



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA & MURGOR, JJA.)

CIVIL APPLICATION NO. NAI.234 OF 2014 (UR 182 /2014)

BETWEEN

NATIONAL ENVIRONMENT & MANAGEMENT AUTHORITY.....APPLICANT AND

EDWARD JUMA MASAKHA.....RESPONDENT

(Application for stay of orders pending the lodging, hearing & determination of an intended appeal from the Judgment of the Industrial Court of Kenya at Nakuru (Ongaya, J.) dated 31st July, 2014

in

Industrial Court Case No.214 of 2013

RULING OF THE COURT

On the 16th September, 2014, the applicant authority filed the notice of motion dated a day earlier, under **Rule 5(2)(b) of the Rules** of this Court. The main prayer was worded thus:

“3. That this Honourable Court do order a stay of execution proceedings of the judgment of the Industrial Court of Kenya at Nakuru (Mr. Justice Byrum Ongaya) delivered on the 13th July, 2014 in Industrial Case No.214 of 2012 pending the inter partes hearing and determination of the appeal.”

The grounds put forth together with the deposition in the supporting affidavit of **Prof. Geoffrey Wakungu**, Director General of the applicant formed the basis on which **Mr. Kalii**, learned counsel for the applicant presented the motion. **Mr. Morintat**, learned counsel for the respondent, opposed it.

The brief background to this cause is that the respondent was the Provincial Director of Environment (Rift Valley). His duties included issuing licences for what were called low and medium risk projects. On 15th March, 2012 his deputy **Joseph Kopejo**, telephoned the respondent reporting that a certain project in Maasai Mara Reserve required urgent licensing and because the respondent was going to a meeting in Nairobi, he filled some blank licence forms which he handed over to the said deputy to complete in respect of the said Maasai Mara Project. The deputy proceeded to do that, and in so doing completed and licensed a high risk project – one which fell outside the respondent’s mandate. For that, disciplinary action was taken against him. The proceedings culminated in his services being terminated summarily. Consequently, the respondent filed a claim in the Industrial Court at Nakuru. The decision of that court delivered on 31st July, 2014, was that the applicant do reinstate the respondent in his duties from the date

of termination – 7th December, 2012, and all his salary withheld during the period be released to him. The court orders were to be effected by the 1st October, 2014 at the latest. And the respondent was given until 8th August, 2014 to report to the applicant for deployment.

We gleaned from the submissions that the respondent reported for deployment and sought to have his dues paid – a matter that the applicant could not effect right away and so contempt proceedings were commenced against the applicant. The record has it that the notice of appeal was filed on 17th August, 2014, then this motion followed.

Mr. Kalii told us that on appeal it will be argued that the mutuality principle was not well and fully appreciated by the learned Judge when he ordered reinstatement of the appellant, and particularly **Section 49 of the Employment Act, 2007**, regarding practicability of ordering reinstatement unless in very exceptional circumstances. That it was not fully and properly addressed.

Counsel continued that as a public body the applicant was bound to safeguard and ensure good use of public resources and so it was mindful not to reinstate and pay the respondent before its appeal was determined. As to whether the appeal could be rendered nugatory if we did not order a stay and finally it succeeded, **Mr. Kalii** posited that a large sum of money if paid could be hard to recover from the respondent. He added that the applicant was faced with contempt proceedings, which if not stayed and the applicant was found guilty, its director could be ordered to serve a prison term, whereby his liberty being put in jeopardy. And that reinstatement of the respondent will make hearing of the appeal irrelevant. It will have been overtaken by events and therefore exhausted.

Mr. Morintat opposed the application. However, he told us that if the applicant reinstated his client, stay orders would issue in respect of the other orders in the decree to await the outcome of the appeal. Remarking that some issues appeared arguable on appeal, nonetheless, it was counsel's view that all relevant aspects relating to proportionality were properly addressed by the learned Judge. The appeal if it eventually succeeds, could not be rendered nugatory because whatever money will have been paid to the respondent during the period of reinstatement will be for actual services rendered. There could be no difficulty in reinstating him since all it would take is a desk and a chair in some office. **Mr. Morintat** did not comment on the situation where reinstatement would mean having two officers performing the same duties at the same time, occasioning additional expense and confusion in the organization.

Regarding the contempt proceedings against the applicant, counsel told us that the same had been put on hold awaiting the outcome of the motion under review.

In applications of this nature, we are aware of what has been stated in many past decisions, that to succeed the applicant must satisfy two conditions in order to be granted stay orders. One, that the applicant has an arguable appeal, and two, that if stay orders are not granted and in the event the appeal succeeds eventually, it shall be rendered nugatory.

It needs no reproducing the specific past cases which have held, *inter alia*, that to make out an arguable appeal even one ground only is sufficient for granting a stay order and that an arguable appeal is not one that will necessarily succeed. It suffices that the ground is argued fully before us. The other principle is that considering whether an appeal will be rendered nugatory or not, this Court must bear in mind that each case must depend on its own facts and peculiar circumstances, and that in such applications this Court exercises original and discretionary jurisdiction, while all the time the Court should be alive to and not appear to make final and definitive findings on the merits of the appeal itself.

In the present matter we are of the view that, at least, the applicant has placed before us one arguable point in that it will be contesting whether or not the learned Judge erred in ordering reinstatement of the respondent especially in the light of **Section 49 of the Employment Act 2007**. The point is arguable because the respondent told us that, in his view, the learned Judge was right all the way, even as its counsel, **Mr. Morintat**, appeared to agree that arguable issues seemed to feature in the appeal.

As to whether the appeal may be rendered nugatory in the event it succeeds yet the stay order was

refused, we hold that recovery of any sums disbursed to the respondent may entail separate, long and costly litigation. And besides, if reinstatement is not put on hold at this point, if effected then the substratum of the appeal will be gone. And also we have considered that if the contempt proceedings go on, and the court orders imprisonment of the applicant's chief officer in civil jail, that may constitute prejudice as to his liberty which can hardly be compensated by money in a satisfactory way.

In sum, we grant the orders sought in this motion but direct that its costs be in the appeal.

Dated and delivered at Nairobi this 13th day of February, 2015

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR