



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA & AZANGALALA, JJ.A)

CIVIL APPLICATION NO. NAI 227 OF 2014

BETWEEN

KENYA NATIONAL TRADING CORPORATION.....APPLICANT

AND

JEMIMAH AKOTH NYDERA ONYOSI.....1ST RESPONDENT

GEORGE KARANJA WANGOCHI.....2ND RESPONDENT

PAULINE MONTHE MAWEU.....3RD RESPONDENT

JANE SIANOI NOOSELI.....4TH RESPONDENT

SIMON OKWOMI MUKABANE.....5TH RESPONDENT

ZACHARIA B. MOKAYA.....6TH RESPONDENT

DONALD MATANGI.....7TH RESPONDENT

(An application for stay of execution and proceedings pending the hearing and determination of an appeal against the Ruling of Hon. Lady Justice Monica Mbaru dated and delivered on 11th June 2014 in

INDUSTRIAL COURT CAUSE NO. 1880 OF 2011

RULING OF THE COURT

The applicant, **Kenya National Trading Corporation**, was sued in the Industrial Court at Nairobi by the respondents on account of what the respondents claimed was an unlawful and fraudulent retirement in the guise of voluntary early retirement which retirement was compounded by what they claimed were wrongful and discriminatory calculations of their terminal dues. The appellant denied the claim and after a full trial Mbaru J., declared that the loss of the respondents' employment with the appellant was wrongful and further that the respondents had been discriminated against. The learned Judge, as a result, awarded the respondents various sums. The learned Judge also ordered the appellant to pay the

respondents' tax exemption sums due to them as a result of a waiver extended to them.

The applicant was aggrieved and lodged a Notice of Appeal on 20th June, 2014. Apprehensive that the respondents would execute the Industrial Court judgment, the applicant lodged this Notice of Motion pursuant to rule 5(2)(b) of this Court's Rules in which it mainly seeks a stay of execution of the said judgment pending the hearing and determination of its intended appeal.

The main arguments advanced by Mr. Wekesa, learned counsel for the applicant, in canvassing the Notice of Motion before us, are that the intended appeal as crystallized in the draft Memorandum of Appeal, is arguable and that if the respondents execute to recover the decretal amount, the applicant shall suffer significant and imminent financial loss. Mr. Wekesa further argued that unless a stay is granted its intended appeal even if it eventually succeeds, will be rendered nugatory as learned counsel doubted the financial means of the respondents. To demonstrate the applicant's *bona fides* Mr. Wekesa submitted that the applicant is prepared to deposit, as security, Kshs.2500,000/= pending the hearing and determination of the intended appeal.

Mr. Namada, learned counsel for the respondents, in responding to the submissions made on behalf of the applicant, contended that all the complaints made by the applicants in its draft memorandum of appeal relate to issues of fact which we should not entertain on appeal. Learned counsel further submitted that it had not been shown that the respondents were not in a position to refund the decretal amount in the event of a successful appeal and therefore, nothing had been proved to show that the appeal will be rendered nugatory if a stay is not ordered. Learned counsel was of the view that the applicant was not acting in good faith as some of the sums due to the respondents as a result of a tax waiver and which were not in dispute have yet to be paid to them despite an order made by the lower court that the same be paid to the respondents by the applicant within an appointed time.

The law under Rule 5(2) (b) is now well settled. In ***Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31***, this Court stated at page 37:

“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 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 the success would be rendered nugatory. In order that the application 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 Reliance Bank Ltd. –v- Norlake Investments Ltd. [2002] 1 EA 227)”

The first issue we have to decide is whether the intended appeal is arguable. As to whether termination of the respondents' employment was lawful and due process followed is, in our view, an arguable point and so is the issue as to whether the appellant discriminated against the respondent. The intended appeal cannot therefore be described as frivolous.

The second issue we have to decide is whether if the intended appeal were to be successful the same would be rendered nugatory if we do not grant to the applicant the stay of execution which it seeks.

Although it was contended, in an indirect manner, on behalf of the applicant that if the decretal amount is paid over to the respondents and the appeal eventually succeeds, the sums so paid would not be recovered from the respondents, the latter responded that save for the mere say so, the applicant had not demonstrated their impecuniosity . Weighing the stand points taken by the parties, we have our doubts as to whether indeed the respondents have the ability to refund the decretal amount which we are informed is now in excess of Kshs.5,000,000/= should the intended appeal succeed. In that event, the success of the intended appeal will be rendered nugatory.

Our conclusion therefore is that the second limb of rule 5(2)(b) of this Court's Rules has also been demonstrated. In the circumstances of this case, it is our view that the stay sought be on terms in view of

the fact that the respondents are retirees and should not be impeded in accessing the judgment sum in the event the appeal does not succeed.

We allow the notice of motion dated 22nd August 2014 and order that the judgment and decree of the Industrial Court made on 4th June, 2014 be and is hereby stayed until the hearing and determination of the applicant's intended appeal or until further orders of this Court. The applicant should deposit the sum of Kshs.5,000,000/= in an interest bearing account with a reputable financial institution in the joint names of the parties' advocates within sixty (60) days from the date of this ruling, failing which the stay orders will stand vacated.

Costs of the application will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3rd Day of July 2015.

W. KARANJA

.....

JUDGE OF APPEAL

J.W. MWERA

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

REGISTRAR