



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, G.B.M. KARIUKI & MWILU, JJA)

CIVIL APPLICATION NO. NAI. 133 OF 2014 (UR 108/2014)

BETWEEN

748 AIR SERVICES LIMITEDAPPLICANT

AND

THEURI MUNYIRESPONDENT

(Application for stay of execution pending determination of Intended appeal from the Judgment of Industrial Court of Kenya at Nairobi (Mathews N. Nduma, J) delivered on 4th February, 2014

in

IND. COURT CAUSE NO. 773(N) OF 2009)

RULING OF THE COURT

1. **THEURI MUNYI**, the respondent herein, was employed by the applicant as its Finance Director until 13th January, 2009 when his services were brought to an abrupt end due to what the applicant described as the applicant's poor financial situation. The respondent immediately moved to the Industrial Court of Kenya claiming damages for wrongful termination, discrimination at the work place, failure to pay terminal benefits, unpaid salary for 13 days, provident fund payment, severance pay, two months' salary in lieu of notice and payment in lieu of 16 leave days. After a full trial the Industrial Court in its Award of 4th February, 2014 dismissed the respondent's claims save those for payment for withheld salary and terminal dues amounting to Kshs. 2,794,364/= in addition to costs.

The costs have since been taxed at Kshs.185,486/= making a total payable sum of Kshs.2,979,850/=. The applicant was dissatisfied with the result and filed a Notice of Appeal on 12th February 2014.

2. The applicant subsequently took out the Notice of Motion now under consideration expressed to be brought under the provisions of **Rules 5(2)(b) and 42 of this Court's Rules** and **section 3A of the Appellate Jurisdiction Act** and all other enabling provisions of the Law praying, *inter alia*, that

“there be stay of execution of the judgment and decree of the Industrial Court at Nairobi (Mathews N. Nduma J) in case no. 773(N) of 2009 pending hearing and determination of the intended appeal from that judgment and decree.”

The Motion is based on some five grounds amongst which are that the respondent has taxed his bill of costs and will be able to execute the decree anytime unless stay of execution is granted which eventuality would render the intended appeal nugatory; that the appeal is arguable as demonstrated by the draft Memorandum of Appeal and the applicant's right of appeal would be extinguishable by an execution of the decree, and that the applicant is ready and willing to deposit the whole decretal sum into an interest earning account in the names of the parties' advocates pending the hearing and determination of the appeal.

3. In his Replying Affidavit in opposition to the Motion the respondent avers that the applicant has no valid appeal that can form the basis of granting the orders sought and further that it has failed to show that unless the order sought is granted the intended appeal would be rendered nugatory. He adds that the appeal raises issues of fact instead of those of law as is required by the **Labour Institutions Act** and that he is not a man of straw and would be in a position to refund the decretal amount were the appeal to succeed. He sees the application as a way of delaying his enjoyment of the fruits of judgment and more so because the Industrial Court did not order that there be interest on the Award.

4. We heard submissions from Mr. Ogotu learned counsel for the applicant that, based on the draft Memorandum of Appeal, the intended appeal was arguable as the trial court ignored the applicant's defence and did not consider that the respondent was estopped from claiming arrears of salary as he had received 8 months' salary in excess of what was due to him. He also submitted the Award did not subject the awarded amount to taxation yet it was an income, the effect of that failure being that the applicant would be made to pay the entire decretal amount. Counsel added that the issue of the employment contract and any amendment to it also made the appeal arguable and that there was implied consent by the respondent by his receiving 8 months' extra salary.

On the nugatory principle counsel submitted that the respondent had not demonstrated his ability to repay the decretal amount in the event the appeal succeeded and finally that there should be a balance of the respective rights of the parties.

5. Opposing the Motion, Mr. Nyaribo, learned counsel for the respondent relying on the respondent's affidavit in reply to the Motion submitted that the appeal was frivolous as the same was based on issues of fact whereas appeals from the Industrial Court are on points of law only. He said that it was not shown that the respondent would be unable to pay back the decretal amount, and indeed the respondent's asset base was sound so the issue of the appeal being rendered nugatory did not arise. He added that the applicant did not show that it would suffer substantial loss if payment was made and counsel saw the applicant's Motion as an attempt to keep the respondent away from the fruits of his judgment yet he lost his job in 2009. Saying that to date no record of appeal has been filed despite the requirement that one was to be filed within sixty (60) days of the lodging of the Notice of Appeal, counsel concluded that it was clear that the applicant was bent on delaying the execution of the decree. Counsel added that an appeal on a money decree such as the one herein is not capable of being rendered nugatory.

6. The applicant will succeed in its motion if it satisfies us that the intended appeal is arguable and/or that the same is not frivolous and further that if the order sought for stay of execution is denied, then the appeal, if eventually successful, will be rendered nugatory. On this see the authority of **TRUST BANK LIMIED & ANOTHER V INVESTECH BANK LTD & 3 OTHERS Civil Appl. No. NAI 258 of 1999**.

The dual principles of arguability and nugatory must be concurrently satisfied for an order under **Rule 5(2)(b)** of our Rules to issue. There is ample authority on the point and we cite only the case of **PETER MBURU NDURURI V JAMES MACHARIA NJORE Civil Appeal No. 29 of 2009 (UR 14/2009)**.

One arguable ground will merit the grant of an order for stay of execution, see **KENYA HOTEL PROPERTIES LTD V WILLISDEN INVESTMENTS LTD. & OTHERS Civil Appl. No. NAI 24/2012**. It is similarly settled that an arguable appeal is not one that must succeed but rather one that is not frivolous and ought to be fully urged before court – see **JOSEPH GITAHU GACHAU & ANOTHER V PIONEER HOLDINGS LTD & 2 OTHERS Civil Appeal No. 124/2008**.

7. We have given due consideration to the Motion, the affidavits in support thereof and in opposition thereto as well as submissions by both counsel on behalf of their respective parties and bearing in mind that at this early stage of the appeal we must resist the temptation to discuss the merits of the intended appeal, we have nevertheless come to the considered conclusion that the intended appeal is not frivolous but that it is one that merits a hearing, raising as it does, issues of estoppel, taxation on income, breach of contract, amongst other issues. We are satisfied therefore that the applicant has satisfied the first limb for the grant of the order sought.

8. Would the Intended appeal be rendered nugatory if the order sought were to be refused? It must always be remembered that each case has its particular circumstances and whether or not an appeal/intended appeal could be rendered nugatory must of necessity be gauged from the circumstances of each case – see **RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD [2002]I EA 227** on that point. So that, it is no longer an irreversible proposition that in a money decree, if payment be made and an appeal is eventually successful, then appeal cannot be said not to be rendered nugatory. It is so because, if there is expense and some length of time to be spent so as to recover what has already been paid out or execution has ensured, then the appeal may well be said to be rendered nugatory, and hence the finding in **THE STANDARD BANK LIMITED V G. N. KAGIA t/a KAGIA & COMPANY ADVOCATES, Civil Appl. No. NAI 193/2003**, that;

“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.”

9. The respondent has exhibited evidence of his professional qualifications and assets that he owns/co-owns. No evidence of liquid cash inflows by way of bank statements was brought and hence the applicant could well be justified in fearing that recovery in the event of a successful appeal may be after some expense and time. At any rate it is the duty of this court to undertake a balancing of the parties’ competing rights; those of the applicant to a right of appeal that must not be threatened by an execution, and those of the respondent to enjoy the fruits of his judgment. Doing the best we can in balancing the interests of the parties and being satisfied that the applicant has also satisfied the second limb of the twin principles, we grant that the applicant’s Motion dated 12th June 2014 in terms of prayer 3 of the Motion and impose the following conditions:

- i. ***Within which time the applicant shall file and serve, if it has not already so done, the record of appeal within thirty days (30) days of this Ruling.***
- ii. ***The applicant shall deposit the decretal sum and the taxed amount both totaling to Kshs. 2,979,850/= in an interest earning account in a reputable bank to be opened in the joint names of the parties’ advocates on record. That account is to remain operational until the appeal is heard and determined.***
- iii. ***The order hereby granted shall automatically lapse should there be non-compliance with any of the above (2) conditions.***
- iv. ***If there is compliance, the costs of the application shall be in the appeal.***

DATED at NAIROBI this 17th day of November, 2014.

P. N. WAKI

.....

JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR