REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 240 OF 2016 (UR 192/2016)

PATRIOTIC GUARDS LTD. …….APPELLANT

AND

JAMES KIPCHIRCHIR SAMBU …….RESPONDENT

*(Being an application for stay of execution of the orders issued in Nairobi Employment and Labour Relations Court of Kenya in the ruling delivered on 21st December, 2015 (**Nzioki wa Makau, J**.) pending hearing and determination of the current appeal pursuant to Rules 5(2)(b) of the Court of Appeal Rules* in **ELRC Cause No. 2535 of 2012)**

****

RULING OF THE COURT

The respondent **James Kipchirchir Sambu**, was employed by the applicant, **Patriotic Guards Limited**, as its Training Officer. That employment relationship fell out for various reasons and the respondent sued the applicant at the Employment and Labour Relations Court, Nairobi, seeking various remedies. A trial was conducted before Nzioka wa Makau, J., who in a judgment delivered on 3rd November, 2015 found for the respondent and entered a judgment for Kshs.3,568,210/= on various heads set out in the judgment. The hearing in that court was concluded without hearing the applicants defence because at the hearing, neither the applicant nor its advocate was present in court. The applicant filed an application to set aside that judgment but the same judge did not find merit with the application and dismissed it vide a ruling delivered on 21st December, 2015. The applicant filed a Notice of Appeal against that ruling and has filed an appeal being Civil Appeal No. 20 of 2016.

The applicant filed in the said court an application for stay pending hearing and determination of the said appeal. That application was heard by M. Mbaru, J., who, in a ruling delivered on 13th October, 2016 ordered that:

> ***"(a) There shall be a deposit of the entire decretal sum in a joint, interest earning account of both Advocates for the parties – Namada & Co. Advocates for the claimant and Wachakana & Co. Advocates for the respondent – within the next 14 days.***
>
> ***b. Orders above (a) shall apply pending the hearing and determination of Civil Appeal No. 20 of 2016 before the Court of Appeal.***

c. Where the respondent fails to move the court as (b) above within 60 days, orders above shall automatically lapse.

d. Costs herein to the claimant."

It is common ground that the conditional stay of execution granted by that court pending appeal has not been complied with.

In the Notice of Motion before us brought under **rules 5(2)(b), 41** and **47** of our rules, the applicant applies in the main that we stay the ruling and orders of 21st December, 2015 pending hearing and determination of the said appeal and that we order a stay of execution of the judgment delivered on 3rd November, 2015. It is said in the grounds in support of the Motion and in an affidavit of Titus Kigen, the managing director of the applicant, that proclamation of the applicants goods has taken place; that the appeal will be rendered nugatory absent stay and that there is an arguable appeal in that the learned trial judge erred in not finding that mistake of counsel should not be visited on the advocates' client.

In submissions before us when the Motion came up for hearing, Mr. Wachakana, learned counsel for the applicant, submitted that there were contradictory orders given by the trial court, one giving an unconditional stay of execution while the other gave a conditional stay of execution. According to learned counsel the applicants' constitutional rights had been breached because judgment was delivered by the trial court without that court taking evidence of the applicant.

Mr. Wathome Ndanu, learned counsel for the respondent, submitted that the applicant, who was armed with a conditional stay of execution from the trial court, was not entitled to another order from this Court.

The principles that govern grant of stay of execution of judgments or rulings from the High Court pending appeal are well settled. To be successful an applicant must, firstly, show that it has an arguable appeal which is the same as to say that the appeal is not frivolous. Such an applicant, upon satisfying that principle, has the additional duty to demonstrate that the appeal, if successful, would be rendered nugatory in the absence of stay – see, for an enunciation of the principles governing grant of stay of execution pending appeal to this Court, the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others Civil Application Nai. 258 of 1999** (unreported) where the following passage appears:

"The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case -----"

Has the applicant here demonstrated that it has an arguable appeal?

As we have already shown in this ruling the applicant applied for, and was granted by the trial court a stay of execution pending appeal. A condition was given in that the entire judgment sum be deposited in an interest earning account in the name of the advocates of the parties. That condition has not been met by the applicant and no explanation has been offered why the applicant has not complied with the condition. The applicant chose to apply for a stay of execution of the judgment of the trial court and received favourable orders by that court but instead of complying with orders given chose to file an application for stay of execution to this Court. Although we recognize that we have our jurisdiction on such an application, is original we cannot be blind to the fact that an applicant who is armed with orders of a lower court but who chooses to file a similar application for stay of execution may very well be abusing the process of the court. We cannot stay the order of 21st December, 2016 dismissing the application to set aside the judgment. There is an appeal against it, vide appeal No. 20 of 2016. There is stay of execution, albeit a conditional one. Once dismissal has taken place, and an appeal has been preferred, what is there to stay? Clearly the application is misplaced.

It has not been demonstrated to us to the required standard that there is any arguable point in the appeal. Having so found we need not go into the second limb of the requirement on whether the appeal would be rendered nugatory.

The Motion before us has no merit and is accordingly dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 24th day of February, 2017.

M. K. KOOME

……...

JUDGE OF APPEAL

G. B. M. KARIUKI

……...

JUDGE OF APPEAL

S. ole KANTAI

……...

JUDGE OF APPEAL

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

DEPUTY REGISTRAR