



IN THE COURT OF APPEAL

IN NAIROBI

CORAM: MURGOR J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 90 OF 2014 (UR.73/2014)

BETWEEN

CAROL ADHIAMBO OLELA.....APPLICANT

AND

ASTERISK LIMITED.....RESPONDENT

(Being an application for a stay of execution and for an injunction pending the hearing and determination of the judgment and decree of Rika J delivered on 23rd January 2014 in H.C. Industrial C. C. No 1049 of 2011)

RULING

On the 30th April 2014, I declined to certify this matter as urgent having decided that no urgent circumstances were apparent to warrant the issuance of a certificate of urgency.

The matter before me relates to a dispute in the Industrial Court where the appellant filed a claim seeking orders for a declaration that that her dismissal was unfair, unlawful and wrongful, that the respondent produce all relevant employment records of the applicant, one month's salary in lieu of notice at Kshs. 26,500/-, twelve (12) month's salary compensation for unfair termination at Kshs. 318,000/- service (sic) pay at fifteen (15) days for every year completed year of service and costs and interest.

In her claim the appellant stated that the respondent is engaged in the business of selling medical and healthcare products, and that during her employment, she was required to undergo specific product training, some of which took place overseas. To protect its interest the respondent compelled the appellant to commit herself to continue working with the respondent for two years after each of the overseas trainings. The appellant was made to sign a Guarantee/Indemnity agreement on 27th May 2009. After she left employment, she received demands from the respondent to refund the costs of training in France. In her view, the Guarantee/ Indemnity agreement was unenforceable and void, having been made in restraint of trade, and there was no consideration given by the respondent to the applicant. The applicant stated that the respondent terminated her employment contract on 4th January 2012, six months after she returned from training, and consequently was not entitled to recover damages under the Guarantee/ Indemnity agreement.

The respondent denied that it initiated the termination of the applicant's employment, but that it

was the applicant who had failed to return to work after the Christmas vacation of 2009, and that they has received information that the applicant had taken up employment with another firm, Nairobi X-Ray Limited. Consequently, the applicant had terminated her own contract without notice to the respondent. The respondent contended that Guarantee/Indemnity agreement was in accordance with the law, and that trainings were not mandatory, as the applicant could decide whether or not to attend such trainings.

On 23rd January 2014, Rika J, delivered an award wherein it was found that the respondent did not terminate the applicant's employment, and that the claims for terminal benefits and compensation were without basis. The Industrial court concluded that the dispute in relation to the Guarantee/ Indemnity agreement should be referred by the applicant for arbitration under the terms of the agreement.

Being dissatisfied with the decision of the Industrial Court the applicant filed a Notice of Appeal to this Court on 6th February 2014, and on 28th April 2014 filed a Notice of Motion together with an supporting affidavit sworn by **Carol Adhiambo Olela**, seeking a stay of execution of the judgment of the Industrial Court pending hearing and determination of the appeal; that pending the hearing and determination of the applicant's appeal, the respondent, its agents, employees and assigns, the Institute of Chartered Arbitrators, Kenya Branch, and the arbitrators appointed or to be appointed by the Chartered Institute of Arbitrators Kenya Branch and its agent be restrained from commencing, continuing and concluding the any arbitration pursuant to the judgment and decree of the Industrial Court. Attached to the Notice of motion was a Certificate of Urgency dated 24th April 2014. This was the application I was requested to certify as urgent, but declined to do so.

In the urgency certificate the applicant contended that the respondent had commenced arbitration proceedings against the applicant, and that the arbitration was disputed as the respondent had acquiesced to the jurisdiction of the Industrial court, that the respondent did not apply for a stay of proceedings in respect of the Guarantee/Indemnity agreement during the proceedings, or for a stay of proceedings of the order to refer the dispute to arbitration. That the respondent had requested the Chartered Institute of Arbitrators to appoint an arbitrator to hear the dispute, and that once the arbitration is concluded there would be nothing left to be determined in the appeal.

The application was referred back to me under **rule 55** of this Court's rules for hearing *inter partes*. Learned counsel for the applicant, *Mr. Ombwayo* submitted that the Industrial Court had declined to hear a challenge on the Guarantee/ Indemnity Agreement, but instead referred the matter to arbitration, under the terms of the Guarantee/Indemnity agreement. Counsel contended that in a letter dated 17th April 2014, the Institute of Chartered Arbitrators had sought to appoint an arbitrator and that should the dispute proceed to arbitration there would be nothing to determine in the appeal, which would be rendered nugatory. Counsel was also concerned that should the matter proceed to arbitration the applicant would be forced to file for a stay of execution proceedings under section 6 of the Arbitration Act, which would result in the applicant commencing litigation again on the same matter.

On her part *Ms. Ithondeka* opposed the application, and submitted that the application had been brought with delay. The judgment was delivered on 23rd January 2014, and the applicant had been granted a 30 days stay of execution. This application was filed on 28th April 2014, and no reason was given by the applicant for the delay in filing the appeal. On the question of the impending arbitration, Counsel submitted that the parties had agreed to arbitration under the agreement, and therefore this could not be the subject of court proceedings. The arbitration process could not commence whilst the court proceedings were ongoing, and now that the Industrial Court has rendered its decision on the question of wrongful termination, it was opportune for the arbitration proceedings to commence. Counsel concluded that no reasons for urgency had been advanced by the applicant.

Having considered the pleadings and heard the rival submissions of counsel, I remain unconvinced on the question of urgency of this application. The applicant's, concern is that with the appointment of an arbitrator by the Institute of Chartered Arbitrators, the arbitration proceedings will commence and the dispute will be determine, and will render the appeal nugatory. Other than that, the applicant did not proffer any substantive reason why the application should be certified as urgent. I consider that for such

an application to warrant an urgency certificate, it must be demonstrated that undue prejudice and/or harm is likely to be suffered by the applicant if the application is not urgently determined. I am unable to ascertain the prejudice that the applicant herein will suffer, by the dispute proceeding to arbitration, and for this this reason, I decline to alter my decision made on 30th April 2014. The costs of this application for urgency to be in the main application.

DATED and DELIVERED at NAIROBI this 24th day of JULY, 2014.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR