



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWILU & KANTAI, JJ. A CIVIL APPLICATION NO. NAI 133 OF 2015  
(UR 107/2015)**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPLICANT**

**VERSUS**

**BANKING INSURANCE & FINANCE UNION (Kenya).....RESPONDENT**

*(Being an application under Rule 5(2) (b) of the Court of Appeal Rules, 2010 for stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (M. Mbaru, J.) delivered on 13<sup>th</sup> day of May 2015*

*ELR No. 1982 of 2013)*

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**RULING OF GITHINJI, JA.**

This is an application under **Rule 5(2) (b)** of the **Court of Appeal Rules, 2010** for two main orders, namely, firstly that the execution of the judgment of the Employment and Labour Relations court, (trial court) dated 19<sup>th</sup> May 2015 be stayed pending the hearing and determination of the intended appeal and, secondly, that the proceedings in the Employment and Labour Relations Cause No. 1982 of 2013 be stayed pending the hearing and determination of the intended appeal.

A brief background to the application is appropriate. On 17<sup>th</sup> June 2010, the applicant employed one **Samuel Chege Njoroge (grievant)** as a graduate clerk and posted him to Mariakani branch of the applicant and at the relevant time he was the ATM custodian. He was a member of Banking Insurance and Finance Union (Kenya) - the respondent herein which has entered into a Collective Bargaining Agreement with the applicant. By a letter dated 21<sup>st</sup> December 2012, the applicant suspended the grievant from duty pending investigation into cash shortage at ATM No. 198 of Kshs. 531,000 at Mariakani branch. This was followed by a letter dated 21<sup>st</sup> December 2012 which required the grievant to show cause why disciplinary action should not be taken. The show cause letter informed the grievant that investigations had revealed that he had committed a breach of security in matters affecting the applicant's business in that:

***“(1) Between 23<sup>rd</sup> November 2012 and 13<sup>th</sup> December 2012 you failed to account for Kshs. 636,000 which had been entrusted to you by the bank and which you noted that it was missing from ATM No. 198 after being taken by your co-custodian for personal use without authority. You also concealed the***

**cash difference on 11<sup>th</sup> December 2012 by indicating on the ATM reconciliation form that the ATM had a difference of Kshs. 7,000.00 whereas the actual difference was Kshs. 636,000.00 contrary to the provisions of the operations manual.**

**2. Further it has been established that you failed to adhere to the provisions of the Operating Manual on dual custody while confirming cash at the ATM thereby facilitating cash being taken from the ATM and exposing the Bank to loss.”**

The grievant replied by a letter dated 4<sup>th</sup> January 2013 in which he stated *inter alia*, that he discovered the difference of Kshs. 576,000.00 on 11<sup>th</sup> December 2012 and verbally reported immediately to the Operating Manager which the co-custodian, confessed to have taken without his knowledge; that the co-custodian explained to the Operating Manager that he had taken money on several occasions and promised to refund the money, which he did by 15<sup>th</sup> December 2012 and that in the confusion occasioned by the discovery of a huge difference, he might have signed the ATM reconciliation which was prepared by the co-custodian. The evidence showed that the co-custodian was one Jacob. The grievant held a combination and password to the ATMs while Jacob held the key and the two had to work together.

The grievant was later invited to bank’s Disciplinary Hearing Panel at which the grievant was represented by an official of the union. The grievant was ultimately summarily dismissed by a letter dated 21<sup>st</sup> December, 2015 which informed him that:

**“The Disciplinary Panel found you guilty of failing to account for cash entrusted on you by the Bank from ATM 198 of which you noted that it had been taken by your co-custodian for personal use without your authority contrary to the provisions of the Bank’s Operating Manual. You also failed to adhere to the provisions of the Operating Manual on dual custody while confirming cash for loading to the ATM thereby exposing the Bank to possible loss and concealed the cash difference on 11<sup>th</sup> December 2012 by indicating that the ATM had a difference of Kshs. 7,000.00 while the actual difference was Kshs. 636,000.00”.**

The grievant reported to the union which in turn reported the existence of a dispute to the Minister for Labour. Thereafter, the Minister appointed a conciliator who recommended that the grievant’s summary dismissal be reduced to a normal termination and the grievant be paid 8 months salary for loss of employment on the grounds that the grievant was not involved in the loss of money and the bank did not incur any losses.

The applicant did not accept the recommendations prompting the union to file a memorandum of claim in the trial court on behalf of the grievant. The reliefs sought in the claim were a declaration that the dismissal was unlawful and wrongful, reinstatement, and pecuniary compensation for loss. The applicant filed a memorandum of reply denying the claim and also filed a counter claim for Kshs. 636,000. By a judgment dated 19<sup>th</sup> May 2015 the learned Judge after analysing the evidence, made a finding that there was substantive and procedural unfairness; that reasons for summary dismissal lacked justification and that the dismissal was unfair. The learned Judge reinstated the grievant to his former position as a graduate clerk/ATM custodian with effect from 2<sup>nd</sup> June 2012 at any branch other than Mariakani and awarded him the previous salaries and allowances to be paid on or before 31<sup>st</sup> May 2015. The learned Judge further dismissed the counter-claim and awarded costs of the claim to the grievant.

The applicant being aggrieved by the decision filed a notice of appeal dated 19<sup>th</sup> May 2015 and an application dated 22<sup>nd</sup> May 2015 for stay of execution of judgment and stay of proceedings pending appeal. By a letter dated 29<sup>th</sup> May, 2015, the applicant reinstated the grievant with effect from 2<sup>nd</sup> June 2015 in compliance with the judgment and sent him on three months leave. On 10<sup>th</sup> July, 2015, the trial court allowed the application in part. It allowed the application for stay of execution in respect of the money decree which it assessed at Kshs. 2,376,736 on condition that the sum be deposited in an interest earning bank account but rejected the prayer for stay of execution in respect of reinstatement.

The application for stay of execution and stay of proceedings is supported by the grounds in the body of the application and in the supporting affidavit of **Samuel Kibugi** – the Head of Legal Services of the applicant and in his further affidavit.

The application is opposed on the grounds contained in the replying affidavit of **Isaiah Kubai**, the Secretary General of the union.

The application for stay of execution of the monetary decree and for stay of proceedings has already been granted by the trial court on the condition of deposit of the decretal sum which the applicant, as shown in its further affidavit, is ready to comply with. It is not therefore, necessary to consider that part of the present application.

As regards the application for stay of execution of the order for reinstatement, the applicant is required to demonstrate that the intended appeal is arguable and further, that unless the application is allowed the intended appeal or appeal, if successful would be rendered nugatory.

The applicant contends that it has an arguable appeal on the grounds disclosed in the draft memorandum of appeal. On the other hand, the respondent states in the replying affidavit that the draft memorandum of appeal does not disclose arguable grounds; that reliefs granted by the trial court are within the contemplation of s. 49 of the Employment Act and that the grievant having been reinstated, the application has been overtaken by events.

The draft memorandum of appeal discloses that the applicant will be mainly faulting the Judge's finding that the dismissal was unfair; that there was substantive unfairness and also in ordering reinstatement.

I appreciate that by **s.17(2)** of the **Industrial Court Act, 2011**, an appeal from the judgment of the trial court lies to this Court only on matters of law.

The applicant contends that it has power both under s. 44 of the Employment Act and under clause A5 of the Collective Agreement to summarily dismiss the grievant and that the judge did not consider the relevant facts including the fact that the grievant had expressly admitted to his own failure to adhere to the applicant's ATM user manual on dual custody of the ATM; the concealment of cash difference in the reconciliation forms and the fact that failure by the grievant to adhere to applicant's dual custody procedure exposed the applicant to possible loss.

On the issue of substantive and procedural fairness, the applicant contends that no procedural step was omitted in the dismissal process and that the grievant did not raise the issue of infringement of his right to a representative of his choice in the disciplinary hearing. On this issue, the record shows that the grievant was represented by an official of the union in the disciplinary proceedings. The respondent has not stated in the replying affidavit why the proposed grounds of appeal on the main findings by the trial court are not arguable.

On the issue of reinstatement, the applicant contends that the learned judge misapprehended and misapplied s.49 (3) and (4) of the Employment Act, relating to the remedies for unfair termination considering, *inter alia*, that the applicant did not desire to have the grievant reinstated; that the grievant was in employment for a relatively short period and that it has been over two years since the employment was terminated. In addition, the learned Judge indicated in the judgment that the applicant stated that upon termination, the applicant paid the grievant all terminal dues in full.

By section 50 of the Employment Act, the trial court should be guided by section 49 of the same Act in the determination of the appropriate remedies. By s. 49(4) (d) of the same Act, one of the factors to be considered in determining the appropriate remedy for summary dismissal or unfair termination is the common law principle that there should be no order for specific performance of a contract of services except in very exceptional circumstances.

The trial had a whole range of remedies to choose from. The question whether or not the trial judge in

ordering reinstatement, applied the correct principles is an issue of law.

From the observations made above, and upon consideration of the judgment of the trial court, the proposed grounds of appeal and the respective affidavit, I am satisfied that the points of law identified by the applicant are indeed arguable.

The applicant contends that the intended appeal, if successful, will be rendered nugatory in that the grievant will already have been reinstated rendering his termination disruptive both of him and to the operations of the applicant. It is further contended that the grievant held a very sensitive position and that it would be undesirable to have him hold such position while an appeal is pending.

**Miss Angela Cherono**, learned counsel for the applicant, further submitted that the position that the grievant held required trust between him and the applicant and that the grievant exposed the applicant to potential financial loss.

**Mr. Daniel Njoroge**, learned counsel for the respondent on his part contended that the appeal would not be rendered nugatory as the judgment of the trial court has partly been satisfied by voluntary reinstatement and that reinstatement cannot lead to a loss as the grievant will be rendering services.

Whether or not an appeal would be rendered nugatory, if successful, would ultimately depend on the peculiar circumstances of each case – (see **Reliance Bank Limited v Norlake Investments Ltd – [2002] 1 EA 227**).

In the instant case, the grievant was an ATM co-custodian. Admittedly there was a loss of Kshs. 531,000.00 which the other co-custodian ultimately refunded after which he was dismissed. The grievant was also summarily dismissed for that loss and for failing to adhere to Operating Manual on dual custody and also for concealing the loss in the reconciliation statement. The learned judge reinstated him to the same position but at a different branch. An arguable appeal is pending. As the applicant correctly contends, if the appeal is successful the grievant would be dismissed against which would be disruptive to the operations of the applicant. Further, it is probable that the grievant if reinstated to the same position, would expose the applicant to great financial loss which the applicant may not be able to recover from the grievant.

I am satisfied that in the peculiar circumstances of this case, reinstatement to the same position would render the appeal, if successful, nugatory.

Nonetheless, it is contended by the respondent that the applicant has voluntarily reinstated the grievant and that the Court cannot reverse the reinstatement at this stage. However, the applicant explains that it reinstated the grievant in compliance with the judgment of the trial court to avoid committal for contempt of the court order and that it immediately sent the grievant on compulsory leave as the reinstatement has proved to be disruptive of the applicants owing to the applicant's nature of business.

At the hearing of the application the respondent's counsel stated that at the time of the application the grievant was still on compulsory leave.

The trial court decreed that the grievant be reinstated by a certain date. The applicant filed a notice of appeal and applied for stay of execution in the trial court before the due date for reinstatement. Contrary to the submission of the respondent, this was not a voluntary reinstatement but rather, reinstatement by compulsion of the court. Furthermore, the grievant has not resumed his duties of ATM custodian. In **Co-operative Bank Limited v. Banking Insurance & Finance Union (Kenya), Civil Application No. NAI 93 of 2014 – 2014 eKLR** this Court stayed the execution of a judgment of the Industrial Court which had *inter alia* ordered reinstatement of an employee even though, like in instant case the employer had in compliance of the court decree reinstated the employee and sent him on compulsory leave.

In my view, where the Employment and Labour Relations Court has ordered reinstatement of an employee within a short time which does not give an employer reasonable time to exercise the right to

apply for, and prosecute an application for stay of execution of the decree pending appeal to this Court, and the employer reinstates the employee in compliance of the decree to obviate contempt of court proceedings, the employer does not thereby waive his right to seek a stay of execution of the decree or to appeal to this court or deprive the Court jurisdiction to grant a stay. If it were otherwise the employer would be denied his undoubted legal right to mount an effectual appeal.

For the above reasons, I would allow the application and grant a stay of the order of reinstatement of the grievant pending appeal.

As **Kantai, JA** agrees, the application is allowed. The execution of that part of the judgment of the Employment and Labour Relations court ordering the reinstatement of the grievant is stayed pending appeal. Costs of the application shall be costs in the appeal.

**DATED and DELIVERED at Nairobi this 2<sup>nd</sup> day of October, 2015.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWILU & KANTAI, J.J.A.) CIVIL APPLICATION NO. NAI. 133 OF 2015**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**BANKING INSURANCE & FINANCE UNION (KENYA) ..... RESPONDENT**

*(Being an application under Rule 5(2) (b) of the Court of Appeal Rules, 2010 for stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Mbaru, J.) delivered on 19<sup>th</sup> May, 2015*

**in**

**Cause No. 1892 of 2013)**

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**RULING OF KANTAI, JA**

I have had the benefit of reading in draft the Ruling of my brother Githinji, JA and I fully agree with reasoning and findings reached by the learned judge.

The facts giving rise to the applicant's application for stay of execution pending appeal are detailed out in the said Ruling and I need not repeat them here.

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 .....”***

**Rule 5 (2) (b)** of the **Court of Appeal Rules, 2010**, 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.”***

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 I 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 circumstance 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 25<sup>th</sup> 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 24<sup>th</sup> 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 the case we are dealing with here the employee whose services were terminated held a sensitive position of being in charge of money at the applicant's branch. That was a position of trust. The applicant was ordered to reinstate the employee by the trial court and did so to avoid breach of a court order and to avoid consequences that would accrue for disobedience. The applicant was however smart enough in the way it managed that issue – it reinstated the employee but immediately sent him on leave so that he was technically in employment but was not performing any duties in fact. In that way the applicant obeyed a court order but ensured that there was no disruption of services at the bank.

It has been demonstrated to the required degree that there is, indeed, an arguable appeal and the same would be rendered nugatory if the said employee is reinstated to the previous position where the applicant could be exposed to further financial loss.

I have said enough.

For the reasons set out in the Ruling of my brother Githinji, JA I would grant a stay of execution as proposed by the learned judge.

***Dated and Delivered at Nairobi this 2<sup>nd</sup> day of October, 2015.***

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWILU & KANTAI, J.J.A)**

**CIVIL APPLICATION NO. NAI 133 OF 2015 (UR 107/2015)**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPLICANT**

AND

**BANKING INSURANCE &**

**FINANCE UNION [KENYA]..... RESPONDENT**

*(Application under Rule 5(2)(b) of the Court of Appeal Rules, 2010 for stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the judgment of the Employment and Labour Relations Court at Nairobi (The Hon. Lady Justice M. Mbaru) delivered on the 19<sup>th</sup> day of May 2010)*

in

**Industrial Cause No. 1982 of 2013)**

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**RULING OF MWILU, J.A.**

1. **CO-OPERATIVE BANK OF KENYA LIMITED**, hereinafter referred to as the applicant has taken out this motion under **rules 5(2) (b) and 42** of the rules of this Court seeking *inter alia*, an interim stay of execution of the judgment issued by Honourable Lady Justice M. Mbaru on 19<sup>th</sup> May 2015 pending the hearing and determination of the intended appeal. The applicant further seeks a stay of proceedings in Employment and Labour Relations Cause No.1982 of 2013 pending the determination of the intended appeal by the applicant. The application is based on the thirteen grounds on the face of it and supported by an affidavit by **Samuel Kibugi**, the applicant's head of legal services. There was also a further affidavit by the same **Samuel Kibugi** filed in support of the application. The respondent, through an affidavit by **Isaiah Kubai**, its Secretary General has opposed the application. By consent of the parties, we granted leave and admitted such further affidavits as had been filed by the respective parties prior to the hearing date. The appellant also filed its list of authorities.
2. In a nutshell, the respondent being a trade union lodged a claim in the Employment and Labour Relations Court on behalf of its member, **Samuel Chege Njoroje**, hereinafter referred to as the grievant, against the applicant being aggrieved by the applicant's summary dismissal from his employment with the applicant. In her judgment, the trial judge awarded the grievant the following main reliefs:
  - **“Reinstatement of the grievant to his former position without any loss of his employment benefits or seniority or service with a direction that he reports to work for deployment in any branch other than his former branch of Mariakani;**
  - **The grievant be paid all salaries and allowances and dues from the date of dismissal to the date of delivery of judgment;** This amount has since been assessed at shs.2,367,736/-
  - **The grievant to remain in the employment and the grievant's past record with regard to the case now removed unless otherwise lawfully removed for any other cause”.** Aggrieved by this decision, the applicant lodged its appeal by filing a notice of appeal and has also filed this application.
3. Its worthy of note that to avert execution, the applicant, vide its letter dated 29<sup>th</sup> May 2015 reinstated the grievant in compliance with the decision of the trial court. However, the applicant immediately sought from the trial court a stay of the execution of the judgment and obtained stay orders against execution and further proceedings before the trial court on condition that the grievant remained reinstated and the judgment amount assessed at Shs.2,367,736/- was deposited as security in a joint interest earning account between the parties.

4. At the hearing before us, **Ms. Angela C. Cheron** appeared for the applicant while **Mr. Daniel K. Njoroge** appeared for the respondent. **Ms. Cheron**, relied on the grounds on the face of the application and the two affidavits sworn by the applicant's Head of Legal Services. Learned counsel submitted that the appeal was arguable as the trial judge had erred in awarding the respondent the remedy of reinstatement as the reinstatement was undesirable and disruptive and untenable in view of the sensitive nature of the position of ATM custodian and Bank teller held by the grievant that requires trust, the loss of such trust being the issue that led to the termination which gave rise to the trial. Counsel confirmed that the grievant had been reinstated and sent on paid leave in view of the applicant's difficulty to integrate the grievant in the applicant's human resource due to the circumstances leading to the termination of the grievant's employment. Counsel further submitted that the valid question to be interrogated by this court on the appeal was whether the conditions under **section 49(4) of the Employment Act** were considered.
5. On whether the success of the appeal would be rendered nugatory if the stay of execution was refused, it is the applicant's case that the judgment sum was Shs.2,367,736/- and there was no demonstration of capacity by the respondent to refund should the appeal succeed. The applicant stated its readiness and willingness to give security for the said sum if so ordered.
6. Counsel referred us to the case of **Githunguri v Jimba Corporation Limited (1988) KLR 838** to show that the applicant has an arguable appeal that merits to be heard. She also referred us to **Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya) [2014] eKLR** to support her argument that the appeal was not only arguable but the same also raises points of law in terms of **section 17(2) of the Industrial Court Act, 2011**. In support of her argument that the appeal may be rendered nugatory if the stay is not granted, counsel **cited 748 Air Services Limited v Theuri Munyi [2014] eKLR** wherein the court addressed itself to money decrees and the ability to repay in the event the appeal is successful as a factor for consideration. Counsel also invited us to consider **CFC Life Assurance Limited v Fredrick Odongo Owegi [2015] eKLR** on reinstatement as a ground that the applicant intends to argue extensively at the appeal.
7. **Mr. Njoroge**, learned Counsel for the respondent opposed the application and relied on the Replying Affidavit filed on its behalf. Mr. Njoroge submitted that the only order that could be stayed is in respect of payment of the salary arrears of shs.2,367,736/- as the rest of the judgment of the trial court had been complied with voluntarily. Learned counsel pointed out that the trial court's judgment spelt deadlines for the reinstatement and payment of the salary arrears and the applicant had only chosen to heed the deadline in respect of the reinstatement. Mr. Njoroge also informed us that the respondent was agreeable to the stay orders in terms of the trial court's decision on stay and deposit of sufficient security. Learned counsel argued that an order of stay of execution stops a party from doing something and it does not impose positive requirements to do something. Counsel distinguished **Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya) supra** in that the court did not order reversal of the reinstatement. Accordingly the decision was irrelevant and inapplicable.
8. In opposing the applicant's argument on whether the appeal would be rendered nugatory, **Mr. Njoroge** submitted that there was nothing to render nugatory as reinstatement did not lead to any loss to the applicant as the grievant is under obligation to render services as directed by the applicant as the employer. Counsel further submitted that the grievant can always be terminated for any future wrongs. In conclusion, it was counsel's take that the court cannot stay what has already been complied with and urged as to dismiss the application or partly stay the same.
9. The principles governing the exercise of the court's jurisdiction under rule 5(2)(b) of our Rules are now well settled. To restate the same, firstly, the intended appeal should not be frivolous or put another way, the applicant must show that it has an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. See **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd, Civil Application Number Nai. 93/02 (UR)**. Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See

**Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**). Moreover, under **section 17(2)** of the Industrial Court Act, an appeal from a judgment, award, decision, decree or order of the Industrial Court lies only on a matter of law (see **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR**). I am glad to note that both counsel appreciate the principles and appropriately addressed us on the same during the hearing of this application.

10. On the first aspect as to whether the intended appeal is arguable and not frivolous, I restate this court's position that the demonstration of the existence of even one arguable point will suffice in favour of the applicant as was stated in **Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others [2014] eKLR**. On a cursory glance of the record and the arguments made before us, I am satisfied that several arguable points of law have been raised. These include the right to dismiss the grievant in accordance with the Collective Bargaining Agreement as read with **sections 44(3) and (4)** of the Employment Act; the application of the remedies set out in **section 49** of the Employment Act and the applicability of reinstatement as a remedy in the circumstances, of this case to name just but a few. As I am not required to go to the merits of these issues, or establish that the issues will succeed or not, we are on a balance of probabilities satisfied that these are arguable issues worthy of determination by the appeal bench.

11. Turning to the second limb as to whether the appeal would be rendered nugatory if stay orders are not granted, the applicant expressed its reluctance to reinstate the grievant while the respondent argued that the prayer not to stay reinstatement is overtaken by events, the grievant having already complied. The applicant on its part indicated that despite its compliance with the reinstatement aspect of the judgment, the grievant has been sent on paid leave as the applicant finds it difficult to integrate the grievant.

12. The applicant seeks prayers 3, 4 and 5 of the motion, namely,

“1. -----

2. -----

3. ***THAT pending the hearing and determination of the intended appeal by the applicant herein, this honourable court be pleased to grant an order of stay of execution of the judgment issued by the Hon. Lady Justice M. Mbaru on the 19<sup>th</sup> May 2015 in Employment and Labour Relations Cause No.1982 of 2013.***

4. ***THAT there be a stay of proceedings in Employment and Labour Relations Cause No.1982 of 2013 pending the hearing and determination of the intended appeal by the applicant.***

5. ***THAT costs of the application do abide by the appeal”.***

I noted from the replying affidavit and the applicant's further affidavit that the applicant moved the trial court seeking substantially similar prayers and was granted prayers 3 and 4 above with conditions that the grievant remains reinstated and the judgment sum assessed at Shs.2,367,736/- be deposited as security in a joint interest earning account to be agreed upon by both parties.

13. I also take note that this is a partial money decree. The applicant argued that it being a money decree, the same would be rendered nugatory in the event the money is remitted to the grievant and the appeal succeeds. The respondent on its part argued that by virtue of the employment, the grievant is a man of means and will be capable of paying the decretal sum if he be so ordered. In relation to a money decree, this Court in the case of **Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)** stated thus:-

***“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains***

***that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”***

It was not lost on me that the respondent was willing to indulge the applicant provided that the decretal sum of Shs.2,367,736/= is deposited as security. Indeed the trial court in considering the application for stay pending this appeal to this court did grant that prayer to the applicant. I am inclined to maintain the same as a reasonable condition for stay in the circumstances.

In the same breadth, prayer 3 of this application has not been contested before this court and I therefore see no reason to decline the prayer.

14. My focus in this decision therefore lies in prayer 3 in relation to reinstatement. The applicant requests us to stay the reinstatement of the grievant while the respondent argues that the prayer is overtaken by events. In seeking to balance the interests of the respective parties, the approach I have always taken in determining whether or not to grant a stay of execution is to ensure that the applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment. The position as to the nature of reliefs accessible under rule 5(2) (b) of this court’s Rules was reiterated by this court in ***Shimmers Plaza Ltd versus National Bank of Kenya (Ltd (supra))*** namely an order staying proceedings; an order staying execution of the superior courts’ orders and lastly an injunction. Any relief sought outside of the above is alien to the reliefs available under rule 5(2)(b) and this court has not hesitated to decline the same ***Mombasa Duty Free Ltd versus Kenya Ports Authority [2006] eKLR***. I am convinced that the prayers sought in the application relate to staying the execution of the superior court’s decision relating to reinstatement of the grievant.

15. The order contested here, was it a positive or a negative one? The question of positive and negative orders when considering an application for stay was recently considered by this court in ***Law Society of Kenya v Deynes Muriithi & 34 others [2015] eKLR*** where the learned judges pronounced themselves as follows:

***“We have applied the principles of case law assessed above to the above set out three orders and we find that none of them amount to either a dismissal order or a striking out order capable of being termed a negative order in terms of the principles of case law assessed above. Second, the respondent did not point out to us any other negative orders of dismissal or striking out as resulting from the said ruling. Third, we are in agreement that all the three orders fell into the category of positive orders as they required the applicant to do something positive in relation to them. They are therefore capable of being stayed.”***

In the above case, the respondents in opposition to the application for stay, such as the present one, had inter alia argued that the orders sought to be stayed had been partially performed and therefore could not be restrained and that the said order did not require any party to it to either do or to refrain from doing anything which is capable of being stayed.

16. In my view, from the above holding, the question for determination is whether the orders of reinstatement are capable of being stayed in view of the reinstatement having already occurred. This court has had occasion to deal with stay of execution where reinstatement had been ordered by the trial court. For instance in ***Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya) supra*** cited by the applicant, the court ordered stay of execution of the judgment of the industrial court. The respondent argued that this case is distinguishable in that the stay did not amount to a reversal of the reinstatement. Unfortunately, the applicant did not address us on how the stay was effected. My inference is that the reinstatement was reversed. Be that as it may, I note that this is a case which was undefended and the applicant’s arguments may as well

have carried the day, litigation in our system being adversarial in nature.

17. In ***Teachers Service Commission V Sarah Nyanchama Ratemo [2014] eKLR*** a stay of execution against the judgment of the Employment and Labour Relations Court which included an order for reinstatement was granted. The court was mainly persuaded by the respondent's lack of means from which she could refund a sum of Shs.1,900,000/= if paid to her. The judges also took note of the likelihood of subjecting the applicant, a public body to the litigious process it may take to recover such money at public expense. Similarly, in ***National Environment & Management Authority v Edward Juma Masakha [2015] eKLR***, in allowing the application for stay of execution of judgment of the industrial court, the judges remarked as follows:

***“...and besides, if reinstatement is not put on hold at this point, if effected then the substratum of the appeal will be gone. And also we have considered that if the contempt proceedings go on, and the court orders imprisonment of the applicant's chief officer in civil jail, that may constitute prejudice as to his liberty which can hardly be compensated by money in a satisfactory way”***

This decision was arrived at despite spirited argument by the respondent that if that appeal eventually succeeded, it could not be rendered nugatory because whatever money would have been paid to the respondent during the period of reinstatement would be for actual services rendered. There could be no difficulty in reinstating him since all it would take is a desk and a chair in some office. In addition, contempt proceedings had been commenced by the respondent against the applicant for the default by the applicant to honour the judgment of the industrial court. In my view, the common thread in the ***Teachers Service Commission*** and the ***National Environmental and Management Authority cases (supra)*** is that the reinstatement was yet to occur and that the applicants were public bodies tasked with rendering public service and funded by public funds which required prudential utilization as per constitutional mandates. On the other hand, the respondents were also public servants guided by the ***Public Officers and Ethics Act*** and ***chapter six*** of the Constitution and to instill confidence in the execution of their duties they needed to exhibit high integrity and willingness to pave way for independent audit and investigation whenever mentioned adversely.

18. This court also appreciates the need to avoid giving orders in vain. In ***William Lerikan Konchellah & another v Julius Tabarai Ole Maito Tampushi [2014] eKLR*** the court in refusing to grant stay under Rule 5
2. (b) held that courts do not act in vain and therefore cannot grant stay for an event that has already taken place. Similarly, in ***International Centre for Policy & Conflict v Kamlesh Mansukhlal Damji Pattni & 5 others [2013] eKLR*** the Court stated:

***“There is no doubt that the criminal case facing the Respondents was terminated in execution of Mutava J's judgment. The sureties have already been discharged by the court. We are not persuaded that there is anything to stay in this matter”.***

In the ***International Centre for Policy & Conflict case***, (supra) the High Court had issued orders prohibiting prosecution of the respondents. The respondents extracted the order and served the Chief Magistrate who then terminated the case facing the respondents. It is these orders that the Applicant sought to have a stay of but the Court of Appeal refused on the ground that the order had been overtaken by events and therefore there was nothing to stay. In addition, in ***Stephen Kipkebut T/A Riverside Lodge and Rooms & another v Natali Ogola & another [2013] eKLR*** the court stated as follows:-

***“If it transpires that pursuant to the order of the Superior Court the register has been amended, it would be futile for us to order stay. It would be like trying to lock the stable door after the horse has bolted.”***

As to whether the horse has bolted or not in my opinion is not a matter of exact precision and

science but rather one largely dependent on argumentative persuasion which varies from person to person.

19. Without getting to the merits of the case, that being the preserve of the bench that will determine the applicant's appeal substantively, I am aware that unlike under common law, **section 49(3)** as read with **section 50** of the Employment Act and **section 12(3)(vii)** of the Employment and Labour Relations Court Act provides reinstatement as one of the statutory remedies for which the court has jurisdiction to grant. Judicial intervention on these sections of the law is to the effect that reinstatement is a remedy to be granted in exceptional circumstances as it should not be automatic. Courts have continued to set factors that need to be considered before this remedy of reinstatement is granted. The factors to consider include practicability and the ability of the employment relationship to withstand friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal (as per D.K. Maraga J.A.' in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR*). Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties including the consideration of prospective effects of the order of reinstatement, not only on the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.

20. The applicant is adamant that the reinstatement of the grievant is disruptive and is not an appropriate remedy in the circumstances despite the applicant having reinstated the grievant and sent him on paid leave. The respondent on its part does not see any difficulties with the grievant remaining reinstated and instead argues that no loss is occasioned to the applicant, the grievant being under obligation to render services as directed by the employer. In considering whether to stay the order of reinstatement or not, I have also considered **Article 23(1) of the Universal Declaration of Human Rights** which provides for the right to work, to free choice of employment and to protection against unemployment. **Article 2(6)** of the Constitution domesticates as part of our laws any treaties and conventions ratified by Kenya. The Constitution further protects the freedom of expression, against forced labour and the right to economic and social rights which can be construed to include the right to work. The grievant, despite what has transpired does not see any difficulty in continuing to work. The applicant on the other hand alleges disruption and loss of trust. The grievant has not reported for duty pursuant to the judgment of the Employment and Labour Relations Court for the applicant to be in a position to determine the alleged disruption.

The applicant's position is therefore at best a mere apprehension. I expected the applicant to at least, on a balance of probabilities, discharge the evidentiary burden set out in **section 112 of the Evidence Act Cap.80 Laws of Kenya** in respect of the disruption. As expressed by the respondent, the applicant is at liberty to redeploy the grievant to other stations or duties that a Graduate Clerk such as the grievant can undertake. Reinstatement is in any event a statutory remedy and I find it appropriate here.

21. In any event, the applicant did not indicate whether it had replaced the grievant or whether the grievant is a surplus to its requirements. As observed in the *Kenya Airways Limited case* I am convinced that the applicant is a large company to which the reinstatement of the grievant is unlikely to alter the execution of duties, and interaction between the grievant and the concerned workmates is unlikely to be substantial. Moreover, employees have been known to be suspended, reprimanded or faced other forms of disciplinary processes after which they resumed their employment duties and performed optimally. The grievant through the respondent took immediate steps upon the termination of the employment leading to the judgment reinstating the grievant now sought to be appealed against. For such a large, reputable and experienced financial institution with coverage across the country, I believe that there are sufficient policies, checks and balances to ward off any improprieties on the part of its employees while also addressing the standards and expectations from each of its employees. As such, the reinstatement herein is not an immunity charter to the grievant against any subsequent breaches or termination as provided for under the

laws. As I have stated I have tried my level best to keep off the merits of the remedy of reinstatement for the bench that will ultimately handle the substantive appeal. I nevertheless felt it necessary to raise the above issues while considering the appropriate order(s) to grant.

22.As for the damages, I am satisfied that the salary arrears can be preserved in the joint account of the parties' advocates pending the determination of the intended appeal. It did not escape my attention that despite superior court granting two orders with specific timelines the applicant only chose to adhere to the timeline relating to reinstatement of the grievant only; despite the order on the damages not having been varied. However, regarding the continued salary earnings by the grievant, I agree with the respondent's advocates that the salary earned will be in respect of the services rendered, the applicant being at all times responsible for the instructions and provision of actual work to be done. This is a practical balancing act between the parties' interests in my view based on the circumstances. I bear in mind the nature of employment relationships in some of which parties tend to make no investment in the other, beyond the immediate exchange of a shilling for labour (see *Njoroge Muigai vs System Intergration Ltd [2013]eKLR*). This notwithstanding, employment relationships, even those imposed by courts, do not have to be permanent provided the law is followed.

23.From the above analysis and considering the circumstances of this case, I take the position that this is an opportunity for the court to crystallize and set in motion the jurisprudence relating to the consideration for an application for stay under **rule 5(2)(b)** where the orders sought to be stayed include an order for reinstatement and the respondent has already been reinstated. I need not repeat but for emphasis reiterate that every case should be looked at based on its own merits and circumstances. I appreciate that I may be sailing in unfamiliar waters and taking a fresh and isolated path but nevertheless feel obliged to do and set the path for the crystallization of the legal position to be applied in these circumstances.

23.Consequently, and considering that the grant of orders under **rule 5(2)(b)** remains discretionary, I must state at this juncture that a stay of execution of judgment on the aspect of reinstatement shall be considered in the context of the following factors:-

- a. *where the reinstatement has not been effected following the judgment of the superior court, despite any execution process having been instituted and not concluded;*
- b. *whether the employee is a public officer and the applicant is a public institution;*
- c. *whether the applicant is a large institution with large station coverage where the applicant can be redeployed to another location away from where the employee was previously serving;*
- d. *the potential intensity of interaction between the employee reinstated and the officers involved in the termination the basis upon which the reinstatement has been ordered;*
- e. *the applicant's demonstration of the obstacles against the reinstatement; and*
- f. *the employee's willingness to be reinstated.*

These are by no means conclusive factors bearing in mind the peculiar circumstances faced in each case

24.Speaking for myself, no ground raised by the applicant persuades me that the reinstatement of the grievant in the terms ordered by the lower court should be stayed, with the result that I decline the orders sought. The order on deposits of the Ksh.2,367,736/= would remain intact. As I am alone in this view, the impact of my ruling is obvious.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of October, 2015.**

**P. M. MWILU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**