



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 13 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

AND

THE TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

EX PARTE APPLICANTS:

IDRIS GARAT NOOR

ABDULLAHI OMAR HASSAN

ABDIRASHID ORE AHMED

ORAN ADAN HUSSEIN

ABDI SHEIKH HASSAN

IBRAHIM ALI

HASSAN ADO ABDI

MOHAMMED NOOR BARE

FARAH ADAN ALI

ISSACK MUHAMED MOHAMUD

ABDI AHMED ALI

ABDIRIZAK ADAN IBRAHIM

ABDIRIZAK ABDIRAHMAN

ABDULLAHI MUHAMMED

YSSUF KILAS ADEN

ALINOOR M. ABDI

ABDI DUBOW IBRAHIM

ALI ABDI HUSSEIN

ADAN EDIN HUSSEIN

RULING

Introduction

1. The application before this Court for determination is a Notice of Motion dated 16th September 2019, brought by the Kenya National Examinations Council, which is the Respondent herein. The Respondent is seeking orders that there be a stay of the proceedings herein pending the hearing and determination of their appeal from the rulings and orders in the ruling delivered by this Court on 12th July 2019. The application is supported by an affidavit sworn on 16th September 2019 by Befley Bisem, the Respondent's Corporation Secretary and Deputy Director for Legal Services.

2. The grounds for the application are that the Respondent has lodged a Notice of Appeal against the ruling delivered herein on 12th July 2019 dismissing its preliminary objection, and has sought the certified copies of the proceedings herein. Further, that they have an arguable appeal, based on the grounds they intend to raise. Lastly, that the application has been filed timeously and without inordinate delay. The Respondent annexed a copy of the said Notice of Appeal dated 23rd July 2019 and filed in the Court of Appeal on 29th July 2019; a letter by its Advocates on record dated 23rd July 2019 addressed to the Deputy Registrar of this Court requesting for the typed and certified copies of the proceedings and ruling delivered herein; and a copy of their draft memorandum of appeal.

3. The ruling delivered herein on 12th July 2019 dismissed the Respondent's Notice of Preliminary Objection dated 4th March 2019, in which the Respondent had objected to the instant judicial review proceedings brought by the *ex parte* Applicants on the ground that they violates section 9 of the Fair Administrative Action Act No.4 of 2015 read together with Part IV A of the Kenya National Examinations Council Act 2012, as the *ex parte* Applicants had not exhausted the internal mechanisms of appeal. The said *ex parte* Applicants are seeking orders of certiorari, prohibition and mandamus in relation the decision by the Respondent contained in a letter dated 15th January 2019, that cancelled the 2018 KCSE examination results of the candidates in the *ex parte* Applicants' schools.

4. This Court found that the National Examinations Appeals Tribunal established under the Kenya National Examinations Council Act 2012 was not an effective remedy to the Applicants in the circumstances of their application, as the issues raised did not fall within the said Tribunal's jurisdiction, and were within the jurisdiction of this Court.

The Response

5. The *ex parte* Applicants herein opposed the said application in a replying affidavit sworn on 3rd October 2019 by the 1st *ex parte* Applicant. The *ex parte* Applicants are Chairpersons of Parents Teachers Associations of various schools, namely Dadaab Secondary School, Tarbaj Secondary School, Wagalla Memorial School, Griftu Secondary School, Yssuf Haji Girls Secondary School, Dertu Girls Secondary School, Kinna Secondary School, Ashabito Girls Secondary School, Wajir Bor Secondary School, Mansa Boys Secondary School, Diif Secondary School, Biyamathow Mixed Secondary School, Senior Chief Ogle Girls Secondary School, Barwaqo Mixed Day Secondary School, Hulugho Boys Secondary School, Hulugho Girls Secondary School, Sankuri Secondary School, Kutulo Girls Secondary School and Kutulo Girls Model Secondary School.

6. The *ex parte* Applicants averred that the Respondent does not have an arguable appeal with a high chance of success, and that their judicial review application will be rendered nugatory and they will suffer irreparable loss of the orders sought are granted. Furthermore, that the interests of justice do not warrant the exercise of discretion in the Respondent's favour, as the application herein will only serve to cause delay and costs to the parties and deny the Applicants the opportunity to argue their case on the merits.

The Determination

7. The said application was heard by way of written submissions. Obura Mbeche & Company Advocates for the Respondent filed submissions dated 10th December 2019, while the *ex parte* Applicants' Advocates, Garane & Somane Advocates, filed submissions dated 4th February 2020. I have read and considered the said submissions, and find that the main issue to be determined in this application is whether the proceedings herein should be stayed, pending the hearing of the appeal filed in the Court of Appeal by the Respondent.

8. The Respondent in this respect cited various provisions of the law that provides for the right of appeal in judicial review cases, including section 8(5) of the Law Reform Act, section 75 (1)(h) of the Civil Procedure Act and Order 43 (1)(aa) of the Civil Procedure Rules, and submitted that taking into consideration the fact that it has already filed a Notice of Appeal, the appeal is deemed to be filed by dint of Order 42 Rule 6(4) of the Civil Procedure Rules. Further, that the fact that this Court has pronounced itself on the issues raised in the appeal does not affect the Respondent's right of appeal, and to proceed with the hearing of the matter herein would obliterate its appeal. The Respondent cited the decision of the Court of Appeal in **Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others (2013) e KLR** on the principles applied by the Court in applications for stay pending appeal.

9. It was the Respondent's submission that it had raised issues to be determined on appeal which were arguable, and shown the prejudice it would suffer as its appeal would be rendered nugatory as it is appealing on this Court's jurisdiction to proceed with this matter which should

first be settled. The decision in **Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd, [1989] eKLR** was cited in this regard, as well as the decisions in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others (2013) e KLR** and **Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008**

10. Lastly, the Respondent urged that the arguable nature of the appeal stems from the reasons that its appeal touches on interpretation of statutory provisions, there are conflicting decisions of the High Court on issues raised in these proceedings. Further that the question whether or not the National Examinations Tribunal has jurisdiction is one of public interest and national importance.

11. The *ex parte* Applicants on their part submitted that the decision whether or not to grant a stay of proceedings is an issue of judicial discretion, and relied on the decision in **Kenya Wildlife Services vs James Mutembei (2019) e KLR** on the principles that guide the exercise of this discretion, namely, that the applicant must establish a *prima facie* arguable appeal, that the appeal must be filed expeditiously and that it would be in the interests of justice to grant the orders sought.

12. Applying these principles to the instant application, the *ex parte* Applicants submitted that they would be prejudiced in the conduct of their case if the stay is granted as the hearing would be delayed and their judicial review application will be rendered nugatory. Therefore that it would be in the interests of justice, neither will the Respondent suffer any substantial loss if the application is declined, and cited the decision in **Kenya Power & Lighting Company vs Esther Wanjiku Wokabi, (2014) e KLR** in this regard.

13. In conclusion, the *ex parte* Applicants submitted that the Respondent had not established a *prima facie* arguable case as this Court decided that the issues raised in this case require interpretation of the Constitution which the National Examinations Tribunal was bereft of jurisdiction to address. Furthermore, that this Court cannot sit on its own appeal, and would be usurping the powers of the appellate court. Lastly, that the Respondent’s application was not timeously filed, as it was filed on 20th September 2019 two months after delivery of the impugned ruling on 12th July 2019.

14. I have considered the pleadings and arguments made by the parties, and note that the applicable law on stay of proceedings is not as clear cut as that on stay of execution that is provided in Order 42 Rule 6 of the Civil Procedure Rules. However, the legal considerations to be applied in an application for stay of proceedings have been laid down in various judicial decisions, and particularly by **Ringera J. (as he then was) in Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** wherein it was held as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously

15. The courts discretion in deciding whether or not to grant stay of proceedings is thus to be guided by the main principle of the interest of justice, as determined by three main factors;

- a) Whether the applicant has an arguable appeal.
- b) Whether the application was filed expeditiously, and
- c) The need for expeditious disposal of the cases and optimum utilization of judicial time.

16. In the present application it is not contested that the ruling appealed from was given by the trial Court on 12th July 2019, and the application herein were lodged on 27th September 2019. It is also notable that the Notice of Appeal was filed on 24th July 2019. The delay of two months in filing the application has not been explained, and will be material in this Court’s decision as to whether or not to exercise discretion in the Respondent’s favour.

17. In addition, it is my view that the question of whether or not the Respondent has an arguable appeal is not for this court to determine, but for the court seized of the appeal which is the Court of Appeal. The decisions cited by the Respondent on the principles were all made by the appellate court, and not the Court of first instance. This Court, having rendered itself on the matters in issue cannot start a process of reconsideration of the same and reopen an application which it had determined, and indeed has no jurisdiction to do so, except on an application for review.

18. This Court is also alive to the requirements of the “Oxygen principles” laid out in sections 1A and 1B of the Civil Procedure Act which were relied upon by the 1st Respondent, and which provide that the overriding objective of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of cases.

19. The application of these principles was discussed by the Court of Appeal in **MSK v SNK [2010] e KLR** as follows:

“In this regard we believe that one of the principal purposes of the “double ‘O’ principle” is to enable the Court to take case management principles to the centre of the Court process in each case coming before it, so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap. On our part, we have no doubt that a process which would result in the exclusion of the directly affected parties, would fly against this timely intervention in the management of the civil justice system in our country. Expressed differently the purpose of the “double O principle” in its application to the

civil proceedings is to facilitate the just quick and cheap resolution of the real issues in the proceedings and the court cannot claim to have before it real issues where affected parties have been excluded.”

20. In the present application, the Respondent has not indicated what stages of hearing its appeal is in, and seeking to stay these proceedings indefinitely would be contrary to the oxygen principles. In addition, the *ex parte* Applicants has shown the prejudice they are likely to suffer in terms of delay in determining its case, coupled with the delay in bringing this application, while the Respondent on the other hand is unlikely to suffer any prejudice, as it still has the opportunity to move the Court of Appeal for stay pending appeal under the Court of Appeal Rules. In addition, as indicated earlier in this ruling, it is the Court of Appeal which has the jurisdiction to determine whether the 1st Respondent has an arguable appeal in this regard.

21. The orders that commend themselves to me therefore are that the Respondent's Notice of Motion dated 16th September 2019 is found not to be merited and is hereby dismissed. The Respondent shall meet the costs of the said Notice of Motion.

22. In addition, in light of the scaling down of the Court's operation as a result of the COVID -19 pandemic, this matter shall be mentioned electronically for directions, and the Deputy Registrar of the Judicial Review Division shall put this matter on the Division's electronic causelist for mention on **14th July 2020** and bring it to the attention of a Judge in the Division on that date for directions.

23. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE