

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 1993 OF 2017

MABEL KIBORE.....CLAIMANT/RESPONDENT

VERSUS

NATIONAL OIL CORPORATION

OF KENYARESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant filed the notice of motion seeking to vacate the orders of the court granted on 8th November 2017. The Respondent filed the motion on 9th November 2017 supported by the affidavit of Pauline Kimotho sworn on the same date. The Respondent seeks stay pending appeal. In her affidavit Pauline Kimotho depones that the intended appeal raises triable issues and that the Claimant if reinstated would not be in a position to refund the sums paid as salary in the intervening period. She deponed further that during the pendency of the motion by the Claimant there were no orders restraining the Respondent from recruiting a replacement for the Claimant's position and that it had since been filed up.

2. The Claimant was opposed and filed a replying affidavit sworn on 17th November 2017. She deponed that she had reported to work on 9th November 2017 and that the Respondent had not appointed a replacement for her office and that the letter purporting to have appointed anyone to her office was intended to defeat the orders of the court made on 8th November 2017. She deponed further that the Respondent would not suffer any prejudice if she was retained in her employment.

3. The application was urged on 30th November 2017 and Mr. Ouma for the Respondent/Applicant submitted that the applicant has to show that there is an arguable appeal and that the appeal will be rendered nugatory if the orders are not granted. The Respondent submits that it was aggrieved by the ruling of the court made on 8th November 2017 and is intent on filing an appeal in the Court of Appeal. He submitted that the Respondent has an arguable appeal and that the appeal would be rendered nugatory if the orders sought are not granted. He submitted that based on paragraph 5 of the supporting affidavit had outlined the sensitivity of the office and that the Respondent was apprehensive that if the Claimant is reinstated and the intended appeal successful then the Applicant will have been adversely affected during the period of reinstatement. He submitted that the relationship between the parties had irretrievably broken down. In reference to the replying affidavit he submitted that the reply had delved into matters not in issue in the present application by going into details that were not under consideration in the stay application. He submitted that a stay was granted on 9th November 2017 and that the correspondence attached to her motion were after the grant of stay.

4. In reply to the motion Mr. Mwaura for the Claimant submitted that the Claimant had filed a replying affidavit and stated that the Respondent had treated the court in a casual manner. He submitted that there was no draft memorandum of appeal that the court could base its decision on. He stated that he who comes to equity must come with clean hands. He submitted that the Respondent never disclosed that there was an ongoing recruitment exercise when the matter was in court and that there was no good faith on their part. He stated that in the email circulated to employees it was said that Cecilia Kalungu had been

appointed to her office yet she had sat in the office on 9th and 10th November and that no one had occupied her office. He submitted that the letter appointing Cecilia required her to report with immediate effect and that he wondered where she sat on 7th, 8th, 9th and 10th November. He stated the letter was backdated to defeat the court process. He submitted that the balance of convenience tilted in favour of the Claimant. He thus urged that the court to disallow the application as there is no intention to appeal.

5. In an application to obtain stay pending appeal, the criteria for the grant of the orders is well set out in precedent. These are that in the application seeking stay of the order of reinstatement, the applicant would have to demonstrate that the intended appeal is arguable and further that unless the stay is allowed the appeal will be rendered nugatory. Refer to **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** a decision of the Court of Appeal (Githinji, Mwilu (as she then was) & Kantai JJA), which is binding, for the restatement of the principles for grant of stay of execution of orders of reinstatement. The Application was filed a day after the Ruling of the court and as to arguability, Mr. Ouma submits that there is an arguable appeal with an overwhelming chance of success. He asserts that if not granted a stay, the intended appeal will be rendered nugatory. Mr. Mwaura counters by saying that there is no basis for the court to determine the same as no draft memorandum of appeal is attached. The Respondent filed a Notice of Appeal on 8th November 2017 which was quite quick. There is however no memorandum of appeal or even a draft memorandum of appeal attached or exhibited anywhere in the motion before me. It therefore is impossible to tell whether there is an arguable appeal or whether the intended appeal is frivolous. In my view, having failed to satisfy the first limb of the criteria set for grant of stay pending appeal, the application does not succeed. It would be an academic exercise to attempt to decipher whether an intended appeal will be rendered nugatory if there is no basis for the determination as to the merits or otherwise of the alleged intended appeal. I accordingly have no recourse but to dismiss the Respondent/Applicant's application with costs to the Claimant.

It is so ordered.

Dated and delivered at Nairobi this 5th day of December 2017

Nzioki wa Makau

JUDGE