



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWILU & ODEK, JJ.A)

CIVIL APPLICATION NO. NAI. 14 OF 2015 (UR 14/2015)

NATIONAL BANK OF KENYA LIMITED APPLICANT

AND

LOENARD G. KAMWETIRESPONDENT

(Application for stay of any further proceedings in Industrial Cause No. 1965 of 2014, pending lodging, hearing and determination of an intended appeal from the Ruling of the High Court Kenya at Nairobi (Hon. Lady Justice R.E. Ougo) delivered on 24th day of October, 2014

in

H. C. CIVIL SUIT NO. 370 OF 2013)

RULING OF THE COURT

1. By the notice of motion dated 21st January, 2015 and filed herein on 22nd January, 2015 the applicant prays for stay of proceedings before the Employment and Labour Relations Court until its intended appeal is heard and determined.
2. The undisputed relevant facts are that the respondent was an employee of the applicant as its Company Secretary until his services with the applicant were brought to a sudden end on 31st July, 2013 following which the applicant brought a plaint on the 6th September, 2013 against the respondent seeking various orders including permanently restraining the respondent by himself or howsoever from disseminating or revealing to unauthorized persons the applicant's confidential information particularly relating to the minutes of the applicant's Board of Director's meeting held on 8th July, 2013; general damages for breach of confidence, aggravated and exemplary damages for distress, embarrassment and damage to the applicant's reputation.
3. The applicant then took out a notice of motion seeking and obtained a temporary injunction restraining the respondent as sought in the plaint. The motion was heard exparte. Subsequently the respondent took out his own motion on 18th March, 2014 and raised a Preliminary Objection seeking the setting aside of the exparte proceedings and the consequential orders, an order striking out the suit on the basis that the High Court lacked jurisdiction to hear the same as the same fell for determination by the Employment and Labour Relations Court as per the provisions of **section 87(2) of the Employment Act.**

4. Following arguments by counsel on both sides the Court found and held that terms of the contract of service between the parties herein would be an issue to be determined in the main suit, and that the damages sought by the applicant were as a result of the alleged breach of confidence the respondent was expected to keep at the time of his employment. The learned judge consequently ordered that it was the Employment and Labour Relations Court which had jurisdiction under the provisions of **section 12(3)** of the **Industrial Court Act**, to hear the case and grant preservatory and prohibitory orders and to award compensation, and with that rather than strike out the suit, transferred the same to the Employment and Labour Relations Court for hearing and final determination. That finding is the cause of the applicant's dissatisfaction.
5. Being so dissatisfied the applicant, in its Memorandum of Appeal, raises the following grounds of appeal, that the learned judge erred in law and fact by misinterpreting the appellant's claim lodged in HCCC no. 370 of 2013 as involving an industrial relations dispute yet the same involves a civil claim for damages for breach of confidentiality and trust; by misinterpreting and/or misapplying the provisions of **section 87(3)** of the **Employment Act**, and by disregarding the submissions of the appellant.
6. At the hearing before us Ms. Mc Asila learned counsel for the applicant told us that the applicant has an arguable appeal in that this Court would have to determine whether or not the court below misinterpreted the provisions of **section 87** of the **Employment Act**. Counsel further submitted that the jurisdiction of the High Court and that of the Employment and Labour Relations Court was clearly spelt out in the Constitution, that the dispute between the parties herein did not fall for resolution by the Employment and Labour Relations Court, as the matters complained of happened after ceassation of the respondent's employment with the applicant; and that the respondent, being an advocate, was obliged to comply with the provisions of **section 134** of the **Evidence Act**. On the nugatory aspect of the appeal, counsel told us that the appeal would surely be rendered nugatory if the Employment and Labour Relations Court proceeded to hear the case only for the appeal to eventually succeed.
7. Mr. Ojiambo, the learned counsel representing the respondent opposing the application, submitted that the threshold of **rule 5(2)(b)** of this Court's rules was not met as he saw no existence of an arguable appeal herein stating that the applicant was ignoring the provisions of **section 12** of the **Industrial Court Act**. Counsel submitted that clearly the Employment and Labour Relations Court was clothed with the requisite jurisdiction to grant or refuse to grant all the reliefs sought; that striking out of the suit in the court below was no longer a present threat, and as there was already in place an order of injunction restraining the respondent from disseminating the information obtained while he was in the employment of the applicant; and that nothing could render the appeal nugatory if the orders sought were not granted, because, if the applicant lost the suit before the Employment and Labour Relations Court, it could always appeal to this court.
8. The object of the provisions of **rule 5(2)(b)** of this **Court's Rules** to, *inter alia*, stay proceedings, is to preserve the substratum of the appeal so that the appeal is not rendered nugatory should it, once heard, succeed. The dual limbs of arguability of appeal and the nugatory aspect must be shown to co-exist in default of which an order under **rule 5(2)(b)** of the **Court of Appeal rules** shall be declined. This has been the subject of many cases and suffice here to cite that of *Republic V Kenya Anti-corruption Commission & 2 others [2009] KLR 31*, wherein it was stated;

“The law as regards the principles that guide the Court in such an application brought pursuant to Rule 5(2)(b) of the Rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb. See also the court's decision in the case of Reliance Bank Ltd V Norlake Investments Ltd [2002] IEA 227 and Githunguri V Jimba Credit Corporation Ltd & Others (No. 2)

9. In the instant application the applicant raises a question of jurisdiction and the Court’s alleged misunderstanding and misinterpretation of the applicability of the provisions of **section 87** of the **Employment Act** *vis-à-vis* those of **section 12** of the **Industrial Court Act**. Admittedly those are arguable issues particularly in a case such as the one under review where matters arising during and after a contract of service are made subject for determination. Jurisdiction of a Court is a central issue in all cases as without it a court acts in vain – see **Owners of the Motor Vessel “Lillians” V Caltex Oil (Kenya) Ltd. [1989) KLR1.**

We find therefore that the applicant has met the first limb of the requirements of **rule 5(2)(b) Court of Appeal Rules**, as the burden is to show, even a single arguable point – see **Kenya Railways Corporation V Ederman Properties Ltd, C A No. Nai. 176 of 2012,** and by arguable is not meant an appeal that must succeed but one that raises an issue or issues which merit consideration – see **Kenya Tea Growers Association & Another V Kenya Planters & Agricultural Workers Union C A No. 72 of 2001.**

10.As to the nugatory aspect, this is what the Court requires to be satisfied;

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”, as stated in **Stanley Kangethe Kinyanjui V Tony Ketter & 5 Others, C A No. 31 of 2012.**

If the suit were to proceed before the Employment and Labour Relations Court, a specialized court as per the provisions of **Article 162(2)(a)** of the **2010 Constitution** and eventually the appeal succeeds to the effect that that Court lacked the requisite jurisdiction then most definitely the success of that appeal would amount to nought, nugatory as it were, as the suit would have been determined by a court bereft of jurisdiction whose proceedings would amount to nothing. Moreover, we consider that the issue of jurisdiction ought to be determined before further proceedings in accordance with **section 3B(c)** of **Appellate Jurisdiction Act** to facilitate efficient use of judicial time.

11.In the result we find and hold that the applicant has satisfied the two limbs of **rule 5(2)(b)** of this Court’s rules and has earned itself the orders sought in prayer (3) of the notice of motion under consideration. Accordingly we grant the motion. The respondent shall meet the costs of this application.

Delivered and Dated at Nairobi this 12th day of June, 2015.

H.M. OKWENGU

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR