



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, J.J.A)

CIVIL APPLICATION NO. NAI 68 OF 2015 (UR. 58/2015)

BETWEEN

AAA GROWERS LIMITED APPLICANT

AND

COLLINS OROTO LUKHALE RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (M. Mbaru, J) dated 25th September, 2014

in

Industrial Cause No. 100 of 2012)

RULING OF THE COURT

1. This application is brought by way of notice of motion dated 14th March, 2015 under **Rule 5 (2) (b)** of the Court of Appeal Rules (the Rules) for stay of execution pending the hearing and determination of an intended appeal. The appeal intended herein arises from the decision of the Industrial Court (M. Mbaru, J) dated 25th September, 2014. Briefly the material facts are as follows:
2. The respondent, an accountant, was employed by the applicant and issued with a letter of appointment dated 7th June, 2010 and on the same date commenced work at a salary of Kshs. 55,000/= per month which increased to Kshs. 60,000/= in July, 2011. The respondent was also issued with a copy of Disciplinary Procedures Manual which outlined all the terms and conditions of work, disciplinary procedures and supervision.
3. On 26th August, 2011 the respondent was served with a notice of termination of his employment. He promptly filed a claim in the Industrial Court seeking compensation for alleged unlawful termination of his employment. The Court, in its judgment dated 25th September, 2014 found that the termination was unlawful and irregular to the extent that it did not comply with the stipulated disciplinary procedures including warnings, before dismissal, and further that it offended the provisions of **sections 5, 35, 41 and 44** of the Employment Act, 2007 and the conventional labour

practices. The respondent was awarded compensation for unfair termination at Kshs. 720,000.00; loss of office at Kshs. 600,000.00; and costs at 50%.

4. Being aggrieved by the judgment, the applicant lodged a notice of appeal in this Court on 3rd November, 2014 and filed an application by way of notice of motion under the provisions of **Rule 5 (2) (b)** of this Court's Rules. It cited **Article 159, 162 (2)** and **164 (3)** of the Constitution, **section 1A, 1B** and **3A** of the Civil Procedure Act, **section 12 (3) (i)** and **(viii)**, **section 17 (1)** and **(2)** of the Industrial Court Act and **Rule 16** and **27** of the Industrial Court (Procedure) Rules in support of the application, and sought orders for stay of execution of the judgment delivered on 25th September, 2014 and all consequential orders pending the lodging, hearing and determination of the intended appeal.
5. The Industrial Court, on 2nd March, 2015 granted an interim stay of execution subject to the applicant forthwith paying over to the respondent the equivalent of a whole year's salary of Kshs. 720,000/=; and further depositing in joint earning account of both advocates Kshs. 600,000/= being the total salary payable for the residue of the term of the respondent's employment contract.
6. The application came before us on 10th June, 2015 having been certified urgent on 16th March 2015. At the hearing, learned counsel Mr. Tom Onyambu and Teddy Kaburu appeared for the applicant; and Mr. A. Ojiambo and Miss Mwendu appeared for respondent.
7. Mr. Ojiambo, for the respondent, conceded, rightly in our view, that the intended appeal was indeed arguable and that the only issue for determination was whether it would be rendered nugatory should we not grant stay of execution. Accordingly, both counsel made submissions only on the nugatory aspect.
8. Mr. Onyambu argued that the respondent, by his own admission, earned a net salary of Kshs. 79,427/= per month, making it highly unlikely that he would be able to refund the large decretal sum should the appeal succeed. The respondent's only other asset was a parcel of land worth Kshs. one million (or Kshs. 700,000/= in the event of a forced sale) which, he submitted, could be insufficient to refund should the appeal succeed.
9. Mr. Ojiambo, learned counsel for the respondent, opposed the application and relied on the replying affidavit sworn by Collins Orotu Lukhale. He submitted that the respondent was entitled to enjoy the fruits of his judgment, especially given that the sum represented his lost salary, and that he would be able to refund the sum if called upon to do so.
10. We have considered the application, the affidavits, rival submissions of the learned counsel and the law. The exercise of jurisdiction by this Court, in an application of this nature, is discretionary based on the twin principles of whether the applicant has an arguable appeal and if so, whether the appeal will be rendered nugatory if the orders sought are not granted.
11. These principles have been reiterated in numerous cases. For instance, in **Civil Application No. Nai 157 of 2006** in ***Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd (unreported)*** in these terms:

“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. These principles are now well settled. For an applicant to succeed he must not only show that 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 that appeal will be rendered nugatory.”

(See Githunguri vs Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-1988).

12.As we stated before, the only issue before us is whether the intended appeal would be rendered nugatory should we decline to grant the stay sought.

13.We are persuaded that the applicant has demonstrated that the appeal, if successful, will be rendered nugatory if the orders sought are not granted. This Court stated in **Reliance Bank Ltd vs Norlake Investments Ltd, (2003) IEA 232,**

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. Whether or not the success of an appeal or intended appeal will be rendered nugatory is a question of fact not law. Each case must therefore be considered on its own peculiar facts and circumstances and there is no limit to the number of factors that may be considered in the process of exercising the Court’s discretion.”

14.Given the depositions filed before us, we are of the view that the respondent who earns a net salary of only Kshs. 79,427/= and has no substantial asset (except a parcel of land whose “forced sale” value is given at Kshs. 700,000/=) would not be in a position to refund the decretal sum should the appeal intended herein succeed.

15.We have come to the conclusion that this is a deserving case for the exercise of our discretion under **Rule 5 (2) (b)** of the Rules of this Court. Accordingly, we allow the application dated 14th March, 2015, and order that pending the hearing and determination of the intended appeal there will be a stay of execution of the award of the Industrial Court dated 25th September, 2014. We also order that the applicant shall furnish security to the respondent in the form of a bank guarantee for the amount of Kshs.1,320,000/= within the next 60 days.

16.Costs of the application to abide the outcome of the appeal.

Dated and delivered at Nairobi this 10th day of July, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR