



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 596 OF 2017

JANE KIONGO.....1ST RESPONDENT/1ST PETITIONER
LYNET L. KAGEHA.....2ND RESPONDENT/2ND PETITIONER
SUSAN NYAWIRA.....3RD RESPONDENT/3RD PETITIONER
JANET M. YULU.....4TH RESPONDENT/4TH PETITIONER
ALICE N. KAMBI.....5TH RESPONDENT/5TH PETITIONER
GRACE N. OGETO.....6TH RESPONDENT/6TH PETITIONER
BELINDA W. CHEGE.....7TH RESPONDENT/7TH PETITIONER
SUSAN ANINDO A.....8TH RESPONDENT/8TH PETITIONER
BEUTRIS NZAMBU.....9TH RESPONDENT/9TH PETITIONER
ANNE N. THIGA.....10TH RESPONDENT/10TH PETITIONER
NANCY WANJOHI.....11TH RESPONDENT/11TH PETITIONER
GRACE NJENGA.....12TH RESPONDENT/12TH PETITIONER
AGNES NJERU.....13TH RESPONDENT/13TH PETITIONER
EUNICE KARWIRA.....14TH RESPONDENT/14TH PETITIONER
KIARA JULIA KENDI.....15TH RESPONDENT/15TH PETITIONER
MOHAMMED MUMINA HIRBO.....16TH RESPONDENT/16TH PETITIONER

VERSUS

LAIKIPIA UNIVERSITY.....1ST APPLICANT/1ST RESPONDENT
COMMISSION FOR HIGHER
EDUCATION.....2ND APPLICANT/2ND RESPONDENT
CABINET SECRETARY
FOR EDUCATION.....3RD APPLICANT/3RD RESPONDENT

COMMISSION FOR

UNIVERSITY EDUCATION..... 4TH APPLICANT/4TH RESPONDENT

THE CHANCELLOR

LAIKIPIA UNIVERSITY.....5TH APPLICANT/5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

THE KENYA NATIONAL QUALIFICATION AUTHORITY.....7TH RESPONDENT

RULING

1. Laikipia University, the Commission for Higher Education, the Cabinet Secretary for Education, the Commission for University Education, and the Chancellor of Laikipia University were the 1st to 5th respondents in the petition. They are the respective 1st to 5th applicants in the notice of motion dated 26th July, 2019. The key prayer they seek through the said application is an order staying the judgement delivered by this Court (Mwita, J) on 5th July, 2019 pending the hearing and determination of an appeal they have filed in the Court of Appeal. The 1st-16th petitioners are the respective 1st-16th respondents in the application. For avoidance of confusion I will refer to 1st-16th respondents in this application as the petitioners.

2. The application is supported by the grounds on its face and an affidavit sworn on the date of the application by the applicants' advocate Mr. Peter Raydon Mwangi. The applicants' case in brief is that they have an arguable appeal and unless stay of execution of the judgement is granted the appeal will be rendered nugatory. Counsel for the applicants averred that the judgement compels the 1st Applicant to include the petitioners' names in its next graduation ceremony despite evidence being tendered that they did not undertake all the mandatory units and have therefore not satisfied the requirements for graduation.

3. It is the applicants' deposition that they have filed an appeal and the same will be rendered nugatory if the petitioners graduate before the appeal is heard and determined. They also state that their appeal has high chances of success and they will suffer substantial loss if the execution of the judgement is not stayed.

4. The petitioners opposed the application through a notice of preliminary objection dated 6th September, 2019. The application is opposed on the grounds that this court has no jurisdiction to hear the application; that the advocate who swore the affidavit in support of the application had no knowledge of the averments and further that the supporting affidavit violates the ethical prohibition against counsel testifying on behalf of a client; that the application is mischievous, misconceived and made in bad faith with a view to delaying the petitioners' right to justice considering that they are meant to graduate in December, 2019; and that the application is frivolous, vexatious and an abuse of the court process. The court is therefore urged to dismiss the application with costs to the petitioners.

5. The applicants' counsel filed submissions in support of the application. Counsel for the applicants submitted that in deciding an application for stay of execution pending appeal, the court essentially weighs the pros and cons of granting or not granting the order. According to counsel, the factors to be taken into account are the need for expeditious disposal of cases, the merits of the intended appeal, the optimum deployment of judicial resources and whether the application has been brought expeditiously. Counsel supported this assertion by referring to the decision in the case of **Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000** as cited in the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR**.

6. Counsel for the applicants outlined the principles governing the grant of stay pending appeal and submitted that an arguable appeal was defined in the case of **Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** as cited in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** as one in which an applicant has shown that **"there is at least one issue upon which the Court should pronounce its decision"**. Counsel contended that the applicants have demonstrated through the application, the supporting affidavit and the memorandum of appeal annexed thereto that there are issues for the determination of the Appellate Court and they have therefore successfully discharged the onus of establishing an arguable appeal.

7. It was the submission of counsel for the applicants that the application was filed without delay. He relied on the case **M'ndaka Mbiuki V James Mbaabu Mugwiria [2016] eKLR** for the statement that:-

"Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed."

Counsel pointed out that the judgement was delivered on 5th July, 2019 and this was immediately followed by the filing of a notice of appeal on 11th July, 2019. It was therefore his assertion that the court was moved without any delay whatsoever.

8. The applicants stressed that it is in the interest of justice to grant the orders sought. They contended that unless the execution of the judgement is stayed, their appeal, if successful will be rendered nugatory resulting in substantial loss. According to counsel for the applicants, what amounts to substantial loss was defined in the case of **Antoine Ndiaye v African Virtual University Nairobi HCCC No. 422 of 2006** where the Court stated that:-

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

9. The applicants contended that if stay is not granted the petitioners will graduate without completing the entire course work and this would set a bad precedent from which the appellants will not be able to recover. Further, that if the appeal succeeds the degree certificates will have to be recalled and this will be costly to all sides. It was therefore their view that the best approach is to stay the judgement and allow the appeal to proceed to conclusion.

10. Finally, counsel for the applicants submitted that the judgement, not being a monetary one, does not attract an order for provision of security. Counsel sought support for this proposition from the case of **Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR** as cited in the case of **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & Another [2017] eKLR** where it was held that:-

“As this is not a monetary decree, no financial obligations are involved on either side, the issue of security does not arise...”

11. Responding to the contention by the petitioners’ counsel that the affidavit sworn in support of the application is defective as it was sworn by the applicants’ counsel, counsel submitted that the said affidavit is proper and within the law. In support of the assertion, reliance was placed on the case of **Regina Waithira Mwanti Gitau v Boniface Nthenge [2015] eKLR** as cited in the case of **Francis Kimutai Bii v Kaisugu (Kenya) Ltd [2016] eKLR** where it was stated that:-

“However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective.”

12. Counsel for the petitioners did not file written submissions but made brief comments when the application came for hearing on 9th October, 2019. He submitted that the application is incompetent and unmerited. He based his case on the grounds that the affidavit in support of the application was sworn by the applicants’ advocate and that there is no memorandum of appeal annexed to the affidavit sworn in support of the application.

13. Counsel for the petitioners stressed that his clients are women who decided to go back to school and the judgement had directed that they should graduate in the next graduation which may take place any time. Further, that his clients are members of a marginalized group who have suffered discrimination in the past. He therefore prayed for the dismissal of the application and the award of costs to the petitioners.

14. It is appropriate to consider the procedural issues raised against the application by the petitioners before delving into the merits of the application. One of the grounds of objection in the petitioners’ preliminary objection is that this court has no jurisdiction to hear the application. No elaboration was forthcoming from the petitioners’ counsel at the hearing. I therefore do not understand on what basis the jurisdiction of this court is questioned. For avoidance of doubt, this court being the court whose decree is being appealed, is empowered by Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 to order stay of the decree pending appeal.

15. Another issue taken up by the petitioners’ counsel is that the application is defective as it is supported by an affidavit sworn by the applicants’ counsel. This concern is sufficiently answered by the decision in the case of **Regina Waithira Mwanti Gitau v Boniface Nthenge [2015] eKLR**. An advocate can swear an affidavit in respect of the facts that have come to his knowledge in the course of representing a client. He can also make averments in regard to the law. This is what the applicants’ counsel has done. There is therefore no merit in the objection to the application by the petitioners on this ground.

16. The principles which guide courts in deciding an application for stay pending appeal were pronounced by the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** as follows:-

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

17. In the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR**, the Court of Appeal restated the principles governing the grant of an order of stay pending appeal as follows:-

“10. The principles governing the exercise of the court’s jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:-

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,**
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”**

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31).”

18. The Court of Appeal further cited its decision in the case of CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4 where it was held as follows:-

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

19. Did the applicants bring the application promptly? The applicants filed their application dated 25th July, 2019 on 19th August, 2019. The application was therefore filed about one and half months after the delivery of the judgement on 5th July, 2019. Annexed to the affidavit is a notice of appeal dated 10th July, 2019 and served upon this court on 11th July, 2019. It is therefore clear that the applicants immediately declared their intention to appeal upon the delivery of the judgement. The filing of the application approximately one and a half months after the delivery of the judgement cannot be termed as inordinate in the circumstances of this case. I therefore hold and find that the application herein was filed without undue delay.

20. Do the applicants have an arguable appeal? In considering whether an arguable appeal has been established by an applicant, the court should not go into the details of the applicant’s arguments least it prejudices the appeal. In its decision in Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR, the Court of Appeal warned that:-

“We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge.”

21. The applicants’ main complaint against the judgement of this court is that the petitioners have not met the requirements for the award of certificates and this court acted in error by compelling the applicants to award the certificates to the petitioners. Whether or not that argument will be upheld by the Court of Appeal is not an issue for the consideration of this court. Their claim in itself satisfies the requirement for the disclosure of an arguable appeal. In the case of Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR, the Court of Appeal defined what amounts to an arguable appeal by stating that:-

“On the first aspect as to whether the intended appeal is arguable and not frivolous, we restate this court’s decision in Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001 wherein the Court addressed what is considered to be an arguable appeal thus,

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicant. (See Kenya Railways Corporation v. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012 and Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No.NAI.256 of 2013).”

Applying the stated law to the facts of this case, it becomes apparent that the applicants have an arguable appeal. In the circumstances I hold and find that they have surmounted the condition that required them to establish that they have an arguable case.

22. Before an order of stay of execution pending appeal is granted, another condition an applicant needs to meet is to show that irreparable loss will be suffered if the order is not granted. The applicants’ case is that the execution of the judgement will result in award of university certificates to undeserving persons and this will be damaging to the 1st Applicant’s reputation. In his oral submissions made at the hearing of the application on 9th October, 2019, Dr. Khaminwa for the petitioners submitted that granting stay will amount to denying the petitioners an opportunity to graduate.

23. How will the grant or denial of stay orders affect the parties? Denying the order will mean that the applicants will include the petitioners in their graduation list for this year. Such an action will result in instant justice to the petitioners. For the respondents it would

mean that their appeal will be rendered nugatory were it to succeed. It would indeed be expensive to recall certificates already issued. There is also the possibility that the petitioners may have used the papers to secure employment and other opportunities by the time the appeal is concluded.

24. In **Equity Bank Limited v West Link MBO Limited [2013] eKLR**, D. K. Musinga, JA observed that:-

“Courts of law exist to administer justice and in doing so they must as of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met.”

In the case before me the petitioners are entitled to enjoy the fruits of their judgement. This right should, however, be weighed against the applicants’ right of appeal. Execution of the judgement in the circumstances of this case may result in irreversible consequences which may extinguish the applicants’ right of appeal. A successful appeal will be of no use to the applicants in the circumstances of this case. As such, I find that this is a case warranting the grant of the order sought by the applicants.

25. As was stated by the Supreme Court in the case of **Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR**, the key purpose of an order of stay pending appeal is to preserve the substratum of an appeal, or an intended appeal. The Supreme Court citing one of its decisions explained the purpose of Rule 5 (2) (b) of the Court of Appeal Rules of 2010 as follows:-

“It is clear to us that Rule 5 (2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellants, in consonance with principles developed by that Court over the years.”

26. Should any conditions be attached to the grant of the orders of stay? No award of damages was made in the judgement. The 1st Applicant is an established university and I do not foresee the difficulty they will have in complying with the judgement of the Court of Appeal, if the outcome of the appeal will go against the applicants. In the circumstances I will not attach any conditions to the order of stay.

27. In conclusion, I find that the applicants’ application for stay pending appeal is merited and I allow it. There shall therefore be stay of the judgement delivered by this Court on 5th July, 2019 pending the hearing and determination of the applicants’ appeal.

28. On the issue of costs, I note the indication by counsel for the petitioners that his clients are ordinary Kenyans trying to improve their lot. Whatever the outcome of the appeal they will still have a continuing relationship with the applicants in the short term. In the circumstances, I direct each party to meet own costs of the application.

Dated, signed & delivered at Nairobi this 25th day of November, 2019.

W. Korir,

Judge of the High Court