



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWILU & KANTAI, J.J.A.) CIVIL APPLICATION NO. NAI 316 OF 2014**

**BETWEEN**

**NEW KENYA CO-OPERATIVE CREAMERIES LTD ..... APPLICANT**

**AND**

**OLGHA AUMA ADEDE ..... RESPONDENT**

*(Being an application for stay of Execution pending the hearing and determination of an intended Appeal against the Judgment and Decree of the Industrial Court (Maureen, J.) dated 9<sup>th</sup> May, 2014*

**in**

**Industrial Cause No. 37 of 2011)**

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**RULING OF THE COURT**

The respondent, **Olgha Auma Adede**, employed by the applicant as Head of Sales and Marketing, had her employment terminated after various allegations were made against her by her employer. As a result of this she filed **Cause No. 87 of 2011** at the Industrial Court of Kenya (now fashioned

“Employment and Labour Relations Court”) which cause was heard by Maureen Onyango, J. who, in a judgment delivered on 9<sup>th</sup> May, 2014 partly allowed the respondent’s claim giving Judgment in the sum of **Kshs.2,329,350/=**. The applicant’s application for stay of execution of the Judgment pending appeal was refused by that court hence this application for similar orders but premised on **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Rule 5 (2) (b)** of this Court’s rules.

It is now well settled by the jurisprudence that has emerged from decisions of this Court that the jurisdiction of the Court while considering applications for stay of execution pending appeal is not only original but is also discretionary. See, for instance, the case of **Ishamel Kagunyi Thande v Housing Finance Company of Kenya** Civil Application No. NAI 157 of 2006 (unreported) where it was observed:

***“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***

An applicant, to enjoy the shield of protection in a **Rule 5(2) (b)** application must satisfy the two principles –that there is an arguable appeal which is to say one which is not frivolous and secondly that the appeal, if filed, or intended appeal, will be rendered nugatory if stay of execution is not ordered.

It is stated in the grounds in support of the application, and in the affidavit in support thereof, that substantial loss, damage and hardship would be occasioned if stay of execution was not granted and:

***“6. THAT I verily believe that the intended Appeal is arguable and raises weighty and valid legal issues questioning the judgment of the Superior Court and has a high probability of success and it is only just and fair that we are accorded the liberty to freely ventilate the intended Appeal issues in this Honourable court without the imminent risk of execution against us which the respondent herein has threatened and is threatening to execute and which execution I verily believe would render the intended appeal nugatory. (Copy draft Memorandum of Appeal and Notice of Appeal annexed and marked “P6” & “P7”respectively.***

***7. THAT I verily believe that should execution ensue the intended Appeal which raises arguable and weighty issues and has an extremely high probability of success will be rendered nugatory causing the applicant great loss. I further verily believe that the respondent will not be put to any prejudice that would not be compensated by way of costs pursuant to grant of stay of execution.***

***8. THAT the applicant is ready to abide with such terms as the court may order including deposit of the judgment sum in court and/or in an interest earning bank account in the joint names of both Advocates on record.***

***9. THAT the respondent’s financial means are unknown as she was not in any gainful employment as the time the matter in the Superior court was heard thus the chances of her not being able to refund the judgment amount in the event the intended appeal is successful are extremely high.....”***

In the replying affidavit sworn by the respondent on 16<sup>th</sup> June, 2015 it is stated, *inter alia*, that there is no appeal pending because a notice of appeal filed was not accompanied by a letter bespeaking proceedings; that the applicant has no right to come to this Court in an application like this one because according to the respondent, stay of execution was refused by the lower court and the applicant should have appealed that decision and finally that the applicant is one of the largest business entity in the dairy industry in East Africa and therefore cannot suffer loss if the decretal sum is released to the respondent.

In submissions before us when the Motion came for hearing on 22<sup>nd</sup> July, 2015 **Miss V.M. Wambua**, learned counsel for the applicant urged that the intended appeal was arguable as the lower court granted the respondent gratuity when she had served 9 months of a contract period when such an award was available to employees who have served a period of 3 years. Also that general damages had been awarded for unfair dismissal which counsel thought were not envisaged by the contract of employment. Finally, urged Miss Wambua, the respondent had not shown that she had any means to refund the decretal sum should the intended appeal succeed.

**Mr. Ibrahim Adan**, learned counsel for the respondent, in opposing the Motion, thought that the applicant was abusing court process by filing an application for stay of execution at the trial court and, after its refusal, filing a similar application here. In any event, submitted learned counsel, there were no issues of law to be raised on appeal as the Industrial Court Act allowed appeals to be filed to this Court on points of law only.

We have carefully considered the Motion, the opposing affidavits, submissions of counsel and the law.

As we have already stated the jurisdiction of this Court to entertain applications under **Rule 5(2) (b)** of this Court’s rules is original. It matters not that an applicant has been unsuccessful in the lower court on a

similar application as what we require of an applicant is to satisfy us on the two principles on which we exercise our jurisdiction – that an appeal, or intended appeal, is arguable and that should stay of execution not be granted the appeal, or intended appeal, would be rendered nugatory. It matters not, therefore, contrary to the submission of Mr. Adan for the respondent, that the lower court had heard a similar application and refused it. The determination of that court has no bearing on the exercise of our jurisdiction under the said rule of the rules of this Court.

In the draft Memorandum of Appeal the applicant states, *inter alia*, that:

***“2. THAT the learned Judge erred in both law and fact in holding that the respondent was entitled to gratuity payment of Kshs.739,350/- against the weight of evidence available to the effect that the respondent as per clause 13 of the contract of service dated 15<sup>th</sup> December 2009 which was applicable at the time of her dismissal was not entitled to such payment as she had not completed even one (1) year of service under the said contract of service.***

***3. THAT the learned Judge erred in both law and fact in failing to dismiss the respondent case in its entirety. ....”***

These are issues of law and the applicant is entitled to canvass them in the intended appeal.

On the nugatory aspect the respondent has not shown or demonstrated that she has the ability to refund the not insubstantial sum of **Kshs.2,329,350/=** ordered by the trial court. All the respondent says on this is:

***“8. THAT more importantly, the Applicant, being one of the largest business entity in the dairy industry in East Africa which deals in food industry, processing, marketing milk and milk products, will not suffer substantial loss, damage or hardship if they pay the decretal amount, granted in the superior court, pending the determination of the appeal, as I have sufficient assets to repay the decretal sum, should the Applicant ultimately succeed on appeal. Needless to say, the Applicant has not objectively demonstrated how settling the decree would render its intended appeal nugatory.”***

The respondent, in the event, appears to reverse the principle we have enumerated above on demonstration of the nugatory aspect relevant to an application such as this one.

We are satisfied that the applicant has demonstrated to the required degree that the intended appeal is arguable and that the same would be rendered nugatory if we did not grant stay of execution as prayed. We therefore allow the application the consequence being that there shall be a stay of execution of the lower courts judgment pending hearing and determination of the intended appeal. Costs of the Motion shall abide the intended appeal.

***Dated and Delivered at Nairobi 25<sup>th</sup> day of September, 2015.***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P.M. MWILU**

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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**