



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (PCA), OKWENGU & OTIENO-ODEK JJA)

CIVIL APPLICATION NO. NAI. 42 OF 2015 (UR) 38 OF 2015)

BETWEEN

WELLS FARGO LIMITEDAPPLICANT

AND

CYRUS KIOKO & 48 OTHERS RESPONDENTS

(An application for stay of execution of the ruling and subsequent order of the Employment & Labour Relations Court (Wasilwa, J). dated 3rd February 2015

in

H.C.CAUSE No. 26 OF 2015)

RULING OF THE COURT

1. At all material times in this suit, the 49 respondents herein are employees of the applicant. By letter dated 9th January, 2015, the applicant summarily dismissed the respondents from its employment. The respondents moved to the Employment and Labour Relations Court seeking orders to quash the summary dismissal and orders for reinstatement and damages for unlawful and unfair dismissal. The Court (Wasilwa, J.) in an interlocutory Ruling delivered on 3rd February, 2015 gave orders expressing herself as hereunder:

“It is also apparent that on 14th January 2015, this Court gave orders restraining the respondents from filling up the posts previously occupied by the claimants...The prayer sought by the applicants stopping filling of the posts still stands and any action taken against this order is null and void. The applicants sought to be reinstated in employment but that would be tantamount to also condemning the respondent without consideration of all the facts. I believe damages could adequately compensate the applicants if this court finds that the dismissal was unlawful. I will decline to reinstate them... but would on a balance of probabilities treat them on suspension in which case they would be entitled to ½ pay pending final hearing and disposal of this case”(emphasis ours).

2. Aggrieved by the ruling, the applicant has come to this Court seeking orders for stay of execution of the ruling and the consequential orders thereof pending the hearing and determination of an

- intended appeal which it has already filed. The grounds in support of the application for stay as deposed in the supporting affidavit of Mr. Steve Kangethe are that the intended appeal is arguable with high chances of success and the appeal shall be rendered nugatory if stay is not granted. The applicant contends that if the appeal succeeds, it will suffer irreparably as it will not be able to recover the monthly sum of Kshs.600,000/= that it pays the respondents as ordered in the impugned ruling; that the order stopping the applicant from filling vacant positions previously occupied by the respondents is causing hardship and is crippling its business making the applicant unable to meet its clients' needs due to lack of manpower.
3. The applicant in its supporting affidavit and draft memorandum of appeal contends that the intended appeal is arguable on grounds, *inter alia*, that the learned judge erred in law and fact in granting interim injunctive orders preventing the applicant from filling up vacancies left by the respondents following their summary dismissal; that the judge erred in reducing and converting the respondents' summary dismissal into suspension without substantive consideration of the applicant's evidence as the suit is still pending before the Employment and Labour Relations Court; that the judge erred by ordering the applicant to pay the respondents 50 per cent of their monthly salary until the case is heard and determined yet no work is being done by the respondents; that the judge erred by holding that the applicant did not issue the respondents with suspension letters yet it was the respondents who exhibited the suspension letters to their pleadings; that the judge erred in holding that the applicant did not give the respondents an opportunity to be heard and that the applicant denied the respondents representation by a trade union of their choice. Counsel for the applicant submitted that all these grounds as stated in the draft memorandum of appeal demonstrate that the intended appeal is arguable and not frivolous.
 4. The respondents did not file a replying affidavit to the Motion but opted to oppose the same on points of law. At the hearing of the application, learned counsel Mr. Thomas Kimani holding brief for Mr. Paul Oginde appeared for the applicant, while learned counsel Mr. J.S. Namada appeared for the respondents.
 5. Counsel for the applicant reiterated the grounds in support of the application for orders of stay emphasizing that the intended appeal was arguable and the same would be rendered nugatory if stay order was not granted. He submitted that whereas **Section 49 (3)** of the **Employment Act** provides for reinstatement as a remedy, the remedy could only be granted on merit upon a full hearing and determination of the suit; that the judge erred by converting the summary dismissal of the respondents into suspension and thereby reinstating the respondents and placing them on the applicant's payroll with orders that they be given half pay; that the judge erred in law and wrongly exercised her discretion in reinstating the respondents before hearing the dispute between the parties on merits; that it is an arguable point as to whether the trial court has jurisdiction to grant an interim order of re-instatement and that it is also arguable that the court erred in converting summary dismissal into a suspension.
 6. The applicant submitted that the intended appeal, if successful, shall be rendered nugatory as the applicant has been ordered to pay the 49 respondents a monthly sum of Kshs.600,000/= which is their half pay, for no work done, and there is no chance of the applicant recovering monies paid to the respondents; that the respondents are persons of straw and that to safeguard their interest, the applicant is willing to deposit in court as security six months' salary of the respondents; that the applicant is suffering irreparable damage through the order which prohibits it from recruiting new employees as this makes it difficult to remain in business and serve its clients due to shortage of manpower; that the applicant has now been left with only one employee in a department that is ordinarily served by 50 people and the order barring it from replacing the respondents is causing hardship and business inconvenience. The applicant cited the cases of **Kenya Medical Lab Technicians -v- Prime Communications Ltd (2014) eKLR**; **Reliance Bank Ltd. -v- Norlake Investments Ltd. (2002) 1 EA 227** and **Kenya Airways Limited -v-Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** in support of its submissions.
 7. The respondents in opposing the appeal stated that the intended appeal was not arguable and the

same shall not be rendered nugatory if it succeeds. It was submitted that the intended appeal is a misapprehension of the issues before the Employment and Labour Relations Court; that the dispute between the parties is still pending for hearing and determination before the trial court; that the draft memorandum of appeal raises factual matters to be canvassed at the hearing of the main suit; that the grounds of appeal and exhibits cited go to the merits of the case which merit is yet to be heard and determined; that the instant application is premature and the applicant should await the full hearing and determination of the dispute by the trial court; that in granting interlocutory relief to the respondents, the trial court was exercising discretionary powers and no appeal lies against an order made in exercise of a discretionary power unless the orders made do not conform to the principles laid down in the case **Mbogo & Another -v- Shah (1968) EA 93**, where it was held that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion....”

8. Counsel for the respondent submitted that the applicant had not brought itself within the principles of **Mbogo & Another -v- Shah (1968) EA 93**; that the learned judge correctly applied the principles in the case of **Giella -v- Cassman Brown & Co. Ltd (1973) EA 358** and the judge was satisfied that the conditions for grant of an interlocutory injunction were fulfilled; that **Section 12 (3)** of the **Industrial Court Act** gives the Employment Court jurisdiction to grant and make interim preservative orders; that it is not correct in law to state that damages *per se* are an adequate remedy; that the law allows courts to grant damages as an additional remedy which includes an order for reinstatement; that trial court did not err in making interim orders preserving the employment positions of the respondents as this is allowed under **Section 12 (3)** of the Industrial Court Act; that the respondents stand to suffer irreparable damage and prejudice if stay orders are granted; that the respondents are depended and live on the half pay as granted by the trial court and any stay order will deprive them their means of livelihood and that whereas the trial court made an order prohibiting recruitment and replacement of the respondents, such an order was necessary to preserve the employment of the respondents and the same operates as an incentive to the applicant to ensure that the dispute between the parties is heard and determined expeditiously before the Employment and Labour Relations Court.
9. Counsel distinguished the authorities cited by the applicant particularly the decision of this Court in **Kenya Airways Limited -v- Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**. It was submitted that the **Kenya Airways** decision (supra) was made on merits after full hearing of the parties; that the decision arose out of a claim founded on redundancy and not unfair dismissal; that this Court in arriving at its decision in **Kenya Airways** awarded damages over and above other remedies, and this indicates that damages is not the only remedy to be awarded when termination of employment is unfair or otherwise.
10. In reply, counsel for the applicant submitted that even if the trial judge was exercising discretionary powers in granting interlocutory orders, the grant of such orders cannot be made in violation of express provisions of law; that in the instant case, the law stipulates that reinstatement can only be made after hearing the dispute on merits and this has not been done and the respondents have admitted that the applicant's business is negatively impacted by the order prohibiting recruitment and replacement of the respondents.
11. We have considered the application, the grounds in support thereof, the submissions by counsel and the law. For the application to succeed, two principles must be satisfied. First, that the intended appeal is arguable and second, that unless stay is granted, the appeal or the intended appeal, if successful, would be rendered nugatory - see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982 – 88) 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.

12. In the case of **Stanley Kang'ethe Kinyanjui -v- Tony Keter & 5 Others**, Civil Application No. NAI. 31/2012, this Court stated *inter alia*

“that in dealing with **Rule 5 (2) (b)**, the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

13. We have examined the draft memorandum of appeal. The applicant submitted that it is arguable whether the trial court has jurisdiction to grant interlocutory orders reinstating the respondents before hearing the dispute on merit; that it is arguable whether the trial court erred at the interlocutory stage by converting summary dismissal of the respondents into suspension; it is also arguable whether the court erred in the exercise of its discretion prohibiting the applicant from recruiting new employees to replace the respondents. The applicant submitted that if its appeal succeeds, the same shall be rendered nugatory as it would have paid the respondents monies that it may never recover; the applicant submitted that as a business enterprise, it is suffering irreparably and its business is being stifled and crippled by the order preventing it from replacing the respondents.

14. We have considered the submission that the respondents are persons of straw and any monies paid to them may not be recoverable; it is our considered view that the applicant has not demonstrated to our satisfaction that the respondents are persons of straw, as there is no affidavit of means availed to prove the impecuniosity of the respondents. This particular submission does not satisfy us that the intended appeal shall be rendered nugatory as bare allegations without evidence cannot suffice;

15. The applicant submitted that the impugned ruling is causing it hardship; business inconvenience and is crippling its operations. We are cognizant that the trial court in granting interim orders was exercising its discretionary powers. This is an application for stay orders and is not a hearing of the main appeal between the parties. We are alive to the decision in **Mbogo & Another -v- Shah (1968) EA 93**, particularly the dicta that an appellate court will interfere with a discretionary decision of a trial court where the decision fails to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Since the enactment of the Employment Act and the Industrial Relations Act as well as the Industrial Court Act, all of 2007, damages and reinstatement are now statutory remedies and the court has jurisdiction, *inter alia*, to order reinstatement of the affected employees or award damages to them. (See **Paramount Bank Ltd. - v- Mohammed G. Qureishi & Another Civil Appeal No. 239 of 2001 (2005) eKLR**; and **Kenya Airways Limited -v- Aviation & allied Workers Union Kenya & 3 Others (2014) eKLR** as per Maraga JA).

16. In the present case, the trial court converted the summary dismissal of the respondents into a suspension and ordered the respondents to receive half pay. Whether the trial court had jurisdiction to do this at the interlocutory stage is an arguable point to be canvassed in the intended appeal. In **Kenya Airways Limited -v- Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** as per Maraga JA, it was stated that reinstatement is not an automatic right of an employee; it is discretionary and each case has to be considered on its own merits; that traditionally, courts should not force parties in a personal relationship to continue in such relationship against the will of one of them when this can engender friction which is not healthy for business. **Section 49 (4)** of the **Employment Act** encompasses elements of reasonableness and practicability before reinstatement is ordered. In the instant case, whether the trial court’s interim decision prohibiting the applicant from filling up positions previously occupied by the respondents was reasonable and practicable is an arguable point to be canvassed in the intended appeal.

17. Our discretion to grant stay under **rule 5(2) (b)** is original and unfettered. In our view, by the time the intended appeal comes up for hearing and determination, there is a fear which is not unfounded, that the business and commercial interest of the applicant will be disrupted and affected due to lack of manpower as a result of the order prohibiting recruitment and replacement of the respondents. Justice requires that we consider whether undue hardship would be caused to the applicant if stay is refused— see **Oraro & Rachier Advocates v Co-operative Bank of Kenya Ltd.**, Civil Appl. No. Nai. 358/99 (ur), **Clarkson (Insurance Brokers) Ltd vs. South Coast Fitness Centre** – Civil Appl. No. Nai. 204/95 (ur) and **Trust Bank Ltd & Another vs. Investech Bank Ltd & 3 others** Civil Appl. No. Nai. 258 & 315 of 1999 (ur). We must weigh the respective positions of the parties. What prejudice is to be suffered by the respondents if the applicant were to temporarily fill the positions? The respondents are on half pay, what prejudice do they suffer when they are receiving half pay for no work done? We are of the view that there is every justification for the applicant’s position to be secured by stay orders as not doing so would cripple its business enterprise and render the intended appeal nugatory. At an interlocutory stage, a court ought not make orders that have the potential to cripple the financial and commercial interest of a party. Except where there is evidence to the contrary and subject to balancing the interest of all parties, interim orders are meant to preserve the substratum of the suit and not to financially stifle and cripple either party. The respondents are receiving half pay and are not being financially stifled and crippled. It is only just and fair that the applicant’s business enterprises should also not be commercially stifled and crippled.

18. In the instant case, we are satisfied that had the trial court weighed and balanced the respective interest of the applicant and the respondents and considered the negative and potentially crippling consequences of an interlocutory order prohibiting the applicant from recruiting and replacing the respondents, the court would have arrived at a different decision. Our examination of the ruling delivered by the trial court does not reveal how the court weighed, considered and evaluated the balance of convenience between the parties and the crippling effect of the order made. We find that there is partial merit in the present application and we hereby set aside in entirety the ruling and consequential orders made by the trial court on 3rd February 2015 and substitute in their place the following orders:

- a. *the applicant shall be at liberty to engage casual workers pending the hearing and determination of the intended appeal;*
- b. *the applicant shall continue to pay the respondents one half of their monthly salary until the hearing and determination of the intended appeal;*
- c. *Costs of this application shall abide by the outcome of the intended appeal.*

Dated and delivered at Nairobi this 9th day of October, 2015

P. KIHARA KARIUKI, PCA

.....

JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR