



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1349 OF 2010

ANNE KIRUMBA RIUNGU.....CLAIMANT

VERSUS

TELKOM KENYA LIMITEDRESPONDENT

RULING

By a Notice of Motion dated 1st July 2013 and filed in court under Certificate of Urgency on the same date the Applicant seeks the following orders;

1. **That this application be certified as urgent.**
2. **That this Honourable Court be pleased to order a stay of execution of the decree resulting from the Judgment delivered on 5th June, 2013 pending the hearing and determination of this application inter partes.**
3. **That this Honourable Court be pleased to order a stay of execution of the decree resulting from the judgment made on 5th June, 2013 and any other consequential orders arising there from, pending the hearing and determination of an intended appeal against the whole of the judgment by the Honourable Lady Justice Maureen Onyango on 5th June 2013.**
4. **That the costs of this application be provided for.**

The application is supported by the affidavit of CAROLINE NDINDI sworn on 18th July 2013 (which must be a wrong date as it was filed in court on 1st July 2013). In the affidavit CAROLINE NDINDI depones that she is the Legal Manager of the Respondent; that Judgment in this case was delivered on 5th June 2013 and in spite of finding that the Claimant was negligent in her duties the Judge proceeded to award her the sum of Kshs.1,735,198.96 as gratuity together with Shs.168,424.00 as one months' notice, that the applicant intends to appeal against the Judgment and has filed a Notice of Appeal and applied for typed copies of proceedings to facilitate preparation of Record of Appeal, that the Respondent has an arguable appeal. That if the Claimant executes the decree the application will be rendered nugatory, that the claimant has no known source of livelihood and may not be able to reimburse the Respondent should the appeal be successful, that the Applicant will suffer prejudice and that the applicant is willing to abide by any directions of the court.

The Claimant filed grounds of opposition to the application as follows;

1. **The application is an abuse of the court process, frivolous and filed in bad faith.**
2. **The application is fatally defective for want of a draft memorandum of appeal to inform the court of the Grounds to be relied upon in the intended Appeal.**
3. **In the absence of a Draft Memorandum of Appeal, no evidence or facts can show that the Respondent has an arguable appeal to warrant the order of stay. It is a perquisite pleading**

- before any grant of stay is given.
4. **That the contents of the application are contradictory to the Notice of Appeal. The Notice of Appeal is filed against the whole judgment while the contents of the application only relates to gratuity.**
 5. **That the Respondent has not clarified which loss it will suffer since a monetary decree is capable of being refunded.**
 6. **That Section 44 of the Employment Act does not even state that an Employee who is summarily dismissed is not entitled to benefits accruing from her contract of service.**
 7. **That the Employment Act overrides any contract of service between the parties.**
 8. **The application is premised on a wrong notion of law and fact since the Hon. Judge in her Judgement did not find that the Claimant's dismissal was lawful and proper.**
 9. **The Respondent has not stated which particular law has been breached by the holdings of the Judgement.**
 10. **That the application be dismissed with costs.**

The Application was heard on 15th July 2013 when Mr. Mate representing the Applicant argued that the Respondent has filed a notice of appeal, that the appeal has overwhelming chances of success as the court found that the Respondent had sufficient reason to take disciplinary action against the Claimant, that the appeal would therefore deal with the issue whether the Claimant was entitled to compensation in the form of gratuity. That the appeal will also deal with the issue whether the award of gratuity had the effect of rewriting the contract between the parties. That should the appeal succeed the Claimant will not be in a position to refund the decretal sum, that the Respondent is willing to deposit the decretal sum in an interest earning account pending the hearing and determination of the appeal. He referred the court to the bundle of Authorities filed by the Respondent in support of this application. That in **James Wangalwa & Another vs Agnes Naliaka Cheseto Bungoma Hcc Misc. App. No. 42 of 2011** and **Tarbo Transporters Ltd vs Absalom Dova Lumbasi Bungoma Civil Appeal No. 31 of 2012** the court was clear on the importance of preserving the right of appeal through grant of stay of execution pending appeal. That in **Margaret Wambui Magu V Rachel Njeri Nyawanga & Another Nairobi Hcc 1509 Of 2002** and **Attorney General of The Republic of Uganda vs EACJ African Law Society & Another EACJ Application No. 1 Of 2013**, the court was of the view that where there is a right of appeal the court needs to preserve the subject of appeal until the appeal is heard. That failure to annex draft Memorandum of Appeal is not fatal as was held by the court in **Henry Wanyama Khaemba vs Standard Chartered Bank (K) Limited Nairobi CA No. 67 Of 2008** and **Mukuna vs Abuoga Nairobi CA No. 95 Of 1987**.

Mr. Koceyo for the Claimant (who is the Respondent in the application) argued that failure to annex draft grounds of appeal is fatal as that is the only document which can show whether the appeal is arguable or not. Mr. Koceyo argued that **Henry Wanyama Khaemba case** and **Mukuma Case (Supra)** are not applicable to this court as the cases in this court are not civil cases, that this court has developed its own jurisprudence. He cited **Case No. 1123 OF 2012** in which the court held that it does not know whether or not there is an arguable appeal.

It was further argued for the Claimant that the Respondent has misapprehended the judgment, that there are 2 limbs to the judgment and that the claimant is entitled to prove only one limb. That the court held that there were grounds to take disciplinary action but the procedure was not fair, that the applicant has only addressed one limb which is in their favour but have in the whole application not mentioned what the court found wanting.

Mr. Koceyo further argued that the applicant has not shown that it will suffer irreparable loss as the extenuating factors have not been stated in the application. That money could not be termed irreparable loss.

Mr. Koceyo finally argued that the argument that the court has rewritten the contract is not correct as the Employment Act provides for the remedy. He argued that the Respondent only wants to delay the Claimant's enjoyment of the fruits of her Judgment.

I have considered the application with the supporting affidavit the grounds of objection and the authorities cited by the litigants. I have also considered the oral submissions made in court.

The grounds upon which the court can stay execution of a decree or order pending appeal have been will settled. First there must be an arguable appeal with a reasonable chance of success.

Once this is established, the court would then consider the other factors which are the preservation of the subject matter so that the appeal if successful is not rendered nugatory or that the applicant does not suffer irreparable loss or substantial damage.

In the present case the Respondent has not filed the grounds of appeal. However in the application it has been clearly demonstrated what the grounds of the intended appeal are.

The grounds of appeal are set out at paragraph 7 of the supporting affidavit of Caroline Ndindi as follows:-

“That I verily believe that the Applicant has an arguable appeal with high chances of success. In the premises, the Applicant’s appeal will be rendered nugatory if the orders sought herein are not granted for the following reasons.

- a. **The intended appeal will deal with the issue whether the Claimant was entitled to an award of gratuity in light of the court’s finding that the claimant was negligent in the performance of her duties.**
- b. **The intended appeal will deal with the issue whether the award of gratuity had the effect of rewriting the employment contract between the Applicant and the Claimant.**
- c. **The intended appeal will deal with the issue whether the Claimant was entitled to any compensation”.**

In the Judgment I found that there was sufficient reason for the Respondent to take disciplinary action against the Claimant but that the Respondent failed to prove that the termination was in accordance with fair procedure.

For a termination to be valid, there must be both valid reason and fair procedure. If any or both ingredients are missing then the termination is unfair. This is what is provided for in **Section 45 (1) and (2) of the Employment Act**. The Section is reproduced here below:-

“45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee’s conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure”.

Having found that the Respondent had not proved fair procedure, the termination was unfair as I did find. **Section 49(1)** as read together with **Section 50** of the **Employment Act** provides that once the court finds

termination unfair, the employee would then be entitled to:-

49. Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the

employee been given the period of notice to which he was entitled

under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract;

Clause 15 of the Claimant's contract of employment attached as Appendix AKR1(b)" provides for payment of gratuity as follows:-

15.1 Subject to the provisions of sub-paragraph (3) of this paragraph, on completion of the contract, the officer shall be granted a gratuity of 31% of the total salary payable to him under this agreement in respect of such contract including the amount of salary payable to him under this agreement in respect of any annual leave granted provided that where the officer, having exercised his option under paragraph 9(3) receives a terminal payment in lieu of leave he shall be granted at the same time a gratuity of 31% of the amount of that terminal payment.

15.2 The gratuity relating to salary earned up to the last day of service, together with the gratuity relating to the terminal payment (if any) will be paid to the last day of service. The gratuity relating to salary earned in respect of any period of annual leave granted on the completion of contract will be payable at the end of such period of leave.

15.3 If this agreement is terminated (otherwise than at the instance of the company under paragraph 17 or at the instance of the company under paragraph 18 or in circumstances in which the officer is deemed to have completed the contract) the officer shall not be granted gratuity under sub-paragraphs (1) or (2) or this paragraph.

Clause 18 provides as follows:-

18.1 Either party to this agreement may, at any time after the expiration of three (3) months after the commencement of this agreement terminate the agreement by giving to the other party three (3) months' notice in writing or by paying to the other party one (1) month's salary in lieu of such notice PROVIDED THAT notwithstanding that the officer has complied with the provisions of this paragraph he may not vacate his office until his notice of termination of employment has been accepted by the company.

18.2 If this agreement is terminated within three (3) months of its commencement otherwise than in accordance with the provision thereof, the party terminating the agreement shall be liable to pay to the other party as liquidated damages three month's salary.

18.3 On the termination of this agreement under this paragraph at the instance of the Company the officer shall be deemed to have completed a tour of service on the date of such termination and no salary or allowance whatsoever shall be payable for the unexpired period of the contract.

My understanding of the provisions of **Section 49 (1) (a) and (b)** read together with clause 15 and 18 of the Claimants Employment Contract is that once I find that the Claimant was unfairly terminated, she is automatically entitled to the gratuity up to the date of termination and to notice. The only benefit I would not have granted her had she prayed for it is compensation for unfair termination. This would be because of her contribution to the circumstances that led to the termination of her employment. This does not however affect notice and gratuity which are entitlements under her contract of employment which I must give to her once I find the termination to have been unfair.

In the application the Claimant has completely ignored the fact that the termination of the Claimant's employment was found to be unfair on the basis that the Respondent failed to prove fair procedure in her termination. The application only dwells on validity of reason.

For this reason I find that the Applicant has not shown that their intended appeal has any chance of success.

Having found as above, I do not have to consider whether the Applicant merits stay of execution on the grounds of the appeal being rendered nugatory or the Applicant suffering substantial loss.

For the forgoing reasons I dismiss the application with costs.

The Applicant may if not satisfied with this ruling apply for stay at the Court of Appeal.

Orders accordingly.

Read in open Court this **20th** day of **March 2014**

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Kako holding brief of Koceyo for claimant

No appearance for Respondent