



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 165 OF 2015 (UR 133/2015)

BETWEEN

MAASAI MARA UNIVERSITY APPLICANT

AND

DANIEL K. CHEBOI RESPONDENT

(Being an application for stay pending appeal against the Judgment of the Employment and Labour Relations Court at Nakuru (Radido, J.) delivered on 8th May, 2015)

in

Cause No. 249(C) of 2013)

AS CONSOLIDATED WITH CIVIL APPLICATION NO. NAI 166 OF 2015 (UR 134/2008)

MAASAI MARA UNIVERSITY..... APPLICANT

AND

PETER M. OKEMWA RESPONDENT

in

Cause No. 249B of 2013)

AS CONSOLIDATED WITH

CIVIL APPLICATION NO. NAI 167 OF 2015 (UR 135/2015)

MAASAI MARA UNIVERSITY

APPLICANT

AND

WILLIAM MOROGO MUTWO RESPONDENT

in

Cause No. 249 of 2013)

AS CONSOLIDATED WITH

CIVIL APPLICATION NO. NAI 168 OF 2015 (UR 136/2015)

MAASAI MARA UNIVERSITY

APPLICANT

AND

AMOS SASINE KITAIA RESPONDENT

in

Cause No. 249A of 2013)

RULING OF THE COURT

When this application came for hearing on 28th September, 2015 **Mr. Alexander Jaoko** learned counsel for the applicant and **Mr. Josiah Oumo** learned counsel for the respondent informed us that they had agreed that the ruling to issue here do apply to **Civil Application No. NAI 166 of 2015 (Maasai Mara University v Peter M. Okemwa); Civil Application No. NAI 167 of 2015 (Maasai Mara University v Willaim Morogo Mutwo) and Civil Applicaiton No. NAI 168 of 2015 (Maasai Mara University v Amos Sasine Kitaika)** and that the said applications be consolidated and heard together reason being that the parties in all applications are the same, the complaint at the trial court was the same and the prayers sought before us are the same. We so ordered.

The applicant **Maasai Mara University** brings this applicaiton against the respondent **Daniel K. Cheboi** (and the other respondents in the other applications) premised on **rules 5(2) (b), 41 and 47(1) of the Court of Appeal Rules, 2010** and **section 17 of the Industrial Court Act, 2011**. The main prayer being that we stay enforcement of the judgment and decree of the Employment and Labour Relations Court sitting at Nakuru delivered on 8th May, 2015 pending determination of an intended appeal. It is also prayed that we issue an order staying the reinstatement of the respondent back to employment until further orders of the Court. There are grounds set out in support of the application and there is a supporting affidavit of one **Samson ole Kisikoi**, the **Acting Registrar** of the applicant. A summary of the averments and grounds is that the respondent was employed by the applicant to a position of cashier within the applicant's establishment but for some reasons that were given to the trial court the respondent's employment was terminated; that after termination the applicant employed another cashier to that position; that the Employment and Labour Relations Court in the suit intended to be appealed gave judgment on 8th May, 2015 where the respondent was ordered reinstated to employment; that implementation of the decree will stifle the managment of the applicant; that the trial court ignored certain factors envisaged in **section 49 of the Employment Act No. 11 of 2007**; that the applicant will

suffer irreparable harm which cannot be compensated in damages and that the intended appeal is meritorious and would be rendered nugatory if the orders sought are not granted.

In the said judgment sought to be appealed various reliefs had been sought but only the order for reinstatement was granted with effect from the date of dismissal and it was further ordered that the respondent was not to lose any benefits.

Rule 5(2) (b) of this **Court's Rules** grants us unfettered discretion to order a stay of execution of an order pending appeal the only qualification being that we exercise that discretion judicially but not capriciously or at the whims of the Judge dealing with the application. That jurisdiction is original. It is now trite that two principles must be satisfied by an applicant who applies for stay of execution under the said rule – firstly that there is an arguable appeal which is to say that it is not frivolous, and secondly, that if the appeal, if filed, or intended appeal, would be rendered nugatory if stay of execution applied for was not granted – **Ishmael Kagunyi Thande v Housing Finance Company Limited (Civil Application No. 156 of 2006 (ur))** where these principles were restated thus:

“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. The principles are well settled. For an applicant to succeed, he must not only show 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 the appeal will be rendered nugatory.”

In submissions before us at the hearing of the application Mr. Jaoko learned counsel for the applicant confirmed that the respondent had been reinstated to employment in compliance with the trial court's order but that reinstatement only related to payment of salary and that the respondent was not in actual occupation of office. Learned counsel submitted that the learned trial judge erred in granting orders that would interfere with management of the applicant's affairs. Counsel cited **Butt v Rent Restriction Tribunal [1982] KLR 417** in support of the proposition that a stay of execution should be granted so that the appeal if successful will not be rendered nugatory. Reliance was also laid on the case of **Githunguri v Jimba Credit Corporation Ltd & Others [1988] KLR 838** for the same proposition.

Mr. Oumo opposed the application and relied on the replying affidavit of the respondent sworn at Nakuru on 21st September, 2015. Learned counsel was of the view that the application had been brought with undue delay; that the intended appeal was not arguable and that the learned trial judge was right to protect the employment opportunity of the respondent who may not be able to secure employment elsewhere.

We have considered the Motion, the rival affidavits and submissions made before us. It is common ground that the respondent's employment which had been terminated was reinstated through the trial court's order. The applicant takes the view that it has technically reinstated the respondent by paying him his salary but without either assigning him work or allowing him back to office. The respondent however takes the view that he has been fully reinstated to employment. This is therefore not an ordinary situation of staying an interim order.

An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in **Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984)** where it was stated:

“..... an order for stay of execution must be intended to serve a purpose”

A consideration of past decisions of this Court will however show that the Court has found it desirable to first consider the nature of the order intended to be stayed and whether the decree has been satisfied – this, before delving into a consideration of the two principles we have just set out. For instance, in

Charles Gichina Mwangi v Henry Mukora Mwangi [2000] eKLR there was evidence that the order sought to be stayed had been complied with in that subdivision and transfer of land the subject of litigation had taken place. It was held by this Court:

***“..... In the circumstances there is nothing to stay. That being the position, the application for stay must be, as it hereby is, dismissed with costs*”**

Following that approach of looking at the nature of the orders even before delving into the said principles in a **Rule 5(2) (b)** application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in **Executive Estates Limited v Kenya Posts & Anor. [2005] 1 E.A. 53** where it was stated:

***“..... The order which dismissed the suit was a negative order which is not capable of execution*”**

But what about applications for stay of execution pending appeal in cases of disputes between employers and employees where the contention is that an order to reinstate an employee has been complied with in compliance of the order of the trial court?

This Court has adopted a different approach where the application for stay pending appeal involves a situation where the employer has reinstated a sacked employee to obey an order of a court. The Court has refused to look at the nature of the order and confined itself to a strict interpretation of the principles upon which an application for stay of execution pending appeal is granted. Such was the situation that confronted the Court in the recent case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union Kenya [2014] eKLR** where the Court considered not the nature of the order but the said principles governing the grant of stay of execution pending appeal. This is how the Court rendered itself:

***“We find that on the facts of this application, it is arguable whether the employment of the employee was unlawfully and unfairly terminated. It is equally an arguable point whether in the circumstances of this case an order for reinstatement of the employee was the most viable or appropriate remedy, considering the provisions of the Employment Act as well as judicial authorities.*”**

Turning to the question of whether the appeal will be rendered nugatory if the judgment of the Industrial Court is not stayed, we are similarly satisfied that it will. The applicant’s averments in the affidavit supporting the application sworn on 25th April, 2014 by Samuel Kibugi contend that the applicant will not be able to recover the total amount in the decree, which is not insubstantial, from the employee. That averment has not been controverted. As this Court stated in RELIANCE BANK LTD VS NORLAKE INVESTMENTS LTD (2002) 1 EA 232, what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. Long delay and inconvenience in recovering money which has already been paid out is a relevant consideration. (See NATION MEDIA GROUP & 2 OTHERS VS JOHN JOSEPH KAMOTHO & 3 OTHERS, Civil Application No. 108 of 2006). In THE STANDARD BANK LIMITED VS. G.N. KAGIA T/A KAGIA & COMPANY ADVOCATES, Civil Application No. NAI 193 OF 2003, this Court expressed similar sentiments as follows:

“If the applicant’s appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”

We have come to the conclusion that this is a deserving case for exercise of our discretion under rule 5(2)(b) of the Rules of this Court. We accordingly direct that the judgment of the Industrial Court dated 24th April, 2014 be and is hereby stayed until the hearing and determination of the applicant's intended appeal.

The Court did not find it necessary in that case to address itself to both the nature of the order for reinstatement and when such an order can be said to have been executed and rendered complete.

There has, however, been consistency in the application of balance of interests and convenience of the parties in considering whether an appeal will be rendered nugatory as a result of reinstatement of a dismissed employee – See, for instance, the recent case of **Kenya Revenue Authority v Sidney Keitany Changole & 3 Others** [2015] eKLR where this Court rendered itself as follows:

“If an order for reinstatement was given, and then the appeal is allowed later, this would be very disruptive to both the applicant and the respondents. This Court has a duty to balance the interests of both parties and arrive at a fair decision. (See Oraro & Rachier Advocates vs Co-operative Bank of Kenya Ltd [1999] 1 EA 236).

It is more prudent for the respondents to wait for the intended appeal to be determined instead of leaving what they have been doing for the last six years in order to resume work as trainees with the applicant, only for their hopes to be shattered later in the event that the appeal was to succeed. The balance of convenience clearly tilts in favour of the applicant herein. In the result, we find that this application passes the threshold required for applications of this nature under Rule 5(2) (b) of Court of Appeal Rules.

Accordingly, we allow the same and grant the stay order sought. We nonetheless order that the appeal be filed within 90 days from the date of this Ruling failing which the stay will automatically stand vacated.

Employers who have demonstrated that the employee may be found to have been in breach of their position of trust or may cause more damage at the employer's cost such as strikes or lack of performance by other employees, have been able to enjoy an order of stay of execution even after compliance.

This means that the employee stands terminated until the hearing and determination of the appeal.

This approach by the Court of Appeal is in line with the overriding objective and duty of the court provided under **sections 3A and 3B** of the **Appellate Jurisdiction Act**. These provisions require that the Court exercises its powers in a way that facilitates the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. It also places the Court under a duty to handle all matters presented before it for the purpose of timely disposal of the proceedings, and all other proceedings in Court, at a cost affordable by the respective parties.

In this case, the respondent was employed as a cashier and was therefore in charge of dealing in money at the university owned by the applicant. That was a position of trust. The applicant was ordered to reinstate the respondent and has done so technically to avoid consequences which would accrue if there was disobedience. We accept the position that the respondent has not been assigned any duties.

Looking at the draft memorandum of appeal, ground 1 thereof states that:

“That the learned Honourable Justice RADIDO STEPHEN, Judge of the Employment and Labour Relations Court at Nakuru erred in law and his judgment delivered on the 8th day of May, 2015 AND the decree dated and issued on 13th May, 2015 is tantamount to violation of Section 49 of the Employment Act No. 11 of 2007, which provides that before the Court make orders for reinstatement, The (sic) Court must look into Section 49(b) circumstances to which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; 49(c) The (sic) practicability of recommending reinstatement or

re-engagement; and 49(d) The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.”

Whether or not it was right for the trial court to order specific performance in an employment contract is obviously an arguable point in the intended appeal.

On the nugatory aspect of the matter we adopt the view that this Court adopted in **Kenya Revenue Authority v Sidney Keitany Changole & 3 Others** (supra).

To reinstate the respondent to a position of trust (as cashier) it would appear that trust has been lost and if money was lost would certainly make the intended appeal nugatory.

We are satisfied that the applicant has satisfied the principles upon which an applicaiton of this nature is granted and we therefore grant a stay of execution of the judgment of the trial court pending hearing and final determination of the intended appeal. Costs of the application shall abide the appeal.

These orders apply to the consolidated applications.

Dated and Delivered at Nairobi this 30th day of October, 2015.

ALNASHIR VISRAM

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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