IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MAKHANDIA & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. NAI 107 OF 2012

BETWEEN

THE YOUTH AGENDA ……..……. APPLICANT

AND

RITA KIJALA SHAKO …….. RESPONDENT

(Being an application for stay of execution of the Industrial Court of Kenya at Nairobi (Mukunya, J.) dated 24th February, 2012

CIVIL CAUSE NO.583 OF 2010)

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RULING OF THE COURT

Before us is an application by way of Notice of Motion dated 13th April, 2012. It is expressed to be brought under ***rules 5(2)(b)*** and ***42*** of this Court's rules. In the main the application seeks that this Court be pleased to stay the execution of the decree of the Industrial Court of Kenya issued on the 16th of March, 2012 pending the lodging, hearing and determination of the intended appeal against the said judgment and decree. The applicant too prays that the costs of the application be provided for.

The application is hinged on the grounds that the applicant has an arguable appeal and the appeal if successful, is likely to be rendered nugatory unless the application for stay of execution is allowed because the respondent, who is an individual of limited financial capacity if paid the decretal sum will be incapable of refunding the amount. In the intended grounds of appeal, the applicant has assailed the Industrial Court Judge for making a finding that the respondent had been in continuous employment for a period of not less than 13 months; that the respondent had a proper claim of unfair termination within the provisions of ***sections 45*** and ***47*** of the Employment Act; that the learned Judge erred in finding that the respondent had been on a probationary contract in terms of the provisions of ***section 42*** of the Employment Act; that the learned Judge erred in awarding the respondent compensation for a period of 10 months equivalent to Kshs.2,000,000/- notwithstanding the 3 months payment in lieu of Notice which he also awarded; that the award was not subject to statutory deduction and on the whole the award was inordinately high considering the circumstances of the case.

Relying on the affidavit in support of the application, which reiterated, expounded and elaborated on the above grounds ***Ms Mungo***, learned counsel for the applicant submitted that in paragraph 7 of the

supporting affidavit coupled with the draft memorandum of appeal, the applicant had been able to demonstrate that it had a plausible and arguable appeal. Counsel submitted further that the learned Judge had erred in finding that the respondent had a valid claim under the Employment Act when at the time of termination of her employment, she was still on probation. She was never confirmed as a Chief Executive Officer (C.E.O.) of the applicant. ***Section 42*** of the Employment Act was clear as to how an employee on probationary terms should be dealt with when it came to termination of her employment. Though the issue was raised before the learned Judge, he however opted to invoke ***section 41*** of the Employment Act to find in favour of the respondent which section was however inaplicable in the circumstances of the case. Apparently and according to counsel, there is a conflict and or contradiction in terms between the provisions of ***section 36*** and ***41*** of the Employment Act which this Court will be called upon to resolve at the hearing of the appeal. The respondent having been paid the remainder of her contract period, she was not entitled to 3 (three) months pay in lieu of Notice. To that extent the award was not justified and amounted to double punishment of the applicant.

On the question of the intended appeal being rendered nugatory if execution is undertaken, counsel submitted that the respondent had no known means of income, and if payment was effected, she may not be able to repay in the event that the appeal is successful. The applicant relies on donor funding, the amount involved is colossal and not provided for in its budget. Accordingly, if paid, it may bring the operations and activities of the applicant to a halt. The applicant acknowledged though that it owes the respondent Kshs.377,162/60. However it refused to pay after the respondent took it to Court.

The application was strongly opposed. ***Mr Naeku T.T.*** learned counsel for the respondent relied on the depositions in the replying affidavit of the respondent and submitted that the application did not meet the threshold required for applications of this nature; there was no provision for extension of probation period in the contract of employment entered into between the respondent and applicant; and that the contract however had a provision allowing any party to sue in the event of a breach. This is the clause that the respondent invoked when she mounted the suit in the Industrial Court that has given rise to this appeal: The applicant never served the respondent with Notice to terminate her services. Consequently the award on that basis was justified. Counsel also urged us to consider the peculiar circumstances of this case and hold that on the whole that the appeal is not arguable at all.

On the nugatory aspect, counsel submitted that the appeal will not be rendered nugatory if payment is made. It matters not that the applicant is an NGO and depends on donor funding. It is obligated to pay what is due. The applicant had not demonstrated that the respondent was a person of straw. The applicant too had not even paid that amount which it concedes it owes the respondent. Finally, counsel submitted that should stay nevertheless be granted, it should be on terms that the decretal sum be deposited in an interest earning account pending the hearing and final determination of the appeal.

We have considered these rival submissions alongside the parties respective pleadings and authorities. As this is not an appeal from the trial Judge's decision but an application for stay of execution, lest we prejudice the substantive appeal, we will restrict ourselves to the principles that govern applications of this nature and the merits of this application.

However before we delve into the merits of the application, we think that a brief recap of the circumstances leading to this application are necessary. By a claim dated 24th May, 2010, and lodged with the Industrial Court of Kenya at Nairobi the respondent claimed as against the applicant for:

- ***A declaration that the applicant without any reason, justifiable or lawful cause, fundamentally breached its obligation to the respondent under the contract of service dated 28th November, 2008 executed between them.***
- ***A declaration that the respondent's contract of service dated 28th November, 2008 subsisted and had not been lawfully wholly terminated by the applicant.***
- ***A declaration that the applicant's letters to the respondent dated 28th January and 28th February, 2010 respectively amounted to unlawful, illegal, unfair and wrongful termination of respondent's contract of service dated 28th November, 2008.***

- ***General and exemplary damages.***
- ***Special damages of Kshs.3,600,000/-.***
- ***Costs and interest.***

The suit was informed by the fact that the applicant employed the respondent vide a two year contract of service dated 28th November, 2008 as its C.E.O. with effect from 5th January 2009. The contract of employment aforesaid was to run from 5th January, 2009 to 4th January, [2011]. On or about 18th December, 2009 the applicant closed its offices for Christmas festivities and was to resume operations on 11th January, 2010. However, whilst on Christmas holidays aforesaid applicant wrote to the respondent advising her that it was in the process of re-organizing operations in the secretariat and profiling the staff for job compatibility and that she had been re-assigned to undertake new responsibilities of which details were to be discussed between her and the respondent, in early January. Subsequent thereto the respondent was offered the unsolicited and non-existent position of Assistant Program Officer in charge of library and archiving and policy documentation. The respondent did not concede and or accept the offer and to the best of her knowledge her appointment as CEO still stood, her contract of service having not been lawfully terminated: The respondent did by an e-mail dated 22nd January, 2010 to the applicant decline the position offered to her as aforesaid. That refusal would appear triggered the letter dated 28th January 2010 terminating employment on account of absconding from duty. It was then that the respondent moved to the Industrial Court as already stated.

The applicant in response to the respondent's claim, denied it in total. It averred further that the respondent's employment was subject to successful completion of 6 months probationary period. However it was not until the lapse of 6 months that the evaluation of the respondent for purposes of confirming her in the job was conducted and found wanting. The applicant further averred that since the respondent continued with her employment after 6 months period without any objections thereto, she was deemed to have accepted the extension of the probation of service prior to the dispute. Hence the respondent's claim was not maintainable under ***section 45*** of the Employment Act. Following her evaluation, she performed best in the area of documentation hence, the re-assignment. The respondent having declined the re-assignment, the applicant was left with no option but to formally terminate the respondent's employment as her services were no longer required by the applicant in the capacity of a C.E.O. vide letter dated 28th January, 2010.

Upon careful considerations of the dispute, the learned Judge of the industrial court found for the respondent holding thus:

> "***… upon careful consideration of all the circumstances of this dispute including the written memoranda, the apprendices annexed thereto, the evidence given and the oral submission, this Court holds that the claimant has established a case for unfair and unlawful termination. She is entitled to compensation for wrongful loss of employment. She is hereby awarded ten (10) months' salary as such compensation which amounts to Kshs.2,000,000. She has demanded payment of three (3) months salary as notice pay. This was conceded by the respondent who claimed to have paid part of it and that Kshs.377,762/60 remain outstanding. The claimant is awarded Kshs.377,762/60 in this regard …"***

These are the findings that the applicant seeks to impugn in its intended appeal; hence the application the subject of this ruling.

For a party to succeed in an application for stay, it must demonstrate that the appeal is arguable; not that the intended appeal must succeed but that it should not be frivolous. Secondly, it should be established that if the application is not granted, the result of the appeal or intended appeal, if successful, will be rendered nugatory,. See ***Bob Morgan Systems Ltd vs Jones (2004) 1 KLR 194, CFC Financial Services Ltd v Juja Road Fancy Stone Ltd, Civil Application No. Nai 328 of 2009 (UR), Oraro & Rachier Advocates vs Co-operative Bank of Kenya Ltd, Civil Application No. Nai 358 of 1999 (UR) and Oraro & Rachier Advocates vs Co-operative Bank of Kenya Ltd, Civil Application No. Nai 358 of 1999 (UR)..***

Regarding the first requirement as to whether the intended appeal is arguable, our view is that given the grounds set out in the draft memorandum of appeal and the oral submissions in support thereof by counsel for the applicant, we are satisfied that the intended appeal is not frivolous. It is trite that even one ground alone found to be arguable is enough to satisfy this threshold. It is certainly arguable whether the learned Judge was right in awarding the respondent compensation for a period of 10 months equivalent to Kshs.2,000,000/- as well as 3 months payment in lieu of Notice. For this reason we think that the applicant has satisfied the requirement of arguability.

On the second requirement as to whether or not the appeal if successful would be rendered nugatory, what is involved here is a money decree. Ordinarily an appeal arising out of a money decree cannot be rendered nugatory if payment is effected, the assumption being that in the event that the appellant succeeds, the respondent would be in a position to repay. However for the applicant to overcome this general principle, it should be able to demonstrate that the respondent is a person of straw or as poor as a church mouse and given those circumstances, if the decretal sum was to be paid, it would not be able to repay the same, to the successful appellant. (see Kenya Shell Ltd supra). However, with the advent of ***Oraro*** and ***Rachier Advocates*** (supra), another consideration seem to have been added in the mix, although the Judges who president over the case where shy to not specifically say so, that in dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted particularly in money decrees, the Court ought to weigh the claims of both sides. The applicant may find itself in a very tight corner if it was forced to pay the decretal amount such that its operations may be crippled or adversely affected, whereas perhaps the respondent would not be hit as hard by being kept out of the sum for a while pending the outcome of the appeal.

In the circumstances of this case, apart from stating in the grounds and the affidavit in support of the application that the appeal, if successful, is likely to be rendered nugatory unless the application for stay of execution is allowed because the respondent, who is an individual of limited financial capacity will be incapable of refunding the amount of the decree, counsel for the applicant did not allude to such fact in her oral submissions nor did she adduce any evidence to back up the assertion. Essentially then, there is no evidence to back up such assertion. In the absence of such evidence, we would have been inclined to hold that the applicant had not demonstrated to our satisfaction that the intended appeal would otherwise be rendered nugatory if the decretal sum was paid. However, the applicant sought to rely on the fact that if it was compelled to pay the decretal sum, it will be subjected to unparalleled hardship that will adversely affect its operations. The applicant is a non Governmental Organization that relies solely on donor funding to run its specific projects, the decretal sum is large considering the applicant's financial standard, execution would ruin its projects thus threaten its very existence. The applicant annexed in the supplementary affidavit its Annual report and financial statement for the year ended 31st December, 2011 which is not so rosy. We think that in the prevailing circumstances, a payment of Kshs. 2,377,672/60 has the potential of disrupting the operations of the applicant and thereby cause severe hardship. Applying the holdings in Oraro & Rachier case (supra), the balance of convenience tilts in the applicant's favour.

Of course we were reminded of the provision of ***section 1A*** and ***B*** of the Civil Procedure Act and ***section 3A*** and ***B*** of the appellate jurisdiction Act, which compels this Court in interpreting the Civil Procedure Act and the Appellate Jurisdiction Act or exercising any power to take into account the overriding objective. The principle aims of this objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See ***E. Muriu Kamau & another (supra)***.

Applying the foregoing to the circumstances of this case, we are satisfied that the applicant should be allowed to prosecute its intended appeal without the sword of damocles hanging over its head in the name of threatened execution of the decree and or compelled payment of the decretal sum. However, this must also be counter-balanced by the fact the respondent has a judgment in her favour for which she must not be denied the fruits thereof.

The financial situation of the applicant notwithstanding, it conceded that in the interim it owed the

respondent Kshs.377,162/60. We do not see any reason why the applicant should not pay over this amount to the respondent pending the hearing and determination of the intended appeal.

The upshot is that we grant an order of stay on condition that the applicant pays to the respondent Kshs.377,162/60 within the next twenty one (21) days from the date of this ruling failing which the order of stay will automatically lapse.

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

Dated and delivered at Nairobi this 15th day of March, 2013.

W. KARANJA

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JUDGE OF APPEAL

M.A. MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR