



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE, MURGOR & MOHAMMED JJ,A.

CIVIL APPLICATION NO. NAI 84 OF 2014

BETWEEN

BANK OF INDIA.....APPLICANT

AND

BANKING INSURANCE &

FINANCE UNION (KENYA).....RESPONDENT

(Being an application for stay of proceedings in an Intended appeal from the ruling and orders of Nduma J, delivered on 6th September 2013 in Industrial Court of Kenya

H.C.C.C. NO. 1290 of 2013)

RULING OF THE COURT

The application before us arises from the ruling of Nduma, J, made on 6th September 2013, where the applicant's Preliminary Objection was dismissed. The applicant seeks a stay of proceedings in the Industrial Court pending the hearing and determination of the applicant's Intended Appeal.

The matter relates to a dispute in the Industrial Court where the respondent filed a Memorandum of Claim dated 5th July 2012 against the applicant for wrongful dismissal of the services of the respondent's members **Samuel Mwangi Kanubi** and **Moses Nandwa Sharon, (the complainants)** who had been summarily dismissed from the respondent's employment on 27th April 2005. The two complainants were arrested on suspicion of having committed a fraud in the course of their employment and were charged with twelve counts of stealing and forgery under Criminal Case No. 600 of 2005, but were subsequently acquitted for lack of evidence. On 7th December 2011 they wrote to the respondent requesting to be reinstated in their positions, whereupon, the respondent's advocates advised that they required fourteen (14) days to consider the request, as the records had been archived.

Upon receiving no further communication from the applicant, the complainants reported a dispute to the Minister for Labour in accordance with section 4 of the Trade Disputes Act Cap 234 (*now repealed*), who appointed a conciliator on 14th February 2006. As no resolution was forthcoming, the respondent on behalf of the complainants filed the Memorandum of Claim. The applicant filed a Statement of Response dated 3rd September 2012, and on 15th March 2013, filed a notice of Preliminary

Objection wherein, it contended that the respondent's action was statute barred by virtue of section 4 of the Limitations of Actions Act, Cap 22 Laws of Kenya and or the Employment Act Cap 226 (*now repealed*). It prayed that the suit be dismissed with costs.

On 6th September 2013, the learned judge dismissed the Preliminary Objection on the basis that the respondent had commenced proceedings by lodging a dispute with the Minister for Labour as required by the Trade Disputes Act, and as such, the suit was deemed as filed, and consequently was not time barred.

Being dissatisfied with the decision of the court, the applicant filed this application which is before us under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders that:-

1. *This application be certified urgent and heard in the first instance.*
2. *This Honourable Court do order a stay of proceedings in Industrial Court of Kenya at Nairobi Cause Number 1201 of 2012 , Banking Insurance & Finance Union vs Bank of India, pending the hearing and final determination of the Applicant's Intended Appeal.*
3. *The costs of the application be provided for.*

The application is premised on seven grounds on its face and on a supporting affidavit sworn by **Hemant Prabhakar Kher**, the applicant's Chief Manager, who deponed that the complainants were employed with the applicant. That on 18th March 2005 owing to a series of frauds of which had given rise to a loss of Kshs. 37,992,660/-, investigations had been conducted by the Banking Fraud Investigation Unit of the Kenya Police, which had linked the complainants to the fraud. As a consequence, the applicant dismissed them from employment. In their Memorandum of Claim the complainants sought reinstatement and damages for unfair loss of employment. Mr. Kher contended that it filed a Preliminary Objection seeking to dismiss Cause No. 1201 of 2012, as the Cause had been filed over seven (7) years from when the cause of action arose, and as a result it was time barred. Following the dismissal of the Preliminary Objection, the learned judge had declined to grant a stay of proceedings pending the hearing of the applicant's Intended Appeal, and had instead gone ahead to fix the date for hearing of the main Cause on **31st July 2014**. Their apprehension is that if the Industrial Court heard the cause as scheduled, the Intended Appeal would be rendered nugatory, since the applicant will be ordered to pay the complainants salaries and allowances.

When the application before us came up for hearing, learned counsel for the applicant **Mr. Mutiga** submitted that the application arises out of the ruling of the Industrial Court where the court made a finding that the cause of action arose on the 25th April 2005, and yet the matter was filed on 17th July 2012, which was over seven (7) years from when the cause of action arose. The Industrial Court found that the applicable law was the Trade Disputes Act and the Employment Act, which do not provide for limitations, but that the applicable law was the Limitations of Actions Act. Counsel contended that the Industrial Court had also found that the court has no right to entertain any matter of contract after the expiry of six (6) years. The court found that section 4 of the Trade Disputes Act required that disputes be initially reported to the Minister, which report amounted to commencement of an action for the purposes of computing time. In counsel's view, the essence of the appeal, is for this Court to determine the applicable law in employment disputes, that is, whether it is the Trade Disputes Act and the Employment Act on the one hand, or the Limitations of Actions Act as read together with the Interpretations and General Provisions Act on the other, particularly as they relate to the computation of time for filing of an employment dispute in the Industrial Court. Counsel submitted that, it was this ambiguity in the law that formed the basis of an arguable appeal.

As to whether the appeal would be rendered nugatory, counsel submitted that the applicant's apprehension was that if the proceedings in the Industrial Court were to continue, it is possible that the court will make an order for reinstatement and payment of salaries and allowances to the complainants for a period of over 10 years, which would result in unnecessary inconvenience and expense to the applicant, and which amounts the respondent would not be unable to refund.

Mr. Kuhutha learned counsel for the respondent opposed the application and contended that the applicant had filed a Notice of Appeal on 19th September 2013, but pointed out that the Memorandum of Appeal had not been filed by the applicant as contemplated by the Rules. Following the filing of the Notice of Appeal, the Memorandum of Appeal was not filed within sixty (60) days, and the request for proceedings from the Industrial Court had not been served on the respondent. Counsel went on to question whether the Court has jurisdiction to proceed with the application, where the appeal was deemed to have been withdrawn. Counsel cited **Kamau Kibanya vs Noordin Construction** Civil App 9 of 1988, and **K & K Anan vs Mount Kenya Game Ranch & Others** 2003 EALR 106.

As to whether there is an arguable appeal, counsel conceded that the appeal was arguable, as there was a fundamental question in employment law that required to be determined, namely, where a mandatory pretrial procedure precludes parties from filing employment disputes in court, in order to compute time for filing of a dispute when does time begin to run?

Regarding the second limb of whether the appeal would be rendered nugatory if the appeal was to succeed, the Intended Appeal indicates that what is sought is an order to strike out the Cause of action before the Industrial court, but conversely, no harm will be suffered by the applicant if the hearing were to proceed. In any event, inconvenience to the applicant is not a substantive reason for rendering an appeal nugatory.

In response to the contention that the request for proceedings had not been served, Mr. Mutiga referred us to the affidavit of Mr. Kher where it was deponed that the Notice of Appeal was filed together with the request for proceedings. We were not however shown a copy of a request for proceedings copied to the respondent.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application. The jurisdiction exercisable by this Court under **rule 5(2) (b)** is discretionary and the applicable principles are well settled. For an applicant to succeed, two requirements must be satisfied, firstly that, the intended appeal is arguable, in that it is not frivolous; and secondly that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory. In **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**, this Court stated thus,

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”***

Prior to considering the two principal issues as they relate to the application before us, it is our duty to determine whether the application is properly before us. See **The Owners of Motor Vessel “Lillian S’ vs Caltex Oil Kenya Ltd [1989] KLR 1.**

From the record, a Notice of Appeal was filed on 19th September 2013 by the applicant. No Memorandum of Appeal was filed within the sixty days period contemplated by the Rules of this Court. Rule 82 provides that in computing time to file the appeal, where the applicant has requested the Registrar of the High Court for proceedings and served the respondent with such request, the computing of time within which the appeal is to be instituted shall exclude such time as may be certified by the Registrar of the High Court as requisite for the preparation and delivery of the proceedings.

The consequence of a failure to file an appeal in accordance with the Rules is to be found at rule 83

of this Court's Rules which provides,

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on the application of any party make such order.”

Mr. Kuhuthu contended that to date, the respondent had not been served with a copy of the request for proceedings, thereby rendering the appeal withdrawn. When pressed for a response, Mr. Mituga referred us to the affidavit of Mr. Kher to demonstrate that the request for proceedings had been filed in the Industrial Court, but he could not state with certainty whether it had been served on the respondent as required by the rules. The letter of request did not on its face show that it was copied to the respondent's counsel.

Given that we ourselves are not able to ascertain with certainty the question of service of the proceedings on the respondent from what is before us, we will by virtue of Article 159 of the Constitution and section 3A and 3B of the Appellate Jurisdiction Act, Cap 9 seek to determine this application in a just, expeditious and proportionate manner, without due regard for technicalities, and will consider the uncertainty in favour of the applicant, and not deem the notice as withdrawn. At any rate the respondent was at liberty to, but did not, apply for an order to that effect. Accordingly, we find that we have jurisdiction to determine this application.

Consequently, does the applicant have an arguable appeal? Mr. Kuhuthu concedes that there is no dispute on this issue, and agrees that there is most certainly an arguable appeal. We are inclined to agree with the parties, that there is a question for this Court to determine, and as a consequence, would have no hesitation in finding, given the circumstances of the case, that there is an arguable appeal.

Turning to whether the appeal would be rendered nugatory in the event it is successful, the situation is that the applicant is apprehensive that since the Preliminary Objection was dismissed, should the Industrial Court proceed to hear the main cause as scheduled, and make a determination against the applicant, the applicant will be immensely inconvenienced, by having to reinstate the complainants, and pay them the arrears in salaries and allowances, before the appeal is heard and determined.

Having regard to the nature of this application, it is evident that, the proceedings in the Industrial Court are yet to be completed, and the Cause determined. Therefore, the applicant's concern that the Industrial Court will order the reinstatement and payment of allowances and salaries to the complainants has not yet arisen. It is also not beyond the realms of possibility that the Industrial Court could dismiss the Cause in favour of the applicant. It is our considered view that, the reasons advanced by the applicant for a stay of the proceedings are unfounded, and that this application is premature. In any event, should the Cause be finally heard and determined, with such orders made against the applicant as apprehended, nothing estops the applicant from seeking a stay of execution of those orders at the appropriate time.

We consider that the applicant has not demonstrated to us what irredeemable harm will be suffered, if the stay of proceedings was not granted.

Accordingly, we do not find any merit in the motion dated 10th April 2014 which we hereby dismiss. We order that the costs of this application to be costs in the appeal.

Dated and delivered at Nairobi this 30TH day of JULY, 2014.

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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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