IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & KANTAI, JJ.A.) CIVIL APPLICATION NO. 82 OF 2016 (UR 62/2016)

IN THE MATTER OF THE INTENDED APPEAL

BETWEEN

KENYA AIRWAYS LIMITED..... APPLICANT

VERSUS

PATRICK WAWERU MWANGI..... 1ST RESPONDENT

HOUSING FINANCE CO. KENYA LIMITED..... 2ND RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Order of the Employment & Labour Relations Court at Nairobi(Maureen Onyango, J.) dated 21st January, 2016 in Industrial Court Cause No. 1281 of 2011)

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RULING OF THE COURT

In a memorandum of claim filed at the then Industrial Court of Kenya at Nairobi, the 1st respondent, ***Patrick Waweru Mwangi*****,** asked that court for various orders including a declaration that his continued "*grounding*" be declared null and void; that he be reinstated to duty with immediate effect; and that various payments be made to him. The claim was denied by the applicant, ***Kenya Airways Limited*** and the 2nd respondent ***Housing Finance Company Limited***, entered the theatre in the course of the proceedings.

The claim was heard by ***Maureen Onyango, J.,*** who in a judgment delivered on 12th Feburary, 2016, found that the applicant had contravened a Collective Bargain Agreement and that, therefore, the grounding of the 1st respondent was unlawful. The learned Judge ordered the applicant to immediately reinstate the 1st respondent to his office as a pilot and restore him to his flying duties. The learned Judge further ordered that the 1st respondent submit himself to medical assessement by a consultant to be agreed between the 1st respondent and the applicant. Those orders are the subject of an intended

appeal.

By notice of motion dated 30th March, 2016, brought under ***rule 5 (2) (b)*** of this ***court's rules,*** the applicant asks us to stay execution of the said judgement and decree pending hearing and determination of an intended appeal. In grounds in support of the motion the applicant states, *inter alia*, that it was wrong for the learned Judge to award the 1st respondent salary for a period when he did not work; that the judgment was delivered over one year after the trial without notice to the applicant; that it was wrong for the learned Judge to order the applicant to recall the 1st respondent back to work in disregard of safety to passengers; that if stay is not granted, the applicant will not only expose passengers to imminent harm but will also suffer irreparable loss and damage as the 1st respondent will not be able to pay consequential damages the applicant may suffer and that that would render the intended appeal nugatory; that the interest and safety of the general public will be greatly prejudiced if a stay of execution is not granted given that if the 1st respondent were to resume flying duties, he would put the lives and safety of passengers at risk because of doubts raised on his health, misconduct, judgment and temperament and that the intended appeal is arguable and would be rendered nugatory if stay is not granted.

Lucy Muhiu, head of Employee Relations in the applicant company swore an affidavit in support of the motion . It repeates the grounds that we have already set out. She depones in addition to the grounds that a trade union to which the 1st respondent is a member has by a letter dated 15th March, 2016, directed the applicant to recall the 1st respondent back to work; that there is a real danger of the 1st respondent executing the judgement in respect of payment of over 4 years' salary for the duration the 1st respondent was on suspension when he did not work. The deponent says in the affidavit that the sum in the decree totals Kshs. 40 Million and if paid the 1st respondent will be unable to refund it if it was found that the sum was wrongly awarded.

It is further deponed:

".....

16. That the interest and safety of the general public will be greatly prejudiced if a stay of execution is not granted given that if the 1st respondent who is a pilot were to resume flying duties, he would without doubt put the lives and safety of passengers at great risk given the doubts raised on his health, misconduct, judgment and temperament.

17.That the Applicant has an operating license with the primary duty to ensure safety of its customers and crew. In the circumstances of this case, the Applicant is unable to satisfy its conscience as to its safety commitments if it were to allow the 1st respondent to resume flying duties.

18. That following the much publicized fatal crash of the Germanwings Flight 9525, a crash that is said to have been deliberately caused by a pilot who was mentally unstable, all airlines have been compelled to satisfy themselves as to the health conditions of the entire flight crew as this would ensure the safety of passengers and equipment.

19. ..... ".

The 1st respondent swore a replying affidavit on 9th June, 2016. He says amongst other things that he has a flying licence issued by the regulator; that the applicant was ordered to recall him back to duties and train him to enable him go back to active flying; that the application before us has been overtaken by events as the orders of the trial court are being complied with; that he has been declared medically fit to carry out his duties as an airman; that he has been flying aircrafts for the last 6 months for leisure and charity; and that the application does not meet the threshold to merit grant of stay of execution.

The motion came for hearing before us on 13th June 2016, when ***Mr. Chacha Odera*** learned counsel appeared for the applicant. ***Mr. Nyangayo Onyango***, learned counsel appeared for the 1st respondent and ***Mr. Edwin Abuya***, learned counsel appeared for the 2nd respondent.

Mr. Odera submitted that the intended appeal was arguable because it had been agreed between the parties that the 1st respondent submit himself to medical examination by a doctor to be picked from a choice of four; that the 1st respondent did not do so but instead went to consult with a doctor who was not in the agreed list. Learned counsel was of the view that the 1st respondent could not resume duties having failed to attend for medical consultation as agreed by the parties. Learned counsel submitted further that the learned Judge was wrong to order reinstatement of the 1st respondent when it had been shown that the 1st respondent had not attended to the doctor. Learned counsel also thought that it was arguable whether the judgment delivered over one year after trial was valid without reason being given in accordance with Civil Procedure Rules. Learned counsel also faulted the learned Judge for ordering in the judgment that a medical consultant be agreed on when such agreement had already been reached. According to counsel, the learned Judge took over contractual duties which were between the parties and which the court was not entitled to do. On the nugatory aspect of the application, it was learned counsel's view that air safety was of paramount importance and in any event, that the sum ordered would not be recovered if paid, thus rendering the intended appeal nugatory.

Mr. Nyangayo submitted that the motion had been overtaken by events because the 1st respondent had seen a doctor who had said that he was fit to fly. According to counsel, the doctor who had certified the 1st respondent as fit to fly was qualified to give such certification. According to counsel, it had not been demonstrated that the 1st respondent could not pay back a sum in the decree which according to counsel was 97 million. For all this, we should dismiss the motion.

Mr. Abuya informed the court that he had no interest either way and did not take sides.

In a brief reply, ***Mr. Odera*** stated that proceedings from the lower court were ready and an appeal was being filed. He faulted the learned Judge for not ordering in the judgment payment of any specific sum when the claim before him was one where special damages were claimed.

The principles that we apply in applications for stay of execution pending appeal are now well settled. An applicant, to be successful, must, firstly, show that the appeal, if filed, or the intended appeal, is arguable which is to say that it is not frivolous. Such an applicant must in addition, show that the appeal, or the intended appeal, if successful, would be rendered nugatory absent stay. These principles have

been well enunciated in many judicial pronouncements that have come forth from this Court such as the case of ***Githiaka v Nduriri [2004] 2 KLR 67***. A useful discussion on those principles can be found in the earlier case of ***Ruben & 9 Others v Nderito & Another [1989] KLR 455*** where the following observation is made:

"In dealing with Rule 5(2) (b) applications, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court; the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (a new) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial Judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful would be rendered nugatory. See Stanley Munga Githunguri -vs-Jimba Credit Corporation Limited, Civil Application Nai. 161 of 1985".

We note from page 499 of the record of the motion that a meeting was held on 11th May, 2011, attended by amongst others, management staff of the applicant, the 1st respondent and representatives of the 1st respondent's union where it was agreed in respect of grounding of the 1st respondent that the 1st respondent would consult with one of four named doctors. The minutes show that the 1st respondent was handed a referral letter and he agreed to attend to one of the four doctors for assessment and possible treatment. The 1st respondent, instead of attending to one of the agreed doctors says in his replying affidavit:

" ...

16. THAT the medical doctor, Doctor Muinde examined me and certified me fit to fly.

17. ....".

This was not one of the four agreed doctors.

In his judgment delivered on 12th February, 2016, about 5 years after the agreement made by the parties on referral of the 1st respondent to visit one of four named doctors, the learned Judge directs as a condition for reinstatement of the 1st respondent by the applicant to his office as a pilot:

"...The claimant must as a condition submit himself for medical assessment to be agreed upon by the claimant represented by KALPA and respondent...".

Mr. Odera, learned counsel for the applicant believes that it is an arguable point whether the learned Judge could make that order when the parties had already agreed on referral to named doctors. That is, indeed, an arguable point. The court that will hear the intended appeal would have to decide whether the learned Judge took over contractual duties of the parties and whether she had authority to do so. As has been held by this Court - see, for instance, the case of ***Yellow Horse Inns Limited v A. A.***

***Kawir Transporters & 4 Others* [2014] eKLR** - an applicant need not show a multiplicity of arguable points as one arguable point will suffice. Also, the applicant need not show that the arguable point will succeed.

What about the nugatory aspect of the matter that a successful applicant must demonstrate to be entitled to an order of stay"

The applicant says in the affidavit, and in submissions before us, that safety of passengers is of paramount importance. It is also stated that the money aspect of the decree is large and colossal and that the 1st respondent would not be able to refund the same were the intended appeal to succeed. We have not seen a viable answer by the 1st respondent to these twin issues. It is obvious that the applicant, a national carrier operating aircraft in Kenya and elsewhere, has a duty to ensure that aircraft are safely maintained for the safety of those aircraft, crew and passengers. The 1st respondent was suspected of suffering a medical condition that may make him unsuitable to carry on his duties as an aircraft pilot. He agreed to see one of four doctors for medical assessment but he did not do so. In that event, we agree with the 1st applicant that there is a genuine fear that the 1st respondent may not operate aircraft with the safety and caution expected of a pilot. That alone would satisfy the second limb on the requirements on an application such as this one, but we may add that the applicant has shown to our satisfaction that the 1st respondent may not have ability to pay back the sum of Kshs. 40,000,000/- (according to the applicant) or Ksh. 97,000,000/- (according to the 1st respondent) from the decree if the intended appeal succeeded.

The applicant, who has satisfied both limbs of the requirements in an application for stay pending appeal is therefore entitled to the orders of stay. We therefore allow the motion dated 30th March, 2016, by ordering that the judgment delivered on 12th February, 2016, in ***ELRC No. 1281 of 2011*** be and is hereby stayed pending hearing and determination of the intended appeal. Costs shall be in the appeal.

Dated and delivered at Nairobi this 29th day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR