



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI & AZANGALALA, JJ.A)

CIVIL APPLICATION NO. 45 OF 2015 (UR 39/2015)

BETWEEN

CHAIRMAN BOARD OF DIRECTORS NATIONAL WATER

CONSERVATION & PIPELINE CORPORATION.....APPLICANT

AND

ENG. MESHACK M. SABOKE.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY

OF WATER AND IRRIGATION..... 2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Being an application for stay of execution of the Judgment and Orders of Mr. Justice Mathews N. Nduma, delivered at Nairobi on 30th January 2015)

in

INDUSTRIAL COURT OF KENYA CAUSE NO. 847 OF 2012)

RULING OF THE COURT

[1] On 30th January 2015, Nduma PJ., of the Employment and Labour Relations Court delivered a judgement in Industrial Cause No. 847 OF 2012 and awarded Eng Michael Sabok (1st respondent) a sum of Ksh 11,636,000/= with costs and interest at court rates from the date of judgement. The award was against the Chairman Board of Directors National Water Conservation & Pipeline Corporation (applicant). Aggrieved by the judgment, the applicant filed Notice of Appeal. Pending the lodging, hearing and determination of the intended appeal, the applicant filed a notice of motion under Rules 5 (2) (b) of this Court rules seeking orders of stay of execution of the aforesaid judgement until the determination of the intended appeal.

[2] The brief facts discernible from the record that is before us are as follows;- The 1st respondent, Eng.

Meshack M. Saboke, was employed by the Ministry on the 28th September, 1987 as an Assistant Engineer on permanent and pensionable terms vide a letter dated 3rd September, 1991; on 26th May, 1989, he was seconded to the applicant where he worked in various capacities until he was appointed Managing Director on the 31st October, 2008 on a three (3) years contract renewable upon expiry; he served as the Managing Director of the applicant for 12 months but on 30th October, 2009, the Minister for Water and Irrigation dissolved the Board, and sent the 1st respondent on compulsory leave, vide a letter written by the 2nd respondent bearing the same date.

[3] On the 28th January, 2010 the 1st respondent was summoned to appear before the Human Resource and General Purpose (HR & GP) Committee of the Board wherein it was alleged that he had signed blank cheques and left them with certain staff members while he was on a mission abroad. Those cheques were used by the said staff members to defraud the Corporation of large sums of money. The 1st respondent admitted signing blank cheques but denied participation in any fraudulent activities. On 19th February 2010, he was served with a notice to show cause with particulars of charges levelled against him to which he responded vide a letter dated 24th February, 2010 denying all the charges. Thereafter the 1st respondent never heard from HR & GP Committee or the applicant until he wrote to the applicant a letter dated 5th September, 2011 enquiring about the status of investigations. That is when he came to know that his contract was terminated.

[4] The 1st respondent filed a suit against the applicant, the 2nd and 3rd respondents herein claiming that his services were wrongfully terminated. He contended that compulsory leave was not a term contained in his contract of service nor a term known in Public Service Scheme Code of Regulations; during the period of compulsory leave and without notice, he was denied certain benefits namely commuter allowance and consolidated allowance amounting to Kshs. 80, 000.00 with effect from December, 2009 to April, 2010; his salary was also stopped from May, 2010. Upon hearing the matter, the learned judge was satisfied that the 1st respondent's contract with the applicant was unlawfully terminated as he was not given a hearing, he was awarded a sum of Ksh. 11,636,000/= with costs and interest at court rates from the date of judgment until payment in full.

[5] The applicant is apprehensive that unless execution of the decree is stayed, the 1st respondent will proceed with execution and the applicant's intended appeal will be rendered nugatory. Mr. Malaiza, learned counsel for the applicant, emphasized that the intended appeal is arguable as it raises important issues of law in employment that are of immense public importance and interest. Those issues are; whether the 1st respondent is entitled to a pay equivalent of full salary for the remainder of the yet to be served period of his contract that was terminated. Counsel cited the case of **Teachers Service Commission vs Sarah Nyanachama Ratemo {2014} e KLR** where the claimant was granted compensation for unexpired period of contract and a Bench of this Court differently constituted granted an order staying execution. The issue of whether the trial judge had power to award salaries for the unexpired period of a fixed contract of three years was found to be an arguable one.

[6] This application was opposed; Mr. E.A Ongicho, learned counsel for the 1st respondent, relied on his client's replying affidavit sworn on the 29th May, 2015. The 1st respondent deposed that the impugned Judgment correctly captures the spirit of the law and the applicant does not have any arguable appeal. Moreover the 1st respondent is able to repay the decretal sum in the event the appeal is successful hence the appeal will not be rendered nugatory. The 1st respondent stands to suffer loss if the prayers sought are granted without a provision for security for the Judgment amount and interest. Counsel maintained that if the contract had expired the 1st respondent would have renewed the same.

[7] For an applicant to succeed with an application under Rule 5 (2) (b) of this Court Rules, he or she must satisfy us;

- i. That the appeal is arguable and not frivolous and

ii. That if the stay order sought is not granted the appeal will be rendered nugatory.

See the case of; - **Ismael Kagunji Thande V. Housing Finance Kenya Ltd** Civil Application No. Nai 157 of 2006 (unreported): the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri V. Jimba Credit Corporation Ltd. No. 2 {1988} KLR 838.)”

[8] We do not intend to delve into the merits of the intended appeal in this application, ours is only to establish whether the applicant has demonstrated the intended appeal is arguable and if this is answered in the affirmative, whether the intended appeal will be rendered nugatory unless an order of stay of execution of orders dated 30th January, 2015 is issued. On whether the intended appeal is arguable, we are alive to the fact that an arguable appeal is described as one which there is an arguable point or arguable points of law not one which must necessarily succeed. (See **Joseph Gitahi & Another versus Pioneer Holdings Limited and 2 others Civil Appeal No. 124 of 2008.**)

[9] According to the applicant the intended appeal raises a fundamental point of law on whether the payment of damages or compensation for an unserved period of a fixed term contract can be awarded. Various decisions by the Employment and Labour Relations Court were cited to us for example in the case of;- **Alphonse Maghanga Mwanchanya vs Operation 680 Limited [2013] e KLR** where Radido J ., while dealing with a similar issue of termination of a fixed contract stated as follows;-

“Further, it would not make sense and cannot be the intention of the Employment Act or the Industrial Court Act to award employees whose fixed term contracts have been terminated prematurely generous damages equivalent to the salary which could have been earned during remainder /unserved term of the contract and restrict compensation to a maximum of 12 months’ for employees who were in permanent employment, but were terminated unfairly. It would not be fair and just as a matter of legal principle to treat employees on fixed term contracts differently from employees on permanent contracts who have been unfairly terminated.”

[10] Counsel for the applicant further submitted that the 1st respondent was awarded notice pay contrary to the provisions of the contract of employment; a claimant is not entitled to a notice pay not provided for in the contract of employment and Employment Act, 2007. From the foregoing, we are satisfied the intended appeal raises arguable points of law for determination in the appeal; these are whether there is justification for the award of damages calculated for the unexpired term of a fixed contract of employment and whether the 1st appellant was entitled to three months salary in lieu of notice as per the contract.

[11] Turning to the second ingredient of whether the appeal will be rendered nugatory if the order of stay of execution is not granted; the decretal sum awarded is Kshs. 11,636,000/=. Although the 1st respondent stated in his replying affidavit that he is capable of repaying the decretal sum in the event that the intended appeal succeeds, he nonetheless did not provide any evidence of his means from which he could refund a whopping sum of 11,636,000/=. We remind ourselves that in the case of;- **Reliance Bank Ltd v Norlake Investment Ltd [2002] 1 EA 227**, 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.”

[12] In light of what we have stated above, we are inclined to allow the application on the following terms;

a) The judgement and decree of the Employment and Labour Relations Court made on 30th January 2015 be and is hereby stayed pending the hearing and determination of the intended appeal providing that the applicant deposits within 30 days from the date hereof a sum of Kenya shillings six million (Kshs. 6,000,000/=) in an interest earning account in a reputable financial institution to be agreed by both counsel to be held as security pending the hearing and determination of the appeal failing which the stay herein granted shall lapse.

b) Costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 20th day of November, 2015.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR