IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & MWILU, JJ.A)

CIVIL APPLICATION NO. 299 OF 2014 (UR 223/2014)

BETWEEN

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....APPLICANT

AND

ABEL MARCEL OKOTH OKELLO…….....……...……RESPONDENT

*(An application to seek stay of execution of the decree/judgment given on the 19th March, 2014 pending the intended appeal against the whole of the ruling of the Industrial Court of Kenya at (**Maureen Onyango, J.**) delivered on 31st March, 2014*

in

Industrial Cause No. 1800 of 2011)

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RULING OF THE COURT

This is an application under **Rule 5(2) (b**) of the Court of Appeal Rules for stay of execution of the judgment and decree of the Industrial Court given on 19th March, 2014 pending appeal against the said ruling.

The following underlying facts are not disputed. On 27th October 2011, ***Abel Marcel Okoth Okello***, the respondent herein filed a memorandum of claim against the applicant in the Industrial Court claiming various sums of money from the applicant for unfair and unlawful termination of the respondent's contract of employment. The respondent in particular claimed shs. 6,273,699/00 being the gross salary he would have earned until lawful end of his one year contract; shs. 241,956/24 as gratuity; award for the remainder of the period that the complainant would have worked until the end of contract; severance pay, and statutory benefits, costs and interests.

The applicant filed a statement of defence to the claim on 24th February 2012 denying the claim. The case was fixed for hearing on 25th May, 2012. Both parties were represented by a counsel on the hearing date, but the hearing was by consent, rescheduled for 7th November, 2012. However, the case was not listed in the cause list for the period from 5th to 9th November 2012. On 7th November 2012, the court heard the claimant's case in the absence of the applicant. On 19th March 2013, the court delivered judgment in

favour of the respondent. It made a finding that the respondent's contract was unfairly terminated and gave judgment for the respondent for a total sum of shs. 1,802,928/24 with costs. On 19th July 2013, the respondent filed an application in the Industrial Court seeking an order that the *ex parte* judgment entered on 19th March 2013 be set aside on the ground that the applicant's counsel attended court on 7th November, 2012 but the case was not listed. That application was supported by the affidavit of ***Carolyne Kamande*** – an advocate. She deposed *inter alia* that she personally attended court on 7th November, 2012 for the hearing of the case but found that the case was not listed; that the respondent's counsel was not in court and after waiting for 30 minutes, she left court to attend to other duties; that counsel for the respondent came later after she had left and called for the file and proceeded with the matter; that on perusal of the court file she established that after hearing on 7th November 2012, court directed the respondent's counsel to file submissions and fixed the case for mention on 27th November, 2012 for highlighting of the submissions; that the matter was not listed for 27th November, 2012 and the respondent's counsel fixed the matter *ex parte* for mention on 28th November, 2012; that on 28th November the court ordered the respondent's counsel to serve a mention notice to the applicant's counsel for 7th December, 2012; that the applicant's counsel was not served with a mention notice, and that on 17th June, 2013, she was shocked to receive a draft decree against the applicant.

The ruling of the Court dated 31st March, 2014 shows that the respondent filed a replying affidavit to the application asserting that the respondent and his advocate were in court at 9.00 a.m. on the hearing date and the case was allocated time for hearing at 11.00 a.m. That affidavit is not included in the record of the present application.

The Industrial Court considered the application and said in part:

> ***"….I find that the respondent's counsel, if indeed she was in court as deponed, which is denied by the claimant, was extremely reckless. In fact, negligently so, to the extent that she gave the impression of deliberately walking away from court without checking with the clerk or looking for claimant's advocate. It appears she wanted to avoid proceeding with the hearing and use the failure to list the case in the day's cause list as an excuse. It appears as if she deliberately walked away from court to cause delay in the hearing of the case."***

The court further made a finding that the defence to the claim filed by the applicant was spurious and not a valid defence. The court ultimately dismissed the application to set aside the judgment.

The applicant filed a notice of appeal and subsequently filed an application for stay of execution of the decree pending appeal which was dismissed by the Industrial Court on 16th October, 2014.

The application for stay of execution is supported by the affidavit of ***Margaret Kigoro*** – the legal officer of the applicant. The respondent has filed a replying affidavit.

The applicant is required to demonstrate that the intended appeal is arguable and that if the application is not allowed, the intended appeal, if successful, would be rendered nugatory.

We have studied the contents of the supporting affidavit, the ruling of the Industrial Court dated 31st March 2014, the subject of the intended appeal and the eight grounds of the intended appeal in the draft memorandum of appeal.

The applicant blames the whole saga on the mistake by the registry to list the appeal in the cause list. The applicant also complains that the learned judge did not exercise her discretion judicially and that the rules of natural justice and right to hearing were breached. It is not necessary to look at the draft grounds of appeal in some detail lest we pre-empt the intended appeal or embarrass the Court which will ultimately hear the appeal. Suffice to say that the appeal raises weighty issues and that the appeal is undoubtedly arguable.

The applicant states that the decretal amount is now about shs. 2.5 million which is a substantial amount and that if the execution takes place, the appeal would be rendered nugatory as the respondent will not be able to refund the amount.

The respondent has lost his employment. He does not say in his replying affidavit that he is in gainful employment or that he will be able to refund the decretal amount in the event that the intended appeal succeeds. The respondent contends that if the court grants the application, it should do so on condition that the applicant deposits the decretal sum.

We are satisfied that in the circumstances of the case if the intended appeal succeeds, the applicant is likely to suffer substantial loss which would render the appeal nugatory. There is no justification for requiring the applicant to deposit the decretal amount as the applicant is a State Corporation and capable of paying the decretal sum in the event that the appeal is dismissed.

For the foregoing reasons, the application is allowed. The execution of the decree given on 19th March, 2013 is stayed pending the hearing and determination of the intended appeal.

The costs of the application shall be costs in the appeal.

DATED and delivered at Nairobi this 3rd day of July, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

……..……..…

JUDGE OF APPEAL

P. M. MWILU

……..……..…

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR