aforesaid orders and accordingly filed the Notice of Motion dated 15th July, 2014 which is brought under **Rule 5 (2) (b)** of the Court of Appeal Rules. The application is seeking for stay of execution of the aforesaid orders pending the hearing and determination of the appeal. The application is supported by an affidavit sworn by Wilkister Munyoka Simiyu, the Legal Officer of the University that was sworn on 15th July, 2015. According to the University, it is aggrieved by the judgment made on 21st February, 2013 that required them to reinstate or redeploy the respondents who were ordered to report on duty the following day on the 22nd February 2013, for redeployment, notwithstanding that they ceased to be employees more than 7 years ago and the positions no longer existed due to institutional changes that had taken place. The applicant is also supposed to pay the respondents their salaries, emoluments and other benefits for almost 7 years when they were out of employment, in addition to deployment. Although the court did not calculate the decreatal sum payable to each respondent, the respondents have made their own calculations and they are claiming in excess of Kshs. 48,000,000/= each from the applicant.

[4] The University intends to challenge the said orders and in the event the appeal will be successful, it is their view that it will not be possible to recover the said amounts from the respondents. The University also contends that they have an arguable appeal which is predicated on the fact that the order for deployment of the respondents whose services were terminated more than 7 years prior to the judgment was made in excess of jurisdiction and without any legal basis. It is further contended that such an order was not founded under the Employment Act and that the learned judge failed to complete his judicial functions of quantifying the amounts payable to the respondents. Further, that unless the order of stay is granted, the applicants' appeal if successful will be rendered nugatory as it is not clear how the respondents can refund such colossal sums of money.

[5] During the hearing of this application Ms. Oyombe appearing for the applicant submitted that the applicant has an arguable appeal that is demonstrated by the several grounds of appeal listed in the draft memorandum of appeal. She faulted the judgment by the learned trial judge for failing to quantify the sum payable to the respondents thereby leaving the judgment inconclusive and for that reason, the respondents have calculated in their own way and are now demanding more than Kshs. 48,000,000/= each from the applicant. According to counsel for the applicant, it is not possible to ascertain the basis of such calculations. Further, counsel submitted that the court erred in interpreting the statute of Moi University which gave the applicants the mandate to engage and discipline or dismiss its employees.

[6] In addition counsel for the applicant urged us to hold that the provisions of the Employment Act limits the period within which an employee can be reinstated. These employees were being reinstated after more than 7 years after the University had transformed and that the court failed to consider that the respondents were employees of Chepkoilel Campus whose legal status changed, and it was elevated into a fully-fledged University complete with its own structure and statute. It was therefore not possible to redeploy the respondents in their former positions which no longer existed. Finally counsel for the applicants relied on several decisions of this Court as per the lists of authorities which have given the general guidelines on the principles that are applicable in granting stay of execution under **Rule 5 (2) (b)** of this court Rules. Some of them will be adverted to later in the ruling.

[7] This application was opposed by Mr. Otieno learned counsel for the respondents. Counsel relied on the replying affidavit by Erick Kimani filed on 12th November, 2014. According to the respondents, the order directing their redeployment had a specific date of 22ndFebruary, 2013 which was not obeyed by the applicant. The other order was for payment of salary and benefits and the court did not set any specific figures to be paid thereby requiring the parties to agree; failure to agree on the assessment, any party can return to court for the court to do the tabulations. Since the applicant has not been incorporative, the respondents calculated in their own understanding what constituted back salaries from the time their employment was terminated arriving at the sum of over Kshs. 48,000,000/= which they are proposing they be paid or the same amount be deposited should this Court be inclined to grant the order of stay of execution.

[8] According to the respondents, the intended appeal is not arguable because the applicant did not follow due process in terminating the respondents' employment.

The court expressly found the termination was unfair and unlawful. The respondents are also undergoing hardship due to unemployment. The applicant has not paid any payment since the judgment and the respondents are subjected to untold suffering. Ms. Aoko further submitted during her oral address to us that the order for reinstatement or re deployment was not enforced despite the fact that the applicant is a learning institution which can easily redeploy the services of the respondents in any of its many departments. The University has also not paid any money to the respondents. While conceding it was a judicial function of the learned judge to quantify the decretal sum payable to the respondents, the University has not shown any good will, it has been belligerent and adamant by refusing to corporate with the respondents to determine the past salaries and benefits. Moreover failure by the trial judge to compute the decretal sum is not a fatal error. It can be cured by an application requesting the court to complete the computation. Counsel urged us to dismiss the application but in the event the court agreed to allow it, the University should be directed to deposit a substantial part of the decretal sum as security. Finally, counsel stated that the applicant failed to file the appeal within the stipulated period and therefore the current application should be dismissed under **Rule 83** of this court's Rules.

[9] This is an application under **Rule 5 (2) (b)** of this Court's Rules under which the court is asked to exercise judicial discretion and as was stated in the case of **Trust Bank Limited And Another V. Investech Bank Limited And 3 Others**

Civil Application NAI .258 and 258 of 1999 (unreported).

> **"The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case…."**

[10] Applying the above principles to the facts of this case it is to be observed that as regards the intended appeal, we are of the view that it is arguable. Indeed it was conceded even by counsel for the respondents that the award of back salaries and benefits that was awarded to the respondents for the last 7 or so years was not quantified. It was also stated by the applicants' counsel that the trial judge stated in a subsequent

ruling that the court was *funtus officio*. We also take note of the submissions that the award for back salaries beyond what is provided for under the Employment Act as a remedy for unlawful termination of employment and the issue of reinstatement of the respondents after so many years are all arguable issues to be dwelt within the substantive appeal and we wish to say no more on those issues.

[11] In **Butt V. Rent Restriction Tribunal** (1982) KLR 417 at PP 419 & 420 Madan, JA (as he then was) said;-

> **"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in WILSON V, CHURCH (No. 2) 12 Ch.D (1879) 459."**

The above observation clearly resonates with the circumstances of the instant application, a back pay of salaries for the last 7 years, which the court did not quantify is tantamount to a non-liquidated claim that is left to the parties to do their own calculations as we are told the respondents are demanding a sum of over 48 million. This in our view is a large sum of money. We have considered the authorities cited to us by counsel for the applicant and in view of what this Court held in **Oraro & Rachier Advocates Vs Co-Operative Bank of Kenya Limited**; Civil Application No. NAI 358 of 1999 (unreported), the balance of convenience tilts in favour of granting an order of stay of execution to the applicant. We are also of the view that unless the order of stay is granted and the respondents were to proceed to enforce the order of reinstatement or execution of the order to recover 7 years of back salaries, the intended appeal would be rendered nugatory.

[12] The upshot of the foregoing is that this application is allowed and we grant an order staying execution of the orders made on 21st February 2013, in Industrial Cause No. 900 of 2010 until the determination of the intended appeal. We recognize a determination of this appeal should be expedited so as to bring this long protracted matter to a close. For this reason, we direct the applicant to file the appeal within three months from the date of this ruling, and thereafter to bring it to the attention of the Registrar of the Court of Appeal so that it can be accorded a priority hearing date. For now we make no orders as to costs which should abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 30th Day of September, 2016

M.K. KOOME

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR