



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MURGOR & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI . 55 OF 2014 (UR 42/2014)

BETWEEN

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....APPLICANT

AND

JAYNE KANINI MWANZA.....RESPONDENT

(Being an Application for Stay of Execution from the Judgment of the High Court of Kenya at Nairobi (Nzioka, J.) dated 23rd January, 2014

in

INDUSTRIAL COURT CAUSE NO.25 OF 2012

RULING OF THE COURT

The applicant corporation filed a notice of motion dated 20th March, 2014 under **Rule 5(2)(b)** of the rules of this Court seeking stay of execution of the judgment delivered on 23rd January, 2014 by the Industrial Court.

Mr. W. Kilonzo, appearing with **Ms. B. Maina** for the applicant, told us that on 17th December, 2008 the applicant employed the respondent on a fixed term contract for services expiring on 16th December, 2011. When the contract expired, the applicant was not inclined to renew it. Consequently, the respondent filed a claim in the Industrial Court praying for declarations, *inter alia*, that her second contract was still subsisting and that it had not been terminated by the applicant.

After hearing the parties, the Industrial Court (**Nzioki wa Makau, J.**) found for the respondent and ordered, among other reliefs, that the applicant do pay her Sh.750,000/= in lieu of 3 months notice and a further Sh.918,000/= as compensation. The appellant felt aggrieved and hence its desire to obtain stay of execution pending filing and disposal of the intended appeal. In this kind of application, the applicant is obliged to satisfy the Court that he/she has an arguable appeal and also that if the stay order is refused that appeal will be rendered nugatory.

Mr. Kilonzo submitted that the applicant will argue on appeal that where a term contract comes to an end by effluxion of time one party, here the respondent/employee, cannot argue that the contract still subsists as she claimed, even after she was served with a letter of termination of services. Neither can it be assumed that failure to communicate termination of services amounts to a “constructive renewal of contract” as the learned judge found.

As to whether the intended appeal would be rendered nugatory in case we do not grant the stay order sought, yet it succeeds in the end, counsel told us that the applicant would be hard put to recover some Sh.1.6 million from the respondent who in her replying affidavit had not demonstrated to the Court her capacity to refund such a sum.

Mr. Ongicho, learned counsel for the respondent, opposed the application arguing that the respondent applied in writing for renewal of her contract as stipulated in the letter of appointment. That the applicant did not respond to that application, only to communicate after the contract period had run out that the sought renewal had been declined. **Mr. Ongicho** agreed with the learned judge, that accordingly and in such circumstances, the respondent’s contract stood renewed and thus an arguable appeal had not been made out. He concluded that the respondent had deponed in her replying affidavit that she was possessed of sufficient assets and could be in a position to refund the decretal sum in the event that the appeal was successful.

Having considered the foregoing rival arguments, we are of the view that the applicant has made out, not a frivolous but an arguable appeal, namely, whether when a fixed term contract expires, and one party does not communicate to the other about the likelihood of not renewing it, that should be deemed to be an automatic renewal of the contract. That point, even as it stands alone, is sufficient to consider issuing a stay order.

However, the next bar to be surmounted is whether the appeal will be rendered nugatory in case a stay order is refused and yet it succeeds in the end. On this point our view is that Sh.1.6 million is a substantial sum which the applicant, a public corporation, may not easily recover from the respondent who has failed to demonstrate or indicate her financial resources to meet a demand to repay.

In sum, we grant the order of stay of execution sought until the intended appeal, which **Mr. Kilonzo** told us he could soon file and serve, is finally determined. The respondent will bear the costs of this application.

Dated and delivered at Nairobi this 11th day of July, 2014

J. W. MWERA

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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

/jkc

DEPUTY REGISTRAR