



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, M'INOTI & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. NAI 93 OF 2014 (UR 75/2014)

BETWEEN

CO-OPERATIVE BANK OF KENYA LTD.....APPLICANT

AND

BANKING INSURANCE & FINANCE UNION [KENYA].....1<sup>ST</sup> RESPONDENT

(Application for stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an appeal from the judgment and decree of the Industrial Court of Kenya at Nairobi, (Marete, J.) dated 24<sup>th</sup> April, 2014

in

I C C No.2071 of 2012)

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RULING OF THE COURT

*Ms Hellen Nduta Ngugi (the employee)*, a unionisable member of the respondent, the **Banking, Insurance & Finance Union (Kenya)**, and on whose behalf the respondent is litigating, was at all material times an employee of the applicant, the **Co-operative Bank of Kenya Ltd**, earning a gross monthly pay of Kshs.81,822.00. She had been employed by the applicant in 2007 as a Graduate Clerk and rose in rank to Accounts Services Officer by April, 2011. On 2<sup>nd</sup> August, 2011, the employee was dismissed by the applicant after the latter lost **Kshs.2,451,856.00** in a fraudulent transaction. The loss was attributed to the employee's careless performance of duties entrusted to her, after she confirmed the authenticity of signatures to facilitate electronic funds transfer without a call-back to the concerned client as required by the applicant's procedures.

Before the dismissal, the employee was required to show cause why disciplinary action should not be taken against her. After the dismissal, she lodged an unsuccessful appeal in accordance with the applicant's procedures. Attempts by the Central Staff Committee to resolve the issue bore no fruits and ultimately the existence of a trade dispute was reported to the Minister for Labour and Human Resource Development. A conciliator was appointed who, after hearing the parties recommended that the dismissal be reduced to termination. The applicant stood its ground, and on 12<sup>th</sup> October, 2012, the respondent lodged **Industrial Court Cause No 2071 of 2012**, claiming that the employee's dismissal was wrongful and seeking the following reliefs:

- i. **Reinstatement of the employee to her position without loss of benefit or seniority;**
- ii. **Payment of all salaries and allowances from the date of the dismissal to the date of the award;**
- iii. **Compensation for unfair loss of job**
- iv. **Any other appropriate relief deemed by the courts justifiable; and**
- v. **Costs of the suit.**

The applicant resisted the claim contending that the termination of the employee was not wrongful, as it was based on **section 44(3) and (4) of the Employment Act** and **clause 45 of the Collective Bargaining Agreement** in force between the applicant and the respondent. It was the applicant's further contention that the employee had violated provisions of the operating manual and the business code of conduct and ethics; that she had admitted in writing that she verified the signatures without a call back to the client; that the employee was given a fair hearing in the presence of a union representative; that in the premises the termination of employment was not malicious or unlawful, but was on valid and fair reasons following a fair procedure.

The cause was heard by Marete, J. who in a judgment dated 24<sup>th</sup> April, 2014 held that the termination of the employee was wrongful, unfair and unlawful for all intents and purposes and ordered her reinstatement to her former position and office without loss of benefits, seniority or service. The reinstatement was ordered to take effect the very next day, on 25<sup>th</sup> April, 2014 at 8.00 hours. In addition, the learned judge awarded the employee **Kshs.2,998,941** being the salaries and allowances lost as a result of the dismissal, **Kshs.727,016.00** as compensation for unlawful termination of employment and costs of the suit.

Not surprising, the applicant was aggrieved by the judgment and filed a notice of appeal on 25<sup>th</sup> April, 2014. When he appeared before us on 17<sup>th</sup> July, 2014, **Mr Nyaribo**, learned counsel for the applicant, informed us that the applicant had already received certified copies of the proceedings and would be filing the appeal shortly.

On 29<sup>th</sup> April, 2014, the applicant filed the application now before us under **rule 5(2) (b)** of the Rules of this Court, in which it seeks a stay of execution of the judgment and decree of the Industrial Court and or a stay of further proceedings in the Industrial Court cause.

At the hearing of the application, learned counsel for the applicant informed us that in a bid to comply with the order of the Industrial Court, the applicant had reinstated the employee and then sent her on paid leave, pending the hearing of this application. Although, according to the return of service on record, the respondent was served with the hearing notice on 4<sup>th</sup> July, 2014, there was no appearance either by the employee or the respondent. There was also no replying affidavit filed in opposition to the application and we accordingly directed that the application be heard in the absence of the respondent.

**Mr Nyaribo** submitted that the applicant had placed before the Court an arguable appeal which would be rendered nugatory if we did not stay the decree of the Industrial Court. Counsel relied on the applicant's draft memorandum of appeal which raises 9 grounds of appeal. Among them is that the learned judge erred in finding the employee's dismissal was wrongful and unlawful while there was solid evidence, including the employee's own written admission that she had carelessly and to the detriment of the employer performed duties entrusted to her; that the learned judge had erred by holding that the dismissal of the employee was unfair whilst she had been afforded an opportunity to show cause, had been heard in the presence of a union representative and had been afforded an opportunity to lodge an appeal against the dismissal.

Learned counsel also submitted that the applicant intends to argue in the appeal that the learned judge had erred in ordering reinstatement of the employee 3 years after termination and without taking into account critical factors such as the fact that the employee had worked for the applicant for a relatively short time, the applicant did not wish to reinstate the employee; there were no special or compelling reasons for reinstatement, it was not shown that the employee could not secure alternative employment, and that the termination of the employee was in any event contributed to solely by her own conduct.

On whether, if successful the appeal would be rendered nugatory, learned counsel submitted that there was no likelihood that the applicant would be able to recover from the employee the substantial total award of **Kshs.3,725,957** because her monthly salary was Kshs.81,882/-. In addition, Mr Nyaribo argued, if the appeal is successful, the employee's employment will have to be terminated again, thus occasioning more disruption to the operations of the applicant.

Counsel concluded by submitting that the position held by the employee was a sensitive position of trust which would be seriously undermined and jeopardized by the order for reinstatement, granted the undisputed loss of client's funds. The decisions of this Court in **SIMBA COLT MOTORS LTD VS JAMES GITAHU MWANGI, C.A No. Nai 111 of 2011** and **ILNGWESI COMPANY LTD VS WENDY MARTIN, CA No. Nai 291 of 2010** were relied upon to bolster the applicant's case.

Under **section 17 (2) of the Industrial Court Act, 2011**, an appeal from a judgment, award, decision, decree or order of the Industrial Court to this Court lies only on matters of law. This Court can only interfere if it is demonstrated that the trial court considered matters it ought not to have considered or that it failed to consider matters it should have considered or that looking at the evidence as a whole, the trial court was plainly wrong in its decision, in which case such omission or commission would be treated as matters of law. (See **MUTHIORA VS AKAMBA PUBLIC ROAD SERVICES LTD & ANOTHER, (2010) 2 KLR 39**).

Upon careful consideration of the application before us, we are satisfied that the intended appeal raises questions of law and is not frivolous. As this Court has said many a time, an arguable appeal is not one which must succeed; it is an appeal which raises a serious question of law or a reasonable argument deserving consideration by this Court. (**KENYA RAILWAYS CORPORATION VS. EDERMANN PROPERTIES LTD, Civil Application No. Nai 176 of 2012**). In addition it has also been emphasized by the Court that to succeed under rule 5(2)(b), an applicant does not have to establish a plethora or multiplicity of arguable issues; even one bona fide arguable issue will suffice. (**KENYA TEA GROWERS ASSOCIATION & ANOTHER VS. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, Civil Application No. Nai. 72 of 2001**).

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

**Dated and delivered at Nairobi this 25<sup>th</sup> day of July, 2014.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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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**

*jkc*