



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, G.B.M. KARIUKI & MWILU, JJ.A) CIVIL APPLICATION NO. NAI 77 OF 2014 (UR 63/2014)**

**BETWEEN**

**CFC LIFE ASSURANCE LTD ..... APPLICANT**

**AND**

**FREDRICK ODONGO OWEGI ..... RESPONDENT**

*(Appellant's Notice of Motion under Sections 3, 3A and 3B of the Appellant Jurisdiction Act, Rules 5 (2) and 20 of the Court of Appeal Rules, 2010 seeking stay/conservatory orders/injunctive orders pending the hearing and determination of the Application as well as pending the hearing and determination of the intended appeal from the decision of the High Court of Kenya at Nairobi (Mbaru, J.) dated 31<sup>st</sup> March, 2014*

*in*

***INDUSTRIAL CAUSE NO. 1001 OF 2012)***

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**RULING OF THE COURT**

CFC Life Assurance Limited is the applicant in the instant Notice of Motion dated 10<sup>th</sup> April 2014 which is brought under the provisions of Rule 5 (2) (b) of the Court of Appeal Rules. The applicant is principally seeking an order of stay of execution of the judgment and order of the Industrial Court of Kenya (as it was then) (Mbaru, J.) delivered on 31<sup>st</sup> March 2014. The jurisdiction of the Court of Appeal under the above rule to grant either a stay of execution, an injunction or stay of proceedings arises if a notice of appeal has been lodged as against a judgment, ruling or order being appealed against as the case may be. In this case the applicant filed a Notice of Appeal pursuant to Rule 75 on the 3<sup>rd</sup> April 2014.

The judgment, the subject of the intended appeal, was wholly in favour of Fredrick Odongo Owegi, the respondent herein. We reproduce here below the summary of the orders that have provoked the applicant to file a Notice of Appeal and this application for stay of execution (of the following orders) pending the hearing and determination of the appeal.

**“(a) A declaration that the termination of the claimant by the respondent was unlawful and unfair.**

**(b) The claimant is reinstated to his job or an equally suitable job with the respondent; with all his back salary, allowances, benefits and any other legal dues.**

**(c) The claimant to be reinstated or re-engaged by the respondent to the office he held or to an equally suitable position with effect from 1<sup>st</sup> April 2014 until his legal retirement unless otherwise lawfully terminated or in the alternative, the respondent to pay to the claimant compensation of twelve (12) months' salaries, all salaries allowances, benefits and any other legal dues from 29<sup>th</sup> March 2012 to date, 31<sup>st</sup> March 2014; and three (3) years basic salary the claimant would have earned save for the reinstatement or re-engagement within 30 days from the 1<sup>st</sup> April 2014;**

**(d) Mention within 30 days from the date hereon to confirm compliance;**

**(e) Amounts payable in (b) above shall be paid with interest; and**

**(f) Costs herein awarded to the claimant.”**

The essential facts that gave rise to the above judgment was a suit or claim filed by the respondent on 13<sup>th</sup> June 2012, in which he sought the following orders:

**“(a) A declaration that the claimant’s dismissal by the respondent is unlawful and unfair.**

**(b) Reinstatement of the claimant to his previous post without loss of any benefit.**

**(c) In the alternative payment of the following benefits;**

**(i) Compensation for unlawful and unfair termination.**

**(ii) Severance pay of 1 month for every year worked.**

**(iii) Salary inclusive of allowances and benefit for the remainder of the period the claimant would have worked until lawful retirement at Kshs. 32,121,648/= expected retirement being November, 2020 at the age of 60 years as per schedule 10.**

**(iv) Entitlement to yearly increment covering the remaining period to retirement.**

**(v) Entitlement to yearly increments covering the remaining period to retirement.**

**(vi) CFC Life pension contribution to the kitty calculated at the rate of 10% of the monthly salary for the record of the working period i.e. Kshs. 3,121,164.80.**

**(vii) Annual bonus at the rate of Kshs. 308,862 for the remainder of the working period i.e. Kshs. 3,088,620.**

**(viii) Club annual subscription @ Kshs. 31,500 for the remainder of the period i.e. Kshs. 283,500/=.**

**(ix) Annual leave allowance @ Kshs. 77,215.50 for the remainder of the period, i.e. Kshs. 694,939.50.**

**(d) An order for loss and interest.”**

Both parties adduced evidence in a rather lengthy trial that went on for close to one year and all the evidence appears to have been summarized in detail in the said judgment. The applicant was aggrieved by the above orders and filed a Notice of Appeal, which was followed in hot pursuit by the instant

application. This application was apparently filed under a certificate of urgency; it came up for hearing before a different bench of this Court on 8<sup>th</sup> July 2014. On that date, the record shows both counsel representing the parties intimated to the Court that they would endeavour to record a settlement of the application on that same date. The application was adjourned and it came up for hearing again on 30<sup>th</sup> July 2014, supposedly to record the settlement, however counsel informed Court that negotiations had not yielded any results thus the Court ordered the application be given a fresh date for hearing in the Registry.

When the application came up for hearing before this Bench on 25<sup>th</sup> March 2015, Mr. Gitau Kamau, learned counsel holding brief for Mr. Regeu for the applicant drew our attention to a consent letter duly signed by counsel for the applicant and respondent in the following terms:-

**“By consent**

**The hearing of the above – noted matter be and is hereby taken out of the hearing list of 25<sup>th</sup> March 2015 as parties are still negotiating with a view to settling this matter.”**

The application for adjournment was rejected by Court for reasons stated in the ruling of the Court, but in a nutshell the Court observed that the same application had been adjourned previously about 8 months earlier for the same reason, which was, to enable parties negotiate a settlement. It was subsequently reported to Court that negotiations had broken down and the application was re listed for hearing. In our opinion, counsel did not present plausible reasons to warrant the exercise of discretion in favour of an adjournment. Moreover, under the Court of Appeal Rules, there are no provisions for counsel or parties for that matter to agree on their own to take out matters that are fixed for hearing before Court. Matters are either to be heard, withdrawn, settled or dismissed as the case may be.

As noted above, the applicant was represented by counsel at the hearing but the respondent was not represented presumably because of the so called consent they had reached to take out this application from the hearing list. When Mr. Gitau was called upon to argue the application, he relied on the Notice of Motion, the grounds in support, the supporting affidavit and the annexed documents. He did not make any submissions. In this ruling therefore, we have considered the applicants’ notice of motion, the supporting affidavit, and the annexures thereto and also the respondents’ replying affidavit in their entirety.

According to the applicant, the intended appeal has merit; it raises important questions of law that touch on the interpretation of **sections 49 and 50** of the Employment Act. There were no reasons recorded to justify the order of reinstatement of the respondent; also in the alternative to the order of reinstatement of the respondent, the court ordered that he was to be paid colossal sums of money as indicated in the order of the Court. Further if substantial sums of Kshs. 8,422,965.00 together with interest are paid or the alternative Kshs. 23,248.24 are paid to the respondent, or the alternative order of reinstatement of the respondent back in employment is effected, there are no prospects or assurance of recovering the same if the appeal is successful or reversing the negative effects of reinstatement as the case may be.

The ability of the respondent to refund the decretal sum is not known. In contrast, the applicant contends that it is a financially stable Insurance Company with assets exceeding Kshs. 20 billion and can settle any sum confirmed by the Court of Appeal. In other words, if the appeal is successful, it would be rendered nugatory; the applicant would have to bear the burdensome implications of reinstatement of the respondent and payment of the colossal amount awarded. The above grounds are re-stated in greater detail in the supporting affidavit of Musili Kivuitu on behalf of the applicant. In summary, Mr. Kivuitu avers that the total award is equivalent to salaries of up to 5 years or 72 months instead of the maximum award of compensation prescribed under the law which should not exceed 12 months’ salary; an order of reinstatement is also a derogation of the agreed terms and conditions of service between the applicant and respondent as they wish to argue in the intended appeal; it is unconstitutional and tantamount to subjecting the applicant to servitude of forcing them to retain an employee against the employer’s will.

The respondent opposed this application; he swore a lengthy replying affidavit and brought out, *inter alia*, the following salient issues; an order of reinstatement is not unconstitutional as it is provided for under **section 12 (3) (vi) and (vii)** of the Industrial Court Act (sic). The respondent’s employment was

unfairly and illegally terminated as proved by evidence; the respondent is about 54 years of age and well past employment bracket in the labour market and hence the orders were justified in that it would be impossible to find another employment; the respondent had worked for a total of 32 years rendering impeccable service to the applicant and the termination of employment was actuated by malice; the sum ordered to be paid of Kshs. 23,243,241 should be paid forthwith to the respondent so as not to prolong his agony. The respondent contends that he has assets amounting well over 50 million and whereas even the applicant has acknowledged it is financially stable, the decretal sum is a “drop in the ocean as the applicant is aware of my background and financial responsibilities which I have never failed to discharge when need arise.” According to the respondent, this application lacks merit and should be dismissed.

We have to address the twin issues raised in this application; arguability and the nugatory aspect of the appeal. In the oft' cited case of; **BUTT V RENT RESTRICTION TRIBUNAL [1982] KLR** page 417, this Court while dealing with a similar issue of whether or not to grant an order of stay of execution held:

**“1. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements.....”**

Bearing in mind the above principles as well as the overriding objective in the administration of justice as spelt out under **Section 3A of the Appellate Jurisdiction Act**, that is just, expeditious, proportionate and affordable resolution of appeals, we have addressed our minds to the issues of whether there are special circumstances and unique requirements that warrant the granting or otherwise of the orders sought. In this regard we recognize that the respondent just like any litigant who is successful in obtaining a judgment is entitled to the realization of the fruits of their litigation unless circumstances exist that justify denying them the immediate execution until the appeal is heard.

What are the special circumstances obtaining in this case? We do not wish to go into the merit of the evidence that was adduced before the trial court on the question of whether the respondent’s dismissal was wrongful which is the work of the Bench that will hear the appeal. A cursory glance at the way the orders are made in the alternative is problematic in our view. This is because the applicant is either ordered to reinstate or re-engage the respondent to an equally suitable position with effect from 1<sup>st</sup> April 2014, until his legal retirement, unless otherwise lawfully terminated or the respondent be paid 12 months’ salary, all salaries, allowances, benefits and any other legal dues from 29<sup>th</sup> March 2012 to 31<sup>st</sup> March 2014; and three (3) years basic salary which the respondent would have earned. To us it is not clear who would have the first option to choose which order to implement; if the applicant chooses the 1<sup>st</sup> option, there is a further problem of what constitutes a suitable re- engagement. Perhaps this is why the court also directed the matter to be mentioned with a view to resolve which orders were to be executed and presumably to deal with any other issues such as suitable re-engagement. Based on the way the orders are coached, we think a prima facie issue is raised regarding the interpretation of the entire provisions of Section 49 of the Employment Act. The question of whether the trial court should explore all the remedies and issue a determinate order is a valid one.

Looking again at the issue of arguability of the appeal, we are of the opinion that both the orders of reinstatement or the alternative order of payment of salaries of close to 5 years are not frivolous. Firstly a cursory look at the provisions of the same **Section 49 (4)** of the Employment Act, there are about 14

conditions for the trial court to consider before making an order of reinstatement of an employee. The applicant avers in the supporting affidavit that the said conditions were never taken into account. To us this presents serious questions of law for submission to this Court at the hearing of the appeal. Should the trial court interrogate each of those 14 conditions and give reasons regarding each one of them before arriving at the conclusion of whether to order reinstatement of an employee or not is made, is also a valid question.

This now brings us to the final issue of whether the appeal will be rendered nugatory if the order of stay is not granted. As demonstrated by the above orders, it is not clear which order is to be implemented, but going by the respondent's replying affidavit, he wishes the applicant to comply with the alternative order and the sum payable from the accrued salaries is estimated at **Ksh 23,243,241/=**. The respondent admits the applicant is financially stable with an asset base estimated at Kenya Shillings 20 million, on the other hand he has not demonstrated that in the event the above sum is paid to him and the appeal is successful, he is financially capable of compensating the applicant. For the aforesaid reasons, we find this application has merit having satisfied the two conditions.

Finally we are fully aware that issues of employment and termination are very critical issues that touch or affect the employees' fundamental rights to life. It is through employment or right to work that an employee earns a living to sustain his or her life. These issues therefore must be given priority, and for this reason we take liberty to direct the applicant to file and serve the appeal within 60 days from the date of this ruling (if it has not done so already). Failure to file the appeal, the order herein granted will lapse. Secondly, the Court of Appeal Registry should fix the appeal for hearing on priority basis. Accordingly, pending the hearing and determination of the appeal, the orders by **Mbaru J.**, made on the 31<sup>st</sup> March 2014, are hereby stayed. Costs of this application shall abide the outcome of the intended appeal.

***Dated and delivered at Nairobi this 19<sup>th</sup> Day of June 2015.***

**M.K. KOOME**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**P.M. MWILU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

