



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, OKWENGU & ODEK, JJ.A)**

**CIVIL APPLICATION NO. 120 OF 2015**

**BETWEEN**

**KENYATTA UNIVERSITY.....APPLICANT**

**AND**

**BEATRICE N. MOLA .....RESPONDENT**

***(An application for stay of execution of the judgment and decree of the Employment and Labour Relations Court at Nairobi (Nzioka wa Makau J.) dated 15th April 2015***

**in**

**Cause No. 606 of 2012)**

**\*\*\*\*\***

**RULING OF THE COURT**

1. Before us is a Notice of Motion dated 7<sup>th</sup> May 2015 lodged pursuant to **Rules 5(2)(b)** of the Rules of this Court seeking *inter alia* a stay of execution of the judgment delivered by the Employment and Labour Relations Court on 15<sup>th</sup> April 2015, pending the lodgment, hearing and determination of an intended appeal.
2. The respondent filed a claim against the applicant before the Employment and Labour Relations Court in Cause No.606 of 2012 seeking *inter alia* terminal benefits, gratuity, payment in lieu of leave, withheld and unpaid salary, arrears of house allowance and compensation for illegal and unlawful termination of employment all totaling Ksh 3,343,870/=. The trial court made a determination and award in favour of the respondent and entered judgment in the following terms:

***“The applicant herein, Kenyatta University, to pay the respondent:***

- a. ***half salary withheld in December 2011, January 2012, February 2012 and March 2012;***
- b. ***payment for 48 days leave not taken;***
- c. ***payment of three months’ salary in lieu of notice;***

d. *arrears of basic pay and house allowances as per CBA for 20<sup>th</sup> September 2012;*

e. *12 months salary as compensation;*

f. *Certificate of service in terms of Section 51 of the Employment Act.”*

3. Aggrieved by the aforesaid award, the applicant now seeks an order for stay of execution of the judgment and decree pending the lodgment, hearing and determination of the intended appeal.
4. The grounds in support of the application for stay are that the intended appeal is arguable with good prospects of success; that the sum in issue is colossal and if the intended appeal is successful the applicant may not recover the same from the respondent who does not have sufficient resources to refund and that if execution is levied, the intended appeal shall be rendered nugatory.
5. In the supporting affidavit deposed by Mr. Paul Wainaina, the applicant confirms that a Notice of Appeal has been filed and a draft memorandum of appeal is annexed to the affidavit; that the judgment of the trial court is at variance with the evidence on record; that the points of law to be urged in the intended appeal include whether the High Court was justified to ignore the fact that the respondent had not abandoned/exhausted the internal disciplinary machinery; whether the trial court was legally justified to prescribe an alternative punishment instead of that given by the applicant; whether statute recognizes illegal and unlawful termination and if so, are they the same as unfair termination? Whether unlawful termination is similar to unlawful dismissal and whether the reason given for termination of the respondent was valid and whether the respondent is entitled to maximum statutory compensation on the basis of an un-pleaded fact.
6. At the hearing, learned counsel Mr. Khaseke Georgiadis appeared for the applicant while learned counsel Mr. Herbert Ashinoma appeared for the respondent.
7. Counsel for the applicant reiterated the grounds in support of the application as deposed in the supporting affidavit. It was emphasized that the intended appeal was arguable and if stay was not granted, the appeal would be rendered nugatory. It was submitted that one of the arguable points of law is that the trial court awarded the maximum twelve (12) months compensation for unlawful dismissal yet the respondent had pleaded illegal and unlawful termination not unlawful dismissal in her claim; that there is a legal difference between unlawful dismissal and unlawful termination; that the trial court erred in misapprehending the legal difference and treating the two as one and the same and as interchangeable; that the trial court erred in awarding twelve (12) months maximum compensation which could only be awarded if there was a prayer for reinstatement; that the respondent never sought reinstatement. It was submitted that the replying affidavit does not deny that the intended appeal is arguable. On nugatory aspect, counsel submitted that the respondent in her testimony before the trial court stated that she was unemployed; that by this testimony, the applicant is apprehensive that if execution is levied, the respondent may not have the means and resources to refund the decretal sum. The applicant also filed a list of authorities, some of which we shall refer to in the analysis herebelow.
8. Counsel for the respondent in opposing the application relied on the replying affidavit submitting that the application for stay lacks merit and is premature; that the decree attached to the replying affidavit shows that there is no specified amount on which the respondent could execute the judgment; that it is an abuse of the court process to seek stay of execution of a decree that does not have a liquidated sum specified for execution; that the judgment by the trial court did not indicate the exact amount due to the respondent; that the respondent has moved the trial court to clarify and specify the judgment and decretal amount; that pending clarification by the trial court, the instant application is premature and the applicant has no reason to be apprehensive that execution shall be levied and that since there is no decree with a specified sum, there is no decree capable of being stayed. It was conceded that while the intended appeal was arguable, not all the items awarded to the respondent are contested; that the intended appeal is primarily against the twelve (12) months' salary awarded as compensation; there is no intended appeal on the other items awarded such as

half salary withheld in December 2011, January 2012, February 2012 and March 2012; payment for forty eight (48) days leave not taken; payment of three (3) months salary in lieu of notice and arrears of basic pay and house allowances as per the Collective Bargaining Agreement (CBA) for 20<sup>th</sup> September 2012 as well as pension and gratuity due to the respondent.

9. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions by counsel and the law. For the applicant to succeed with the orders sought, he must satisfy the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).**
10. In **Equity Bank Limited -vs- West Link MBO Limited- Civil Application No. 78 of 2011** it was stated that the true nature of an application under ***Rule 5(2) (b)*** is an interlocutory application in an appeal pending before this Court; and that ***Rule 5 (2) (b)*** is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter in order to ensure a just and effective determination of appeal. In the instant case, a notice of appeal has been filed and a draft memorandum of appeal is attached to the supporting affidavit.
11. Both counsel concede that the intended appeal is arguable and thus we do not need to consider the merits of the grounds raised in the draft Memorandum of Appeal. It suffices that *prima facie* a single arguable point has been identified to our satisfaction. One of the arguable issues is whether the respondent is entitled to the maximum twelve (12) months compensation as provided for by statute; another arguable point is whether there is a difference between unlawful termination and unlawful or illegal dismissal.
12. On the nugatory aspect, the applicant submitted that the judgment sum as per the decree attached to the replying affidavit is in the tune of Kenya Shillings three million three hundred and forty three thousand, eight hundred and seventy (3,343,870/=) which is a colossal sum and the respondent may not be in a position to refund the same. We have considered the submission and we are convinced that there is need to balance the applicant's and respondent's interest and to ensure that the respondent is not left destitute and in financial want during pendency of the hearing and determination of the intended appeal. It was the respondent's submission that not all items awarded by the trial court have been identified as matters to be canvassed in the intended appeal. In the draft memorandum of appeal, the applicant urges that before the respondent can be paid her terminal dues, she has to undertake clearance with the applicant. We are convinced that a conditional stay would balance the interest of the parties. (See **Telkom (K) Limited -v- John Ochanda, Civil Application No. 237 of 2011 (UR. 152/ 2011).**)
13. Taking into account the above consideration we hereby grant a conditional stay of execution of the judgment dated 15<sup>th</sup> April 2015 and any consequential decree arising therefrom on the following terms:

*“a) The applicant shall pay directly to the respondent a sum of Kenya shillings one million only (Kshs.1,000,000/=) within thirty (30) days from the date of this Ruling.*

- b. In default of any of (a) above, the conditional stay of execution granted herein to automatically lapse.*
- c. Costs of this application shall be in the appeal.”*

***Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2015***

**M. K. KOOME**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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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**