



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 24 OF 2018

SIMON OKWARO HABU.....PETITIONER

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

RULING

1. This is a ruling on application dated 8th November 2019 filed by the respondent seeking stay of execution pending appeal filed on 9th August, 2019.
2. Counsel for the applicant submitted that the appeal is in respect of the entire judgment; he submitted that the court ordered that the petitioner be graduated in the next graduation ceremony and the next graduation is on 29th November, 2019 and other than listing the petitioner for graduation, the applicant is required to pay damages of Kshs 250,000/=. He submitted that if the petitioner graduates, the appeal will be rendered nugatory.
3. Counsel cited four (4) authorities in support of the applicant's assertion that in a case like this the court should ensure that the upcoming appeal is not defeated. He submitted that that court is given discretion to ensure that a party who wants to exercise right of appeal is not defeated.
4. Counsel further submitted that the court of appeal in the case of **Bhat** gives principles for grant of injunction. Counsel submitted that this court has rendered itself in a right to have a party graduate but the Court of Appeal and Supreme Court may reverse the judgment of this court.
5. Counsel submitted that there would always be graduation ceremonies and that coming one is one of them; that if the court does not grant stay it will be difficult to process whether the petitioner should attain first class or second-class degree. That without marks it is difficult to implement the court order.
6. Counsel submitted that the applicant is willing to deposit the Kshs. 250,000/= in court.
7. In response, counsel for the respondent/petitioner opposed the application. Counsel submitted that the applicant must demonstrate substantial loss, which has not been demonstrated. She submitted that if the petitioner graduate, there is nothing to stop the applicant from recalling the degree.
8. She submitted that this court in its judgment delivered on 31st July 2019 clearly determined that the petitioner was entitled to graduate and took cognizance of the fact that for five (5) years, the petitioner has been denied the opportunity to graduate and any further delay will deny him the opportunity to get employment.
9. Counsel for the petitioner further submitted that the court need to consider whether the applicant has furnished security. She cited the case of **John Kamau Waweru Vs Joseph Muriu Waithaka C.A. No.83 of 2016** where **Judge Mulwa** held that it is not enough for a party to say he is willing to deposit security.
10. Petitioners Advocate further submitted the application has been brought late; that judgment was delivered on 31st July, 2019 in the presence of both counsels and the applicant only thought of filing this application after the petitioner visited their offices on 6th November, 2019; that the application has not been brought in good faith, that it is brought to circumvent the rights of the petitioner.
11. In a rejoinder, counsel for the applicant submitted that the application has been expedited; that it has been brought within three (3) months from date of judgment. On deposit of security, counsel submitted that the applicant is waiting for court to render itself then comply. He submitted that the petitioner may have suffered by failing to graduate but the matter is still subject of litigation.

ANALYSIS AND DETERMINATION

12. I have considered arguments by both parties herein.

13. **Order 42 Rule (6)** of the **Civil Procedure Act 2010** provide that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

- i. substantial loss may result unless the order was made.**
- ii. the application was made without unreasonable delay.**
- iii. such security as the court may order for the due performance of such decree or order must ultimately be binding on him has been given by the applicant.**

14. I wish to consider the applicant has established the above conditions to the satisfaction of the court to warrant grant of order for stay of execution pending appeal.

15. In respect of substantial loss, the applicant has submitted that if the petitioner is allowed to graduate, the appeal will be **rendered** nugatory. I take judicial notice of the fact that universities have recalled degrees for grandaunts who are found later not to have obtained the requirements for a particular degree. Egerton University it will not be right therefore to say it will not have remedy in the event the appeal succeeds. It has option of recalling the degree. In respect to payment of damages of Kshs. 250,000/=, the applicant has indicated that it has no issue depositing the amount in court. If deposited in court, the amount can be released to applicant if appeal is successful. Applicant will therefore suffer no loss if the money is not paid to petitioner but deposited in court awaiting determination of appeal.

16. In respect of delay in filing this application, counsel has indicated that it has been filed expeditiously, he has admitted it is filed three (3) months after judgment. There is no dispute that both Advocates were present in court when judgment was delivered. I do not take three (3) months as short period for filing the application. If upon delivery of judgment the applicant intended of appealing against the judgment and had difficulties in complying with court order, the application should not have taken three (3) months to be filed.

17. My view is that there is delay in filing the application; and the filing may have been prompted by visit of applicant's offices by the petitioner to follow up compliance of the order in respect to being included in next week 29th November, 2019 graduation ceremony. The applicant has not demonstrated good faith in filing this application.

18. On difficulty in entering marks, as I observed in the judgment, the petitioner was not to blame for the missing marks. It was enough for the student to demonstrate that he resat the unit. It is for the university to follow up with the lecturer concerned for submission of the marks.

19. On deposit of security, the applicant has expressed commitment to deposit the award of Kshs. 250,000/= in court pending appeal.

20. Counsel for the applicant while admitting that the petitioner has suffered due to delayed graduation said that there would be more graduations to come; I find this to be insensitive to the petitioner's plight. The petitioner has been delayed in graduating for five (5) years, the university has an option of recalling the degree in the event the appeal succeeds while the petitioner may not be enrolled in any employment due to lack of a degree. The balance of convenience here tilts on the petitioner and it would be in the interest of justice to allow the petitioner to graduate in the next graduation ceremony which as confirmed by the applicant is scheduled for 29th November, 2019

21. From the foregoing, I find that that the applicant has not demonstrated that it is deserving grant of stay order pending appeal.

22. **FINAL ORDERS**

- 1. I decline to stay graduation of the petitioner herein.**
- 2. Petitioner to be listed for graduation in the coming graduation scheduled for 29th November, 2019.**
- 3. Kshs. 250,000/= to be deposited in court within thirty (30) days from today's date pending hearing and determination of appeal.**
- 4. Costs of this application to the petitioner.**

Ruling dated, signed and delivered at Nakuru this 26th day of November, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Court Assistants – Schola and Jeniffer

M/s Sambu holding brief for Kisila for respondent/applicant

M/s Ogange for petitioner/respondent