



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**MILIMANI LAW COURTS**

**PETITION NO. 574 OF 2017**

**DOUGLAS MOTURI NYAIRO.....PETITIONER**

**AND**

**THE UNIVERSITY OF NAIROBI.....RESPONDENT**

**RULING**

**Background**

1. The petitioner sought the following orders in the petition filed on 20<sup>th</sup> November 2017:

- i. A declaration that the petitioner’s fundamental rights and freedoms as enshrined under Articles 26, 27, 28, 35, 43 and 47 of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondent;**
- ii. A declaration that the petitioner is entitled to the payment of damages and compensation to be assessed by the Court for the violation and contravention of its fundamental human rights by the Respondent herein as provided for under Articles 26, 27, 28, 35, 43 and 47 of the Constitution of Kenya 2010;**
- iii. A compulsory order compelling the Respondent to unconditionally release to the Petitioner the original official transcripts and original official Master of Business Administration degree certificates.**

2. The petitioner’s claim was that the Respondent was withholding his Masters of Business Administration (MBA) degree certificate and transcripts despite the fact that he had satisfied all the requirements for the award of a degree in MBA having attended the respondent’s School of Business. On 27<sup>th</sup> June 2018 judgment was entered in favor of the petitioner for *inter alia*, a declaration that his constitutional rights has been violated and an award of damages of Kshs. 400,000/= together with costs thereby precipitating the filing of a Notice of Appeal and the instant application for stay pending appeal.

**Application for stay pending appeal**

3. In the application dated 6<sup>th</sup> July 2018 brought under Rule 32(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (hereinafter “**the Rules**”), the applicant seeks orders for stay of execution of the said judgment dated 27<sup>th</sup> June 2018 and all consequential orders pending the hearing and determination of the application herein and of the respondent’s/applicant’s intended appeal. The applicant attached copies of the notice of appeal and memorandum of appeal, as annexures ‘A’ and ‘B’ respectively in his affidavit in support of the petition.

4. The application was supported by the affidavit of **Prof. Isaac Mbeche** who averred that the respondent was aggrieved by this court’s judgment of 27<sup>th</sup> June 2018 and had already lodged a Notice of Appeal to the Court of Appeal. He stated that complying with the orders made in the impugned judgment requiring the respondent to release the petitioner’s original transcripts and MBA degree certificate within seven (7) days and to pay a sum total of Kshs. 480,000/- as damages and costs to the petitioner would render the appeal nugatory. He further averred that should the appeal succeed after the degree certificate is issued to the petitioner, it will be difficult to reverse the process and further that should the general damages and costs be paid to the petitioner, the applicant will not be able to recover the same from the petitioner. The applicant expressed fears that its officials may be cited for contempt of court unless stay of execution is granted. The respondent indicated that they are prepared to meet such reasonable conditions as to security as the Court may direct.

## The petitioner's response

5. The petitioner opposed the application through his replying affidavit dated 20<sup>th</sup> July 2018 whose contents were echoed by the petitioner's counsel in his submissions. The petitioner's case was that one of the orders whose execution the applicant seeks to stay is declaratory in nature and that this court is incapable of staying the same in view of the fact that the declaration has already taken effect on the day that it was issued. Counsel for the petitioner submitted that unlike Rule 42 (6) of the Civil Procedure Rules which gives conditions to be met for stay of execution pending appeal, Rule 32(3) of the Rules, under which the application is brought, grants the court an unfettered discretion in determining whether or not to grant orders of stay. The petitioner maintained that the proposed memorandum of appeal does not raise any triable issues and added that the applicant had not demonstrated that the appeal is arguable. It was the petitioner's case that he would suffer great prejudice if the application was allowed as his employment was under threat of termination, unless he produced his academic certificates, an eventuality that would expose his young family to untold suffering considering that he is the family's sole breadwinner.

6. The petitioner further argued that the appeal would not be rendered nugatory because the applicant's senate has the power of recalling and/or revoking the MBA certificate and transcripts should the appeal succeed. He submitted that the appeal will not be rendered nugatory in the event that it succeeds as the damages and costs can be recovered from his salary and assets. He attached a copy of his title deed to his replying affidavit to demonstrate that he was indeed a man of means capable of refunding the decretal sum should he lose in the appeal.

## Determination

7. I have considered the application together with the pleadings and submissions made by the parties' advocates. The main issue for determination is whether or not the applicant is entitled to an order of stay pending appeal. In considering whether or not to grant orders of stay of execution pending appeal, the court must be careful to ensure that it is not end up reviewing its own findings which are already the subject of the appeal. The purpose of the stay is to preserve the subject matter of the appeal so as not to render the appeal worthless. The court is required in the interest of justice to look at the complaint by the aggrieved party and establish whether there is an arguable appeal. The expression arguable appeal is not to say an appeal must succeed, but that the issues intended to be raised are not frivolous or farfetched.

8. The discretion donated to this court under Rule 32(3) of the Rules, is wide and unfettered as compared to the discretion granted under Order 42, Rule 6 Civil Procedure Rules. As was aptly observed by Otieno J. in the case of **Benjamin K. Kipkulei v County Government of Mombasa [2017] eKLR**, Rule 32(3) may be likened to Rule 5(2)b of the Court of Appeal Rules as both provisions give the court the power to grant stay as it deems fit.

9. In exercising the jurisdiction to grant stay under Rule 32(3) this court must consider whether the appeal is arguable and whether the appeal if successful would be rendered nugatory should stay be declined. On whether the appeal is arguable, the applicant raises among other issues the question of interpretation of Article 35. Without delving much into the details of the grounds of appeal, I find that the issue of whether or not it is arguable falls within the jurisdiction of the Court of Appeal which is to hear the intended appeal. I am guided by the holding of the Court in **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd** where it was observed that it is sufficient if a single *bonafide* arguable ground of appeal is raised.

10. Having found and declared, in the impugned judgment, that the petitioner's fundamental rights had been violated by the applicant, I find that an order staying the entire judgment would not be just as it would allow the applicant to continue perpetuating an illegality that has already been declared. Such an eventuality would inflict a greater hardship on the petitioner/decreed holder who is entitled to enjoy the fruits of his judgment. I am not convinced by the applicant's position that complying with the orders made requiring the respondent to deliver the petitioner's original transcripts and MBA degree certificate within seven (7) days and to pay a sum total of Kshs. 480,000/- as damages and costs to the petitioner would render the appeal nugatory. I find that the respondent's/applicant's senate has the power of recalling and/or revoking the MBA certificate and transcripts should the appeal succeed. I am guided by the decision of Lenaola J. (*ahw*) in the case of **Linus Simiyu Wamalwa v University of Nairobi & another [2015] eKLR** wherein he observed that transcripts were recalled by the university and later on reissued.

11. In considering whether or not to grant the stay the Court must take into account the principle of proportionality in that the Court must balance the competing interests in order to balance the right of the decree holder to access and reap the benefit of the decree against the otherwise undoubted right of the applicant to be heard on appeal and to ensure that should the applicant succeed, the outcome of the appeal is not reduced in real and tangible terms. This was the finding in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63**:

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.*

12. It must be appreciated that the successful party ought not to be kept away from enjoying the fruits of his judgment unless it is absolutely necessary to do so hence the applicant for stay ought to prove that substantial loss may result to the applicant unless the order is made. In this case I am satisfied that the petitioner has demonstrated, through the averments made in the replying affidavit and the attached title deed, that the applicant would be able to recover the said sum of Ksh. 480,000/- from his salary and/or assets.

13. As clearly appreciated by the parties, if the intended appeal is successful, the University would be entitled to recall the petitioner's degree certificate and cancel the same. It has not been alleged that this course of action would not be possible. I am of the view that the fears expressed by the applicant that it will be unable to recover the decretal sum or recall the degree certificate are unfounded and

farfetched since there was no tangible evidence that that is bound to happen especially taking into account the fact that the petitioner has established that he is not a man of straw.

14. This Court in seeking to do justice and balance both parties' interests deems it fair that the applicant should pay 50% of the decretal sum, that is Kshs. 240,000/- to the petitioner and the remaining 50% to be deposited in an interest earning account, with a reputable bank, to be held jointly by the advocates for both parties pending the hearing and determination of the intended appeal. For the avoidance of doubt, the applicant is required to deliver to the petitioner his MBA degree certificate and original transcripts within seven (7) days.

15. Accordingly I allow the instant application for stay of execution subject to the following conditions:

a) **That the applicant shall** unconditionally, and within 7 days from the date of this ruling hereof, release to the petitioner, the original transcripts and original Master of Business Administration degree certificate.

b) **That the applicant shall, within 15 days from the date of this ruling pay to the petitioner the sum of Kshs. 240,000 and deposit the remaining balance of Ksh. 240,000 in an interest earning account to be held in the joint names of the counsel for the petitioner and the applicant herein.**

c) **That the petitioner be at liberty to execute the decree in the event of default in any of the above stated conditions.**

d) **The costs of this application shall abide the outcome of the appeal.**

**Dated, delivered and signed in open court at Nairobi this 31<sup>st</sup> day of July 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:-**

Mr Oduor for the petitioner

Mr Akwabi for the respondent

Court Assistant - Kombo