



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KOOME, OKWENGU & G.B.M. KARIUKI, JJ.A.)

CIVIL APPLICATION NO. 42 OF 2014 (UR 37/14)

BETWEEN

PRIDE-INN HOTEL & CONFERENCING.....APPLICANT

AND

DIANA AMAYI.....RESPONDENT

(Being an application for a stay of execution of the decree/or judgment of the Industrial Court of Kenya at Mombasa (Makau, J.) delivered on 3rd October, 2014

in

Industrial Court Cause No. 205 of 2014)

RULING OF THE COURT

[1] By a claim lodged in the Industrial Court, Diana A. Amayi, (the respondent before us), sought judgment against her former employer, Labour Relations Court, Pride-Inn Hotel and Conferencing (the applicant before us), for payments due to her upon termination of her employment. On the 3rd of October, 2014, the Industrial Court (Makau, J.), delivered a judgment in favour of the respondent for Kshs. 390,828/= plus costs and interest. Being dissatisfied with the judgment of the Industrial Court, the applicant lodged a Notice of Appeal on the 8th of October, 2014 against the judgment. Subsequently, the applicant moved to this court and filed a Notice of Motion under **Section 3A** and **3B** of the **Appellate Jurisdiction Act**; and **Rules 5 (2) (b), 42** and **47** of the **Court Rules** as well as **Article 159** of the **Constitution**. The main prayer in the motion was for stay of execution of the decree/judgment delivered by the Industrial Court on 3rd October, 2014, pending the hearing and determination of the applicant's appeal.

[2] The application was anchored on grounds stated on the notice of motion, as well as an affidavit sworn by Nicholas Ochieng, the Human Resource Manager of the applicant. In short, the applicant opines that it has a good appeal based on the grounds which are reflected in the draft memorandum of appeal, a copy of which it has availed. The applicant is apprehensive that unless the execution of the judgment of the Industrial Court is stayed, the respondent will be paid the decretal sum and the intended appeal will be rendered nugatory. Further, that the applicant would suffer substantial loss, hardship and great injustice as a precedent would be set that would trigger a floodgate of potential law suits against the

applicant. The applicant has also indicated its readiness and willingness to provide security for the payment of the decretal sum.

[3] The parties agreed by consent to canvass this application by way of written submissions. In its written submissions, the applicant contended that contrary to the rules of natural justice, it was not accorded a fair hearing by the Honourable Court as it was denied an opportunity to be heard and the learned Judge also failed to consider its submissions. It explained that it was not able to call any witnesses in support of its defence because of the imminent insecurity of 7th July, 2014 which it urged the court to take judicial notice of. It reiterated its position that the appeal would be rendered nugatory if stay was not granted, and that it stood to suffer substantial loss by the execution of the decretal sum, especially since the respondent had proceeded to tax the bill of costs for Kshs.62,912/=, which it claimed the respondent was not entitled to. The applicant pointed out that the application had been made without unreasonable delay and that it was prepared to furnish any security that the court may order.

[4] The respondent opposed the application and filed a replying affidavit and written submissions dated 21st January, 2015. She maintained that the appeal had no chance of success as it was frivolous and only aimed at delaying the enjoyment of the outcome of litigation; that the application for adjournment was disallowed for lack of sufficient reasons as Saba Saba was on 7th July, 2014, and the hearing was on 9th July, 2014; that following an agreement between the parties' counsel the matter was disposed of through written submissions; that neither party led *viva voce* evidence and so the applicant cannot claim to have been prejudiced.

[5] Further, that **Section 17 (2)** of the **Industrial Court Act 2011**, requires that an appeal from a judgment, award, decision, decree or order of the Industrial Court lie only on matters of law. The respondent relied on the case of **The Director Kenya Medical Research Institute v Agnes Muthoni & 35 Others, Civil Appeal No. 15 of 2011**. She further submitted that the applicant had not demonstrated that it would be unable to recover the money in the event that the appeal is successful; that simply because a person was employed on contract could not form a basis for denying them enjoyment of the outcome of litigation; and that the applicant had failed to meet the two conditions necessary for stay of execution to be granted.

[6] The principles upon which an order for stay of execution pending appeal may be granted are well enunciated in numerous decisions. For instance, in the case of **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others [2013] eKLR**, this court stated as follows:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated”.

[7] Applying the above principles, the issues that arise for determination in this application is whether or not the intended appeal is arguable or frivolous; if the answer is in the affirmative, whether or not the intended appeal will be rendered nugatory if stay is not granted. In considering whether an appeal is arguable, it is worthy of note that arguability of an appeal is not synonymous with success; and that even a single arguable issue is sufficient to meet this criteria (See **Chris Munga N. Bichage** case [supra]).

[8] From the draft memorandum of appeal that was exhibited, it is apparent that the main issue raised by the applicant in the intended appeal is breach of the rules of natural justice for failure to grant it a fair hearing. The applicant is aggrieved that the court declined to grant an adjournment when its witnesses were not able to attend court for hearing on 9th of July, 2015 due to insecurity arising from the call of Saba Saba rally. It accuses the learned Judge of forcing the applicant's counsel to proceed with the matter by way of written submission instead of oral evidence. The proceedings of the lower court were not availed to us however, paragraph 5 of the judgment confirms that the suit was disposed of by way of

written submissions by the two parties' counsel.

[9] There is nothing to confirm the applicant's allegation that its advocate was forced to proceed by way of written submissions, nor is there any averment that the applicant lodged an appeal against the order made on 9th July, 2015, refusing its application for an adjournment. Having complied and filed written submissions, the applicant's advocate must be presumed to have consented to that mode of hearing adopted by the court, and the issues raised regarding the filing of submissions are frivolous and not arguable. Further, copies of the written submission have not been availed to us. In the event, the allegations regarding the failure to take the applicant's submissions into account, and the alleged improper award have not been demonstrated and thus, no arguable issue is discernible.

[10] In support of the contention that the appeal will be rendered nugatory if this application is not allowed, the applicant had two reasons. First, it was apprehensive that it would suffer loss from the payment of the decretal sum; and secondly, that the payment would trigger a floodgate of litigation against it. Neither of these two reasons are sufficient to render the appeal nugatory. The decree is a monetary decree and a successful appeal will simply mean that the decretal sum would have to be repaid back to the applicant by the respondent. The applicant has not alleged nor demonstrated that the respondent will not be able to refund that sum. As regards the potential floodgate of litigation, that cannot render the appeal nugatory as each case will have to be dealt with on its own merit.

[11] The upshot of the above is that the applicant has not satisfied the two conditions upon which an order of stay of execution can be granted. In the circumstances, the application is dismissed with costs.

Those shall be the orders of the court.

Dated and Delivered at Malindi this 3rd day of July, 2015.

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR