



**Biegon v Kabarak University & 2 others (Petition 30 of 2019)
[2023] KEHC 18473 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION 30 OF 2019
HK CHEMITEI, J
JUNE 15, 2023**

BETWEEN

BEVERLINE BIEGON PETITIONER

AND

KABARAK UNIVERSITY & 2 OTHERS RESPONDENT

RULING

1. In its application dated 20th September 2022 the applicants pray for stay of execution of the judgement and decree of this court delivered on 23rd June 2022 and all the consequential orders thereto pending the hearing and determination of the intended appeal. The applicants further pray for costs and any other expedient orders.
2. The application is supported by the sworn affidavit of Chetalam C Purity advocate dated the same date.
3. In the said affidavit the deponent who is the counsel for the applicants avers that the applicants were dissatisfied by the judgement of this court which ordered *inter alia* that the respondent be allowed to graduate unhindered and slapped the applicants with damages of Ksh 500,000.
4. She deponed that the applicants have a strong and arguable appeal and that they should be allowed to prosecute it while holding in abeyance the said judgment. She states that if the stay is not granted, the applicant's stand to suffer loss and damage.
5. The respondent *vide* her sworn affidavit dated 11th October 2022 has opposed the application on the grounds among others that the affidavit in support of the application has been sworn by an advocate who has deponed on facts which are not within her knowledge. She could not substantiate the issues she has stated as she was not a director and or employee of the applicants.



6. She went on to state that the applicant has not met the threshold for grant of stay pending appeal and the whole application is simply meant to delay the enjoyment of the fruits of the judgement. She prayed that it be dismissed and the judgement be enforced.
7. Parties were directed to file written submissions which they have complied. The two rival submissions gravitate around the provisions of Order 42 rule 6 of the *Civil procedure rules*. Each of the parties is essentially persuading this court that they are or are not entitled to the orders sought.
8. Without belabouring the issues, it is clear that Order 42 rule 6(2) has three ingredients which one must prove before the orders are granted in his favour. The said rule states;

“No order for stay of execution shall be made under sub rule (1) unless—

 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
9. Are the applicants likely to suffer any loss should the application not allowed.? This must be proved by cogent or persuasive evidence and not mere averments. Looking at the matter herein I do not respectfully find that the applicants shall suffer any loss. The issue of the respondent’s academic journey with the applicant was clearly spelt out by the court in its judgement. The court found that the applicants had violated and therefore caused her to suffer loss.
10. In any case and as clearly submitted by the respondent the affidavit in support of the application has been sworn by a counsel who has deponed to facts which I doubt is within her knowledge. How is she for example able to explain the loss the applicants will suffer if the application is disallowed yet she is not a director and or employee or servant of the applicants?
11. Peradventure the Court of Appeal finds that the applicants were correct then corrective administrative measures will still be undertaken by the applicants. Otherwise I find the averments that it will suffer loss without any evidence spurious.
12. The issue of providing security in my view is not germane. The applicant is a well and respected private university and I do not think it is necessary to ask it to provide any security pending appeal.
13. Aside from this however, it is the view of the court that the applicant ought to comply with the courts decree including the payment of Ksh 500,000. There is no evidence that the applicant will not be able to pay the same. Nonetheless so as not to prejudice any of them, the said amount shall be deposited in a joint interest account between the counsels on record.
14. The argument about the delay in filing the application has been explained by the applicants satisfactorily. This court is aware that Hon Lady Justice Ngetich was transferred to Kiambu from Nakuru and administratively it may not have been possible to secure the court file in advance to permit the applicants lodge their application.
15. In the premises, the court makes the following orders;
 - (a) The application is dismissed with costs to the respondent.
 - (b) Pending the hearing and determination of the appeal the applicants shall within 30 days from the date herein deposit in a joint interest earning account of the two counsels on record acting



for the applicants and the respondent the sum of Ksh 500,000 and in default execution to issue forthwith.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH JUNE 2023.

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H. K. CHEMITEI

JUDGE

