



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), KOOME & MWILU, JJA)**

**CIVIL APPLICATION NO. NAI. 149 OF 2015**

**BETWEEN**

**ROYAL MEDIA SERVICES LIMITED.....APPLICANT**

**AND**

**VERONICA CHEPKEMOI.....RESPONDENT**

*(An application for the stay of execution of the judgment and decree of the Employment and Labour Relations Court at Nairobi (Marete, J.) dated the 5<sup>th</sup> December 2014*

*in*

***Employment and Labour Relations Court Cause No. 1923 of 2012)***

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**RULING OF THE COURT**

1. Royal Media Services Limited, the applicant herein, had employed the respondent, Veronica Chepkemoi, as a radio presenter to work at *Radio Citizen*, one of the radio stations that it runs. The respondent worked as a presenter of a daily show called *Citizen Express*, until the 7<sup>th</sup> September 2012, when her services were terminated. Aggrieved by the termination, the respondent filed suit in the Employment and Labour Relations Court alleging that the termination was unlawful and malicious. She sought, *inter alia*, an order of reinstatement into the service of the applicant. The respondent opposed the suit and partly denied that the termination was malicious. It stated that the applicant's employment was terminated on account of her poor work performance, which she failed to remedy even after being asked to, and thus asked the Employment and Labour Relations Court to dismiss her claim.
2. After a full hearing, Marete, J. found the termination of the respondent's employment unfair and unlawful, and ordered that she be reinstated to her former position without loss of benefits. The learned judge also ordered that the applicant pay the respondent all her emoluments, salaries and benefits for the time since her termination on the 7<sup>th</sup> September, 2012 until her reinstatement.
3. The applicant has expressed an intention to appeal that decision and the consequential orders of Marete, J. by way of a notice of appeal dated the 15<sup>th</sup> December 2014, and lodged in the Employment and Labour Relations Court on the same date. It has now also asked this Court, by

way of an application dated the 2<sup>nd</sup> June 2015, and brought under Rule 5(2)(b) of this Court's rules, for an order of stay of execution of those orders pending the hearing and determination of the intended appeal.

4. The principles which must be satisfied before this Court will grant an order of stay of execution under rule 5(2)(b) of the Rules are well settled. The first principle is that the applicant must show that it has an arguable appeal. See **Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd (2002) 1 EA 227.**
5. The applicant need not establish many arguable grounds, even one solitary one is sufficient. See **Transouth Conveyors Ltd v Kenya Revenue Authority & Another [2007] eKLR (Civil Application No. 37 of 2007)** wherein the Court held that even:

***“A solitary issue, if it is arguable on appeal, is of course sufficient to warrant favourable treatment of an application under rule 5(2)(b).***

6. To demonstrate that an appeal is arguable, the applicant does not need to show that the issue to be raised on appeal will succeed - it simply needs to show that the intended appeal raises a reasonable question of law that should be determined by this Court. In **Retreat Villas Ltd v Equatorial Bank Ltd & 2 Others [2007] eKLR (Civil Application No. 40 of 2006)** this principle was put thus:

***“The applicant is not required to show in an application of this nature that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if the applicant shows that he has serious questions of law for the submission to the Court on hearing of the appeal.”***

7. In support of the application, the applicant submitted that the intended appeal is arguable as the learned judge erred by ordering that the respondent be reinstated. The applicant contended that the learned judge failed to consider that the relationship between the applicant and the respondent had collapsed, and thus it was improper for him to order her reinstatement as opposed to the various other remedies that are provided by law. To fortify this point, the applicant relied on **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR (Civil Appeal No. 46 of 2013)** where this Court stated that one of the factors that ought to be considered before reinstatement is ordered is the practicability of such an order.
8. The applicant further contends that the learned judge erred by awarding a remedy that is not provided for under section 49 of the Employment Act, since he ordered that the respondent earn a salary for a period of two years during which she was not employed. In support of this submission, the applicant relies on **Teachers Service Commission v Sarah Nyanchama Ratemo [2014] eKLR (Civil Application No. Nai. 227 of 2013)** where the Court found that it was an arguable point if the Employment Act allowed a judge to order payment of salary arrears for a period of over three years.
9. The respondent on its part submits that the intended appeal is not arguable. She states that the application is incompetent as the applicant has failed to annex a draft memorandum of appeal that would enable the Court gauge whether or not the intended appeal is arguable. The applicant further states that there is no order that is capable of being stayed as she was reinstated after the court order, although she has been denied access to her workplace. The respondent distinguished the authority of **Teachers Service Commission v Sarah Nyanchama Ratemo (supra)** by stating that in that application, one of the issues was whether the Teachers Service Commission could redeploy an employee, and the holding was therefore not applicable in the present application. Counsel also distinguished the decision in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (supra)** by stating that the issue therein arose out of employees who had been rendered redundant, while in the present case, the termination of the respondent's employment was found to be unfair.

10. In an application such as this, we must be careful not to embarrass the bench that will eventually hear the main appeal, and therefore refrain from making any definitive findings. We have our doubts as to whether a court can order an employer to make payment of full salary for a period during which a former employee has not worked. We find and hold this to be an arguable point and thus the applicant has satisfied the first principle for the grant of an order of stay of execution.
11. The second principle which we now consider is whether or not, the intended appeal, if successful, would be rendered nugatory if we decline to grant the order of stay of execution. The applicant is of the view that the appeal would be rendered nugatory because after the termination of the respondent's employment, it re-organized the operations of *Radio Citizen*; it has since employed two other employees to take over the program previously hosted by the applicant, and to reinstate her would only serve to cause more hardship to it because the applicant would be forced to fire the two employees. In addition, the applicant states that if the order of stay is refused, it will have to pay the respondent salary arrears, which it estimates at Kshs. 2,112,000.00, and should the intended appeal be successful, there is no guarantee that the respondent would be able to pay back the money.
12. The respondent on her part is of the view that the appeal would not be rendered nugatory even if it is successful. She states that the order of the Employment and Labour Relations Court cannot be stayed as she has already been reinstated. She further states that even if the intended appeal is successful, she would be in a position to refund any money that she is paid.
13. In considering whether or not an applicant has satisfied the second limb for the grant of an order of stay of execution, the Court must consider;

***“ ... whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the successful appellant.”***

See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR (Civil Application No. 31 of 2012)*

14. If this application is not successful, the respondent is likely to resume working at the applicant company. In our view, this may probably cause the applicant some hardship as it would have to find a way to accommodate her after a long period of time. This hardship would be compounded if the intended appeal succeeds and the termination of the respondent's employment found to be fair. We are also alive to the fact that any hardship the respondent may suffer can reasonably be recompensed by damages. We are therefore satisfied that the applicant has made out a case for the granting of an order staying the order of reinstatement of the respondent made by the lower court.
15. Regarding the order of payment of salary arrears for the period during which the applicant was out of work, we remind ourselves that in

***Reliance Bank Ltd v Norlake Investments Ltd (supra)*** this Court held that:

***“In determining the second limb of the test, [a court is] bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory.”***

16. If we decline to grant the order staying payment of the money, the applicant will be required to pay the respondent her salary for a period of two years between December 2012 and December 2014. In view of the arguable issue that is raised by the applicant herein, we are of the view that conditional relief would best serve the interests of justice.
17. In light of what we have stated above, the application by notice of motion dated the 2<sup>nd</sup> June 2015

has merit, and we allow it in the following terms:

- a. The judgment and decree of the Employment and Labour Relations Court made on the 5<sup>th</sup> November 2014 be and is hereby stayed pending the hearing and determination of the intended appeal.
- b. Within thirty (30) days of the date of delivery of this ruling, the applicant shall deposit the entire decretal sum into an interest-earning account in the joint names of counsel for the applicant and counsel for the respondent. The account shall be in a reputable bank to be agreed upon by counsel for the parties, and should they fail to agree, the Registrar of this Court shall designate the bank in which the account shall be opened. The decretal sum shall be so held pending the hearing and determination of the intended appeal, or until further orders of this Court.
- c. Upon compliance with the order in (b) above, the costs of the application shall abide the result of the intended appeal. In default of compliance with this order, the order of stay of execution hereby granted shall stand vacated and the application dated the 2<sup>nd</sup> June 2015 dismissed with costs to the respondent.

Orders accordingly.

**Dated and Delivered at Nairobi this 16th day of October, 2015**

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**