



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MARAGA, MWILU & J. MOHAMMED, J.J.A.)**

**CIVIL APPLICATION NO. NAI 201 OF 2013 (UR 145/2013)**

**IN THE MATTER OF AN INTENDED APPEAL**

**BETWEEN**

**FREIGHT IN TIME LIMITED.....APPLICANT**

**AND**

**ROSEBELL WAMBUI MUTHEE .....RESPONDENT**

*(Application for stay of execution from the Award/Judgment and Decree by the Honourable Justice James Rika delivered on 12<sup>th</sup> February 2013*

*in*

*Industrial Court Cause No. 1199 of 2012*

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**RULING OF THE COURT**

1. Before us is an application dated 8<sup>th</sup> day of August, 2013 by which the Applicant seeks an order that:

*“...pending hearing and determination of this Application there be stay of execution of the Award/Judgment and Decree by the Honourable Justice James Rika delivered on 12/2/2013 in Nairobi Industrial Court Cause No. 1199 of 2012.”*

2. The motion to stay execution is supported by two affidavits, one sworn by Messrs Otieno Arum Advocate and the other by Jignesh Ghelabhai Desai on behalf of the Applicant which affidavits explain the basis for the applicant’s application for a stay of execution of the Award and Decree.

3. The grounds in support of the application are that the appeal is arguable and has prima facie overwhelming chances of success and that the appeal will be rendered nugatory should the court fail to issue the stay of execution and then the appeal succeeds.

## **Background**

4. The Applicant is a Cargo Transport Company that is based in Nairobi with branches in the East African Region.
5. By a written contract of employment dated 12<sup>th</sup> August, 2008, the Applicant employed the Respondent and posted her to Rwanda with effect from 15<sup>th</sup> August, 2009.
6. On 1<sup>st</sup> March 2011, the Respondent applied for maternity leave. On the same date, apparently upon receipt of that application, the Applicant wrote to the Respondent terminating her contract of employment on the basis that it was reorganizing its business in Rwanda. Aggrieved by the termination, the Respondent filed Nairobi Industrial Court Cause No. 1199 of 2012.
7. The Respondent testified in the Industrial Court that she was employed by Freight in Time Kenya Limited and not Freight in Time Rwanda Limited. She testified that the letter of employment was issued by Freight in Time Kenya Limited and referred to the Kenyan Employment Act, thereby bringing her employment under the purview of the Laws of Kenya. She prayed for payment in lieu of notice at Kshs.100,000/=, annual leave pay at Kshs. 50,000/=, 12 months gross salary amounting to Kshs.856,896/= in compensation for unfair termination, costs and interest.
8. The Applicant's representative testified that the respondent was employed by Freight in Time Rwanda Limited and her contract was terminated in 2011. He testified that this was a strategic decision taken by the company to close the Rwanda office. He further testified that termination of the Respondent's contract of employment was not on account of her pregnancy.
9. The court made an Award in favour of the Respondent, dated 12<sup>th</sup> day of February, 2013 ordering that:-
  - (a) *Termination of the Respondent's contract of employment was unfair.*
  - (b) *The Applicant shall pay to the Respondent a total of Kshs.956,896/= in compensation and terminal benefits, within 30 days of delivery of the Award; and*
  - (c) *Costs to the Respondent.*
10. Aggrieved by that Award, the applicant filed a notice of appeal on the 3<sup>rd</sup> day of May, 2013. Pending the hearing and determination of the intended appeal, the applicant has brought the present application for a stay of execution of the award and decree.

## **Submissions by Counsel**

11. This application was heard before us on 11<sup>th</sup> November, 2013. Mr. K.O. Arum, learned counsel for the applicant urged this court to stay execution of the award pending the hearing and determination of the intended appeal. He informed the court that the award which is the subject of the intended appeal was to be delivered on notice. He submitted that the applicant learnt of the award on 12<sup>th</sup> April, 2014 when the respondent's counsel wrote to them regarding execution of the award.
12. He submitted that the Applicant filed an application dated 2<sup>nd</sup> May, 2013 seeking to stay execution of the award pending hearing and determination of an appeal to this Court. The application also sought leave to appeal out of time. He further submitted that in a ruling dated and delivered on 5<sup>th</sup> July, 2013, the Industrial Court (Rika, J) declined to grant a stay of execution but granted leave to appeal out of time.

13. He submitted that the Applicant has an arguable appeal in view of the fact that the Respondent was employed by Freight in Time Rwanda Limited and not Freight in Time Kenya Limited which were completely different entities. He submitted that the learned trial Judge therefore erred when he held that the respondent was an employee of Freight in Time Kenya Limited, the applicant herein. He further submitted that if the orders sought are not granted, the appeal will be rendered nugatory and be an academic exercise as the respondent will be paid the decretal sum which she may not be able to refund thus destroying the subject matter of the appeal and render the appeal nugatory.

14. Learned counsel for the applicant further submitted that the applicant is under financial constraints and payment of the award, amounting to about Kshs.1 million will adversely affect its liquidity and its operations. He urged the court to allow the application.

15. Mr. N. Kimani, learned counsel for the respondent, vehemently opposed the application. He submitted that the application is not only unmeritorious but it is also incompetent as the notice of appeal upon which it is based was filed and served upon the respondent out of time without leave as required by the Court of Appeal Rules, 2010.

16. Mr. Kimani submitted that the applicant has no arguable appeal in view of the fact that from the evidence on record, the respondent was employed by the applicant and her contract of employment was unlawfully terminated. He submitted that the respondent is entitled to the fruits of her judgment and that grant of the orders sought will occasion the respondent great prejudice and will not render the appeal nugatory, if successful. He submitted that the onus was upon the applicant to demonstrate that the Respondent is incapable of repaying the amount paid to her.

He further submitted that the applicant's submissions that they were experiencing financial problems made it even more imperative and urgent for the Applicant to pay the respondent the fruits of her judgment.

17. In response to the Applicant's submission that the Respondent will lose interest once she is paid the amount in the award, the respondent's counsel submitted that the onus is on the applicant and not the respondent to vigorously pursue the appeal. He concluded that the application has no merit and should be dismissed with costs.

### **Our Decision**

18. We have carefully considered the application, the affidavits, rival submissions of the learned counsel and the law. At this juncture the court cannot go into the merits of the appeal but must attempt to balance the interests of both parties. Since this application has been brought under **Section 3A and 3B of the Appellate Jurisdiction Act** and **Rules 5(2) (b) of the Court of Appeal Rules**, the court is tasked to consider the following issues:

- i. whether the intended appeal raises arguable issues; and
- ii. whether the said appeal will be rendered nugatory should the court fail to issue the stay of execution in the event that the appeal is successful.

**Rule 5 (2) (b)** provides that the Court may:

*“In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution; an injunction or a stay of any further proceedings on such terms as the court may think just.”*

19. The above two principles applicable to the determination of applications under **Rule 5 (2) (b)** of the Court of Appeal Rules are well settled. This court clearly reiterated the said principles in the case of **Republic V Kenya Anti-Corruption Commission & 2 Others, (2009) KLR 31** as

follows:

*“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [emphasis added] [see also this court’s decisions in the case of **Reliance Bank Ltd. V Norlake Investments Ltd (2002)I EA 227 & Githunguri V Jimba Credit Corporation Ltd. & Others (No. 2) 1988 KLR 828; Wardpa Holdings Ltd. & Others V Emmanuel Waweru Mathai & HFCK (Civil Appeal No. 72 Of 2011 (unreported).**”*

20. In the case of **Titus Otieno Koceyo & Another V Mathew Ouma Oseko T/A Oseko & Company Advocates, Civil Application No. NAI. 300 of 2009 (UR. 208/2009)**, the learned judges held that satisfaction of only one of the twin principles will not avail the Applicant the orders sought. Thus, having succeeded in demonstrating the arguability of the intended appeal without satisfying the nugatory principle, the application had to fail. Further, this court followed the same principle in the case of **Peris Wanja & 4 Others V Hannah Njeri Muthumbi (Civil Application No. NAI 109 OF 2011)** where it held thus:

*“As the applicants were obliged to satisfy the two conditions above, even assuming they were able to satisfy the nugatory aspect, still, they would not have met the threshold for the grant of a stay or the status quo order, they are seeking. In the result, the application dated 20<sup>th</sup> April, 2011 and filed in court on 26<sup>th</sup> April, 2011, must fail and, accordingly, it is dismissed with costs.”*

21. In a recent decision of this court delivered on 31<sup>st</sup> May, 2013, in **Equity Bank Limited V West Link Mbo Limited, Civil Application No. NAI. 78 OF 2011**, Githinji JA succinctly stated:

*“It is trite law in dealing with 5 (2) (b) applications the court exercises discretion as a court of first instance ..... It is clear that rule 5 (2) (b) is a procedural innovation designed to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”*

22. Thus, in an application under rule 5 (2) (b) of this Court’s Rules, the applicant is obligated, to show firstly, that its appeal or intended appeal is arguable and not frivolous. Secondly, that unless it is granted a stay, its appeal, if it were to eventually succeed, such success will be rendered nugatory.

23. On the point as to whether the intended appeal is arguable, we reiterate what this Court recently stated in **Dennis Mogambi Mongare V Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 [UR 175/2011]**:

*“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”*

24. On the first limb, we cannot go into the merits of the appeal at this stage but what emerges is that the appeal is arguable. We are therefore satisfied that the applicant has satisfied the requirement of arguability of the appeal.

25. On the nugatory aspect, it is trite law that this court must weigh and balance the competing

claims of both parties and that each case must be determined on its own peculiar facts. See **Reliance Bank Ltd. V Norlake Investments Ltd., (2000) I EA 227 and African Safari Club Limited V Safe Rentals Limited, Nairobi Civil Appeal [Application] No. 53 of 2010 (Unreported).**

27. In this case, we are not persuaded that the applicant has demonstrated that the appeal if successful, will be rendered nugatory if the orders sought are not granted.

28. We note from the circumstances of this application that the Applicant has not shown that the Respondent has no capacity to repay the sums paid if the appeal succeeds. In the circumstances, it is our finding that the appeal will not be rendered nugatory if the appeal succeeds.

29. From the circumstances of the application before us, although the applicant has demonstrated that the appeal is arguable it has, however, failed to demonstrate that the appeal will be rendered nugatory if the instant application is dismissed. The applicant has, therefore, failed to demonstrate the existence of both limbs as required by Rule 5 (2) (b) of this Court's Rules.

30. The upshot is that we decline to grant a stay of execution, pending the hearing and final determination of Civil Appeal No. 234 of 2013. The application is accordingly dismissed with costs to the respondent.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of January, 2014.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**