IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KARANJA & OUKO, JJ.A.

CIVIL APPLICATION NO. NAI 19 OF 2011 (UR 14/2011)

BETWEEN

KENYA REVENUE AUTHORITY……..……..APPLICANT

AND

SIDNEY KEITANY CHANGOLE (759(N) OF 2009)…..….....……1ST RESPONDENT

MARK KITHINJI MUTEGI (760(N) OF 2009)…….....…….2ND RESPONDENT

AUDREY EMMAH OWINO (761(N) OF 2009)…….....……3RD RESPONDENT

KENNEDY OMINDE OBONGO (762(N) OF 2009)…….....…..4TH RESPONDENT

(An Application for stay of execution of the award and decree of the Industrial Court of Kenya at Nairobi (Kosgei, J.) dated 12th January, 2011 in

Cause Nos. 759(N), 760(N), 761(N) & 762(N) OF 2009)

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RULING OF THE COURT

Kenya Revenue Authority (applicant) has moved this Court for an order of stay of execution of the award issued by Paul Kosgei, J. on 12th January 2011 in Industrial Court Cause Numbers 759, 760, 761 and 762 of 2009 pending the lodgment, hearing and determination of an intended appeal.

The application is pronounced to be brought under **Sections 3A** and **3B of the Appellate Jurisdiction Act**, **Rules 5(2)(b)** and **42 of this Courts Rules**; **Section 27(1)** and **(2) of the Labour Institutions Act.**

It also seeks an order that costs of the application abide the result of the intended appeal.

It is worth noting that to date, the intended appeal has yet to be filed. The application is predicated on some nine grounds on its face and supported by the affidavit of Ado Moses, the applicants Legal Officer sworn on 9th February 2011. It is opposed through the affidavit of Audrey Emma Owino (3rd respondent) sworn on her own behalf and on behalf of the three other respondents on 25th February 2011.

A brief background of the matter is that the four respondents were employed by the applicant as Graduate Trainees Grade K12 on monthly salary of Kshs 38, 319/= each. They in January 2002, upon accepting the offer of employment and the terms contained therein, signed a code of conduct which clearly spelt out the manner in which they would be expected to conduct themselves while in the service of the applicant.

They were also expected to undergo training and sit examinations, which we believe were important for their career progression. It is while sitting such examinations some months after employment that they were said to have involved themselves in examination irregularities / cheating.

Action was taken against them which included cancellation of the results in the subjects they were said to have cheated in. They recorded statements in which some of them except 4th respondent apparently admitted the said irregularities and asked for pardon. They were allowed to re-sit the examinations whose results had been cancelled with a warning that a repeat of such conduct would disqualify them from sitting any other exams.

They thought that the matter had ended there but seven months later they received letters of termination of service dated 9th July 2009 informing them that their services had been terminated under clause seven (7) of their letters of appointment for cheating in the examinations which according to their employer amounted to an act of dishonesty contrary to the applicant's code of conduct. They were informed that they were only entitled to one month's salary in lieu of notice.

It is this termination that they challenged before the then Industrial Court (now the Employment and Labour Relations Court) vide their claim dated 2nd December, 2009 in which they were claiming the following reliefs, *inter alia*;

1. *Reinstatement to employment to the level they would have reached at the time of such reinstatement,*

2. *Kshs. 239,000/= being arrears of salaries, and*

3. *Compensation for wrongful dismissal.*

After hearing the matter, the court found that the respondents had suffered unfair loss of employment, and ordered that they be reinstated to their jobs within seven (7) days from the date of the impugned award. This is the order that gave rise to the intended appeal herein the execution of which the applicant now seeks to have stayed.

It is the applicant's submission that if the stay sought is not granted then it will be compelled to take back into its employment persons deficient in integrity and that would be detrimental to the operations of the applicant. According to Ms. Mburugu, learned counsel for the applicant, integrity and honesty are key to an institution which deals with revenue collection and if the applicant is compelled to reinstate dishonest people, this might affect its core business of collecting revenue. Such persons, she submitted, cannot be trusted to collect large amounts of taxes. In her view, that is a point that is arguable on appeal.

On the nugatory aspect, learned counsel submitted that if the appellant reinstated the respondents and the intended appeal succeeds, then they will have paid out salaries in vain. That would in learned counsel's view render the appeal nugatory. A quick rejoinder to this from Mr. Bosek, learned counsel appearing for the respondents was that, if indeed the respondents are reinstated and paid salaries, they will only be receiving salaries, for the work done. If thereafter, the appeal fails, then the respondents will just be discharged. The applicant will therefore have nothing to lose.

On the arguability of the appeal, Mr. Bosek submitted that the appeal was not arguable. He urged that the respondent may have been involved in examination irregularities but having been pardoned by the Examination Board, their employment ought not to have been terminated as that amounted to subjecting them to double jeopardy. He further submitted that after being pardoned for cheating, the respondents had continued working for the applicant for seven months and there was no evidence that they had failed to

discharge their duties with honesty and integrity as expected of them. He urged us to dismiss this application.

We have considered this application, the grounds, the rival affidavits and the submissions of both learned counsel. These have to be considered within the context of the twin principles which must be satisfied before a Court can grant the orders sought under **Rule 5(2)b of this Court's Rules.**

These principles are now settled and we have restated and applied them in applications premised on **Rule 5(2)b of this Court's Rules**. They are well articulated in the case of **Ishmael Kagunyi Thande v HFCK, Civil Application No. 156 of 2006** where this Court stated:-

> ***"The jurisdiction of the court under rule 5(2)b is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."***

This Court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed, but one that is not frivolous, and one that raises issues that merit the consideration of this court.

See also **Githunguri vs Simba Credit Corporation Ltd 2 [1988] KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982-88] 1088, Reliance Bank Limited vs Norlake Investment Ltd [2002] 1EALR 227; Harveer Investments Company Limited vs Equatorial Commercial Limited & 3 Others [2009] EKLR.**

A successful applicant must establish both principles and establishing one and not the other will not help. Failure to prove one inevitably dislodges the other.

In the application before us, has the appellant established any arguable point? In our view, although this did not come out clearly in learned counsel for the applicant's submissions, it is an arguable point whether having found that the respondents were in breach of the applicant's code of conduct, and consequently the contract of employment, the best remedy was to order reinstatement. This is what the court said:-

> ***"In view of the said conduct on the claimant's part, the respondent was indeed entitled to terminate the claimant's contract for breach of contract…"***

The other issue that arises and which in our view is arguable on appeal is whether the "pardon" or forgiveness given to the respondent by the Examination Board could stop the Commissioner in charge of Human Resources from issuing the letters of termination seven (7) months later. The appellant's argument which the respondent disputes is that the Examination Board and the Human Resources department are two different entities whose decisions are independent of each other. Assuming they are two different entities, then the issue arises as to whether the respondents were given a hearing by the commissioner human resources before they were sent packing.

That is an issue for the Court hearing the appeal to determine. At this stage, we can only say that the intended appeal is not frivolous.

What about the nugatory aspect? We agree that issues of honesty and integrity in any institution cannot be taken lightly. Indeed the applicant has underscored this importance by explicitly expressing it in its code of conduct which the respondents signed upon acceptance of the offer of employment. If therefore the Court was to order reinstatement of the respondents, and the appeal thereafter succeeds, the appellant will have been burdened with employees who will have been found to have failed to abide by its code of conduct, and who in its view would dent its standing as an institution that does not condone dishonesty or compromise integrity.

We note further that it has been too long since the termination of the respondents' employment – about six (6) years to date. It may not be expedient to reinstate them either to the same position of trainees (which they were before termination) or to the position they would be at today had they stayed on, as this may cause problems as there may be no vacancies available.

If an order for reinstatement was given, and then the appeal is allowed later, this would be very disruptive to both the applicant and the respondents. This Court has a duty to balance the interests of both parties and arrive at a fair decision. (See **Oraro &**

Rachier Advocates vs Co-Operative Bank of Kenya Ltd [1999] 1 EA 236).

It is more prudent for the respondents to wait for the intended appeal to be determined instead of leaving what they have been doing for the last six years in order to resume work as trainees with the applicant , only for their hopes to be shattered later in the event the appeal were to succeed. The balance of convenience clearly tilts in favour of the applicant herein. In the result, we find that this application passes the threshold required for applications of this nature under **Rule 5(2) (b) of Court of Appeal Rules.**

Accordingly, we allow the same and grant the stay order sought. We nonetheless order that the appeal be filed within 90 days from the date of this Ruling failing which the stay will automatically stand vacated.

Costs of this application will be in the appeal.

Dated and delivered at Nairobi this 20th day of March, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR