



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
**(CORAM: KWACH, AKIWUMI & SHAH, J.J.A.)**

**CIVIL APPLICATION NO. NAI. 228 OF 2000 (104/2000 UR)**  
**BETWEEN**

**UNGA GROUP LIMITED ..... APPLICANT**  
**AND**  
**FRANCIS WANGANJU ..... RESPONDENT**

**(An application for stay of execution in an intended  
appeal from a decision of the High Court of Kenya at  
Nairobi (Justice Khamoni) dated 14th July, 2000**

**in**

**H.C.C.C. NO. 2179 OF 1998)**

\*\*\*\*\*

**RULING OF THE COURT**

The present application has been brought under Rule 5(2)(b) of our Rules for stay of the execution of the judgment of the High Court (Khamoni, J.) whereby, the Applicant, one of the largest, if not the largest, industrial enterprise in the country, was ordered to pay the Respondent, who had been an "Executive Employee" of the Applicant, namely, its Group Managing Director, his remaining unpaid early retirement benefits to the tune of Kshs.17,033,165/-. According to the Respondent, what was due to him upon his early retirement from the employment of the Applicant, under the Applicant's early retirement scheme, as one of the:

"Executive Employees whose offers to determine their employment contracts are accepted",

and whose offer for the determination of his employment contract had been so accepted by the Chairman of the Applicant, was Kshs.31,546,745/- out of which, the Applicant had only paid Kshs.14,513,580/- (less taxes), on the wrongful assumption that the Respondent had not retired under the Applicant's early retirement scheme, but under the Respondent's existing employment contract with the Applicant.

This contract, of course, provided for the Respondent's retirement only upon his attaining the age of 60. Apart from this, the Respondent's service could be terminated by way of summary dismissal for misbehaviour, or ill health or incapacity, or by notice given by either party, or without notice under clause 11(c)(ii) of the Respondent's employment contract.

The Respondent had on 18th June, 1997, written, under the heading "Early Retirement", a letter to the Chairman of the Applicant that, as accepted by the Chairman, he wished to go on early retirement under the Applicant's early retirement scheme. The details of his early retirement benefits, which are the same as those set out in the Applicant's Strictly Confidential circular on the Determination of Employment Contract, dated 21st February, 1997, were also set out in his

letter.

The pertinent part of this letter which speaks for itself, is as follows:  
"Mr. Chairman D. Unga N. Group Ndegwa Limited  
Nairobi.

Dear Mr. Ndegwa,

#### EARLY RETIREMENT

As discussed and agreed yesterday afternoon, I wish to apply for an early retirement under the scheme offered by the company in the current retrenchment programme and without prejudice to the provisions of my Service Contract which will for this purpose, be deemed to have been determined by Unga Group Limited through Clause 11(c) (ii) of the said contract. The early retirement scheme offered by the company and which I hereby apply for provides: `The following payments, net of applicable taxation, will be paid to Executive Employees whose offers to determine their employment contracts are accepted:-

1. Notice period (by the company as provided for in the contract) emoluments which are:-

- (a) Pensionable salary
- (b) Non-pensionable salary
- (c) Car Scheme Allowance
- (d) Proportionate school fees allowance

2. Accrued leave days to the date of determination of the contract. In this case items a - d) in No 1 above apply.

3. One month pensionable and non-pensionable salary for every completed year of service and/or part thereof. This will be computed using the current salary level.

Taxation on the above payments will be deducted and remitted to the tax authorities in accordance with the income tax laws. 21 February 1997' ...". The same day, the Chairman replied to the Respondent's letter as follows: "Dear Francis,

#### RETIREMENT

I acknowledge receipt of your letter of even date where you applied for retirement under the terms of your service contract, Clause 11(c) (ii). Your terminal benefits are being calculated in accordance with your employment contract.

I take this opportunity to thank you for your service to the group and express my personal best wishes and good fortune in your future endeavours.

Yours sincerely

D.  
CHAIRMAN."

N.

NDEGWA

The Chairman's letter, having regard to the contents of the Respondent's letter, the fact that the Respondent was at the time, 48 years old, and that clause 9(c) of his employment contract provided for his retirement upon attaining the age of 60 and, what appears in that letter, to be a deliberate and mischievous pretension on the part of the Chairman that the Respondent was not going on early retirement, deserves, as the learned Judge held, little or no credibility. If what the Respondent in his letter,

said had been agreed between himself and the Chairman, was not true, one would have expected someone like the Chairman, to have denied that in his reply. The Chairman, as we have already observed, rather chose to confine himself, only to the determination of the Respondent's service under clause 11(c)(ii) of his employment contract, as if that by itself, would disentitle the Respondent from early retirement under the Applicant's "current retrenchment programme". Mr. Havelock, counsel for the Applicant, has urged that the Chairman's letter contradicts that of the Respondent and also that it is not the Chairman of the Applicant, but rather its Board of Directors, that is to accept any application for early retirement. One would also have thought that if this were so, the Chairman, having regard to the clear and emphatic nature of the Respondent's letter, would have set the record straight in his letter. It would seem that after having accepted the Respondent's application for early retirement at the age of 48, which can only be under the Applicant's early retirement scheme, the Chairman was now by his letter preparing the ground for a change of tune. But we must remember that what is now before us, is not the hearing of the appeal itself. Regrettably, we do not have before us, the record of the proceedings before Khamoni J, which would have enabled us to come to a more conclusive view on this matter. It is therefore, with some reluctance that we think that at this stage, we may be just inclined to assume that the Applicant has an arguable intended appeal.

We must now consider whether the appeal would be rendered nugatory if stay is not granted as sought by the Applicant. We have perused the affidavit of Julius Muia, the Financial Director of the Applicant, in support of the Applicant's application for stay. Nowhere is it stated in this affidavit that if stay is not granted, the Respondent would not be able to disgorge what would have been paid to him as ordered by Khamoni J, and thus, rendering the Applicant's intended appeal if successful, nugatory. The only place where there occurs some vague reference to the Respondent's financial standing is in the affidavit of Mr. Havelock, counsel for the Applicant, which was not in support of the application for stay, but rather the Certificate of Urgency which is not relevant to the application before us.

What is more, the related paragraph of Mr. Havelock's affidavit was abandoned when it came to the application itself. This paragraph which in any case, we find really most unhelpful, is as follows:

"THAT when the Respondent gave his evidence before the High Court he made no mention of his current situation and employment, merely that he qualified as a Certified Accountant in 1978. It is the Applicant's very real fear that unless this Court grants the orders for stay of execution pending the determination of the intended appeal, the applicants right of appeal will not only be academic but will render the intended appeal nugatory."

As is well known, the two conditions which must be satisfied before stay of execution is granted, are that the application must not only, show that the appeal is not a frivolous one, but also, that if stay is not granted, the appeal if successful, would be rendered nugatory. We fear, as must now be obvious from our observation on this issue, that the latter condition has not been satisfied and in the result, the Applicant's application for stay of execution is hereby dismissed with costs.

**Dated and delivered at Nairobi this 18th day of August, 2000.**

**R. O. KWACH**

**JUDGE OF APPEAL**

**A. M. AKIWUMI**

**JUDGE OF APPEAL**

**A. B. SHAH**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**