



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, OUKO & M'INOTI, J.J.A)**

**CIVIL APPLICATION NO NAI 4 OF 2013**

**BETWEEN**

**DEL MONTE KENYA LIMITED.....APPLICANT**

**AND**

**PATRICK NJUGUNA KARIUKI.....RESPONDENT**

*(Application for stay of execution pending the lodging, hearing and determination of*

*an Appeal from the Award and Decree of the Industrial Court of Kenya*

*(Byrum Ongaya) dated 26<sup>th</sup> October, 2012*

**in**

***Industrial Court Cause No.953 of 2011)***

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**RULING OF THE COURT**

The brief background to this ruling is that the respondent, **Patrick Njuguna Kariuki**, moved to the seat of justice in the Industrial Court by a statement of claim dated the 8<sup>th</sup> day of June, 2011 and presented industrial cause No.953 of 2011, directed against the applicant, **Del Monte (K) Limited**, seeking various reliefs.

The applicant **Delmonte Kenya Limited**, responded to the respondents' claim by a defence dated the 4<sup>th</sup> day of August, 2011, to which the respondent **Patrick Njuguna Kariuki**, responded by filing a supplementary memorandum of claim dated the 4<sup>th</sup> day of June, 2012. Thereafter the parties were heard by way of written submissions, culminating in a Judgment delivered on the 26<sup>th</sup> day of October, 2012 by **Byram Ongoya J**, who granted the following orders:-

- (a) ***A declaration that the termination of the employment of the claimant by the Respondent was unfair.***
- (b) ***The Respondent to pay the claimant a sum of Kshs.8, 863,282.29 plus interest at court rates from the date of the Judgment till full payment.***
- (c) ***The claimant to be re-engaged by the respondent in the position of warehouse and logistics manager with effect from December 1, 2012 upon the terms prevailing as at the date of dismissal or such better terms as the parties may agree; and***
- (d) ***The Respondent to pay costs of the cause.***

The applicant was aggrieved by that Judgment and lodged a notice of appeal to this Court on 8<sup>th</sup> day of November, 2012, followed by the presentation in the same Industrial Court, of an application for stay of execution of the decree pending the hearing and determination of the intended appeal. Interim relief was granted at the interlocutory stage but withheld after interpartes hearing.

The dismissal of the application for stay of execution aforementioned, prompted the applicant to file in this Court the application, the subject

of this ruling dated the 19<sup>th</sup> day of December 2012 and presented on the 7<sup>th</sup> day of January, 2013. The application is brought under Rule 1(2) and Rule 5(2) (b) of the Court of Appeal Rules, section 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya and Article 159(2) (d) of the Constitution of Kenya. Five reliefs were initially sought but the applicant is currently pursuing prayer 3, only. It reads:-

**(3). That this Honourable court be pleased to order stay of all further proceedings in Industrial Court case No.953 of 2011,**

***Patrick Njuguna Kariuki versus Delmonte Kenya Limited pending the hearing and determination of the Applicant's intended appeal against the said judgment and order.***

The application is premised on the grounds in the body of the application as well as the supporting affidavit deponed by one **Stergios G.Kalia Moutsas** and all the annexures thereto.

On the date fixed for the hearing of the notice of motion, learned counsel **Mr. Anthony Maruti** and **Mr. Mutua Molo** appeared for the applicant and the respondent, respectively. In his oral argument, learned counsel for the applicant has urged us to allow the application on the grounds *inter lia* that, the same is meritorious as they have satisfied the twin ingredients required to be satisfied before one can earn a relief of stay of execution pending appeal. On argubaility, the applicant argues that they are procedurally before this court as their application is properly anchored and/or premised on a proper notice of appeal filed on 8<sup>th</sup> day of November, 2012 within time, and that their application for stay of execution to the Industrial Court was dismissed notwithstanding the fact that the applicant had complied with an interim order requiring them to deposit the decretal sum amounting to Kshs.8, 863,082.29 within 48 hours.

It is the applicant's further argument that by reason of the Industrial Court declining to grant them an order for stay of execution, they have been exposed to the danger of immediate execution; that they are genuinely aggrieved as the respondent was erroneously granted exemplary damages, which are a creation of section 12(3) (vi) of the Industrial Court Act, an Act of Parliament which came into force on the 30<sup>th</sup> day of August, 2011, whereas the action giving rise to the impugned judgment arose way back in November, 2009. The applicant intends to argue on appeal that the provisions of this new legislation were wrongly applied retrospectively by the Industrial Court to avail the respondent the relief of exemplary damages, and yet these provisions have no retrospective effect.

The applicant is also aggrieved because the Industrial Court erroneously, in their view granted the respondent the relief of reinstatement not known to law in employer/employee relationships. To the applicant, the law governing such relationship does not provide for re-engagement of an employee after dismissal. The appropriate relief in such circumstances it was submitted is usually an award of damages. Therefore, if stay of execution is not granted, the applicant will be obligated to reinstate the respondent as ordered by the Court, against a non-existent position in the applicant's establishment, not to mention an apparent acrimonious and hostile as well as strained employer/employee relationship. The applicant contends further that the situation is more grave considering that the Industrial Court made no inquiries as to whether the position previously held by the respondent was still available or not. Counsel submitted that the Industrial Court was also wrong in erroneously failing to believe the applicant when the applicant rightly informed it that ordering the respondent's reinstatement would have a huge logistical impact as it would not only be expensive, but also unreasonable for the applicant to retain, and pay an employee whose services the applicant does not require.

Turning to the second ingredient of the appeal being rendered nugatory, it is the applicants' assertion that this ingredient too, has been satisfied, for the reason that there is an intended appeal against the entire decree; that though on the face of it, the decree appears to be a money decree, only the 12 months salary of the award could qualify to be a money decree which ordinarily should not be withheld. But therein the resulting money decree includes not only the amount erroneously awarded for exemplary damages, but also the amount awarded for 12 months salary beyond the notice period stipulated in the contract of employment. In the premises it is only prudent to withhold the release of this money at this point in time firstly because the applicant's intended appeal is likely to succeed. Secondly the respondent's ability to refund the same should the applicant's intended appeal ultimately succeed has not been demonstrated.

The respondent on the other hand has opposed the application on the basis of a replying affidavit sworn by the respondent on the 11<sup>th</sup> day of April, 2013 and lodged in the Court of Appeal Registry on the same date. The reasons advanced by the respondent are that the applicant stands non suited as the substratum of the application namely the intended appeal was not filed within sixty (60) days from the date of the filing of the notice of appeal; that no certificate of delay has been exhibited to cure that defect; that the intended appeal even if one were to be filed, the same would be a non starter as it intends to raise issues of fact, and yet the law allows appeals from the Industrial Court to the Court of Appeal on issues of law only; that the said intended appeal has no chances of success as the reliefs granted to the respondent by the Industrial Court are within the law inclusive of the relief of exemplary damages; that the order sought of stay of execution has been overtaken by events 1<sup>st</sup> December, 2012, when the applicant's application for stay was dismissed by the Industrial Court; that the applicant should not be indulged as it has disobeyed the order on the reinstatement of the respondent to his employment position and payment of his rightful dues as ordered by the Industrial Court.

With regard to the ingredient of the intended appeal being rendered nugatory, the respondent argues that this does not hold as the respondent is a person of means who has demonstrated this by exhibiting a valuation report for his property worth over 21 million, which is far much in excess of the decretal amount. Lastly that there is no offer of security for the due performance of the decree should the intended appeal not succeed, and for this reason the relief should therefore be withheld.

In reply, learned counsel for the applicant argued that the procedural lapses alleged do not go to the root of the application, or the intended appeal. They are also curable within the rules. As such, these should not be employed to defeat the applicant's entitlement to substantive justice as it will be unjust to unseat the applicant from the seat of justice and send it away empty handed, in the wake of the respondents' failure to move to fault the notice of appeal, on the basis of which the application subject of this ruling is premised.

As for security for the due performance of the decree should the intended appeal not succeed, it is the applicant's contention that it is prudent to preserve the decretal sum intact as currently deposited; but however, the applicant is willing to release money equivalent to four months salary to the respondent.

Our jurisdiction having been invoked via rule 5(2) (b) of the Court of Appeal Rules, our mandate is simply to determine first whether we are properly seized of this application; and secondly whether the applicant has brought itself within the ambit of the ingredients required to be established before one can earn a relief under rule 5(2) (b) of this court's rules.

The issue as to whether we are properly seized of this matter, arises from learned counsel for the respondent's arguments that, the application is a non starter by reason of the substratum of the application, namely, the intended appeal allegedly being non existent on account of the record of the intended appeal not having been filed within the stipulated time of 60 days from the date of the filing of the notice of appeal. We note the applicant does not contest this fact. However, the respondent argument does not have merit because he has not availed himself of the clear provisions in rule 84 of this court's rules, which required him to move the court to have that notice of appeal struck out. As long as that notice of appeal stands, the application is properly premised on it. On this account, we make a finding that we are properly seized of this application and the applicant is entitled to a merit disposal of the same.

Having found that we are properly seized of this application, our next task is to determine firstly whether the applicant has an arguable intended appeal or an appeal that is not frivolous and secondly whether refusal of an order for stay of execution would render that intended appeal nugatory if it is eventually successful. (*See Ahmed versus Savings and Loan Kenya Limited and another (2000) LLR 4145 and East African Power Management Limited versus the Owners of the Vessel "Victorious Light Nairobi Civil Application No. Nai 245 of 2009*) It is now trite that it will suffice if the applicant demonstrates the existence of a single *bonafide* arguable ground (*Kenya Hotel Properties Limited versus Wellsden Investments Limited and another Civil Application No. Nai 24 of 2012*).

We are also alive to the fact that an arguable appeal is described as one which ought to be argued fully before court, not one which must necessarily succeed. (See *Joseph Gitahi & Another versus Pioneer Holdings Limited and 2 others Civil Appeal No. 124 of 2008*)

Turning to the ingredient of the intended appeal being rendered nugatory, the correct position in law is that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the successful appellant *Stanley Kangethe Kanyoto versus Tony Ketter & 5 others civil application No. Nai 31 of 2012*)

Having borne in mind the above guiding principles of law, and having applied them to the rival arguments set out above, we are satisfied that the applicant has made out a case for a stay of execution and we are inclined to grant the same.

The applicant has presented several arguable points including whether the award of exemplary damages was retrospective; whether an order for the reinstatement of the Respondent was justified in the circumstances of this case and the propriety of the award of loss of salary.

We are alive to the fact that numerous decisions of this Court have now crystallized the position in law which is that the applicant is only required to demonstrate one arguable point. Herein we have identified at least three. We are therefore satisfied that the applicant has brought itself within the ambit of the first ingredient under rule 5(2) (b) of the Court of Appeal Rules.

Turning to the second requirement of the intended appeal being rendered nugatory if stay is not granted, we also find this too, to have been demonstrated to exist. The decretal amount is Kshs.8, 863,282.29 which includes the contested awards of both the exemplary damages as well as an award of salary beyond the notice period allegedly contemplated in the contract of employment. It is appreciated that the respondent has exhibited a valuation report which has not been controverted by the applicant, indicating that his property net worth is about 21 million, thus beyond the amount of money forming the decree. We however note that neither the Industrial Court nor this Court has the mandate or powers to police the respondents' manner of disposal and or use of the decretal amount once ordered paid out to him.

In *Nation Media Group & 2 others Versus John Joseph Kamotho & 3 Others, C.A No.108 of 2006* this Court stated:

***"The applicants have asked the appellate Court to interfere with the awards of damages and there is a possibility that the appellate Court may reduce the awards considerably. There might be long delay in recovering from the respondents the taxed off sums as there are so many imponderables in the sale of land which forms the bulk of their assets. In such a likely eventuality, the applicants might be greatly inconvenienced. The balance of convenience is in favour of the applicant"***

The above scenario calls for us to safeguard the decretal amount involved pending the disposal of the intended appeal. Such a measure will ensure that the decretal amount is secured in some neutral place, so as to be easily accessible by whichever party is adjudged successful at the final determination of the intended appeal

On security for the due performance of the decree should the appeal not succeed in the end, we agree with the respondent that the applicant has made no offer. It is however our considered opinion that the applicant's failure to make such an offer is not a ground for disentitling it to the relief sought. The reason being that our hands are not tied as we have jurisdiction as well as a discretion under section 3A and 3B of the Appellate Jurisdiction Act No. 9 Laws of Kenya to grant either anon conditional or a conditional order of stay of execution as the case may be. We are satisfied that the offer made by the applicant orally in Court, of its willingness to release 4 months salary forming part of the deposited decretal sum to the respondent and have the balance of the money remain secured in a neutral place is a reasonable offer.

In the result, we allow prayer 3 of the applicant's notice of motion dated the 19<sup>th</sup> day of December, 2012 and filed on the 7<sup>th</sup> day of January, 2013. We make orders that there be a stay of execution and or implementation of the award made against the applicant *Delmonte Kenya Limited* and in favour of the respondent *Patrick Njuguna Kariuki* in Industrial Court case No.953 of 2011 *Patrick Njuguna Kariuki versus Delmonte Kenya Limited* on the 26<sup>th</sup> October, 2012 and any decree resulting there from, pending the hearing and determination of the applicant's intended appeal, on condition that the applicant does release and or pay to the respondent an amount equivalent to four (4) months salary previously earned by the respondent as at the time of the termination, within 14 days of the date of this ruling. The balance of the decretal amount is directed to be deposited in an interest earning account in the joint names of learned counsel for both parties in any sound financial institution, mutually agreed upon by both parties, within the same 14 days of the date of this ruling, if not already secured.

If however the balance of the decretal amount is already secured, then the same to remain so secured, save that it be secured in a joint interest earning account in a financial institution mutually agreed upon by the parties less the amount ordered released to the respondent forming four months salary.

The costs of the application to be in the appeal.

**Dated and Delivered at Nairobi this 27<sup>th</sup> day of September, 2013.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. OUKO**

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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**

D/O