REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 36 OF 2019

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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MOHAMED ABDI DIGALE (SUING ON BEHALF OF

PARENTS OF IKHLAS INTERGRATED HIGH SCHOOL

FORM FOUR CLASS OF 2018).....1ST EX PARTE APPLICANT

ADIRAZAK OMAR IBRAHIM & 124 OTHERS

(SUING AS PARENTS OF IKHLAS

INTERGRATED HIGH SCHOOL).....2ND EX PARTE APPLICANT

RULING

Introduction

1. The 1st and 2nd *ex parte* Applicants herein are the Director of Ikhlas Integrated High School, and the parents of candidates in the said school who sat for the Kenya Certificate of Secondary Education (KCSE) examinations in 2018 (hereinafter referred to as "the Applicants"). The said Applicants filed an application by way of a Notice of Motion dated 20th February 2019 seeking orders of certiorari, prohibition and mandamus in relation the decision of the Kenya National Examinations Council (hereinafter the 1st Respondent), contained in a letter dated 21st December 2018. The said decision cancelled the 2018 examination results of the candidates of Ikhlas Integrated High School.

2. The 1st Respondent filed a Notice of Preliminary Objection dated 4th March 2019 simultaneously with its replying affidavit. The main ground of objection is that the instant judicial review application is incompetent, as it 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 Applicants had not exhausted the internal mechanisms of appeal.

3. 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 1st Respondent's Preliminary Objection was thus found not to have merit, and was dismissed.

The Application

4. The 1st Respondent subsequently filed a Notice of Motion dated 22nd July 2019, which is the subject of this ruling. The application is brought pursuant to the provisions of sections 1A, 1B and 3 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The 1st 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 on 1st July 2019. The application is supported by an affidavit sworn on 22nd July 2019 by Andrew Francis Otieno, the Deputy Director in the Research and Quality Assurance Division of the 1st Respondent.

5. The grounds for the application are that the 1st Respondent has lodged a Notice of Appeal against the decision delivered on 1st July 2019, 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. The 1st Respondent annexed a copy of the said Notice of Appeal dated 8th July 219 and filed in the Court of Appeal on 10th July 2019; a letter by its Advocates on record dated 2nd 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.

6. The Applicants opposed the application in a replying affidavit sworn on 7th August 2019 by their Advocate, Wanjala Mukonyi, and filed in Court and sworn on 16th August 2019. The Applicants averred that this case touches on the lives of students who are awaiting the outcome of the case to determine their future. That it would therefore be extremely prejudicial to them to stay this suit on account of jurisdiction and not on merits, and the 1st Respondent has not indicated any prejudice they may suffer. According to the Applicants, the 1st Respondent is employing a delay tactic, and that if the instant application is allowed it would take a lot of time to prosecute the appeal, as the 1st Respondent has not taken any dates for direction on its appeal.

7. The said application was heard by way of written submissions. Obura Mbeche & Company Advocates for the 1st Respondent filed submissions dated 26th August 2019, while the Applicant's Advocates, Weda & Company Advocates, filed submissions dated 30th August 2019.

The Issues and Determination

8. The 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 1st Respondent.

9. The 1st 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. That it would therefore be procedurally irregular for this court to proceed with proceedings in the t same matter which is currently pending before the Court of Appeal, and these proceedings should be stayed to enable the Court of Appeal exercise its appellate jurisdiction on the disputed ruling.

10. It was the 1st Respondent's submission that fear of prejudice to the Applicants should not be floated to override the rule of law, and the issue of this Court's jurisdiction to entertain these proceedings which is in issue should first be settled. The decision in **Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd, [1989] eKLR** was cited in this regard.

11. Lastly, the 1st Respondent urged that its appeals is arguable, and if the proceedings are not stayed, the entire appellate process would be rendered nugatory. Further, 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 which were cited, and that a decision by the Court of Appeal should provide a final solution on the applicability of sections 40H and 40J of the Kenya National Examination Council Act to cases challenging cancellation of examination results.

12. In addition, that an exemption from section 9(4) of the Fair Administrative Action Act has to be preceded by a formal application, but this court exercised its discretion and waived the requirement for an application. Furthermore, that the Court of Appeal will also have to determine whether a party who has invoked an alternative dispute settlement procedure like the Applicants did, can abandon it mid -stream and resort to a judicial review process.

13. The Applicants on their part submitted that the instant application for stay was filed on 22nd July 2019 and only served upon them on the day of the hearing, which is an indication that the 1tst Respondent is trying to delay the matter and justice. Further, that there is no reasonable ground that the Respondents have raised that needs the Appellate Court to determine on appeal, as the procedure for filing the present judicial review application were adhered to, and it is not compulsory or mandatory to lodge an appeal at the tribunal. under section 40 J of the Kenya National Examinations Act, 2012.

14. In addition, that Article 47 of the Constitution as read with Article 23 (1) gives this Court unfettered jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, which includes the instant application for judicial review, and give the High Court oversight mandate over statutory bodies and quasi-judicial institutions. Therefore, that the issue of jurisdiction is well settled, and there is no legal basis for which the Appeal is lodged other than frustrating Applicants. The Applicants also reiterated the substantial loss that the application would occasion if allowed to stand, as student's lives are hanging on the balance because of the acts of the Respondents.

15. In conclusion, the Applicants submitted that the decision whether or not to grant a stay of proceedings is a matter of judicial discretion to be exercised in the interests of justice. That the Court should in this regard bear in mind such factors as the need for expeditious disposal of the case, the *prima facie* merits of the intended appeal in the sense of whether it is an arguable one, the scarcity and optimum utilization of judicial time, and whether the application has been brought timeously.

16. I have read and carefully considered the pleadings and submissions filed. I 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***

17. 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.*

18. In the present application it is not contested that the ruling appealed from was given by the trial Court on 24th November 2015, and that the Memorandum of Appeal and the application herein were lodged on 1st December 2015. The application was accordingly filed expeditiously. What is in contention is whether the Applicant has an arguable appeal and whether it would be in the interest of expeditious and efficient disposal of the case in the trial Court to order stay of proceedings of the same.

19. It is my view that the question of whether or not the 1st 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. 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.

20. 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.

21. 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."**

22. In the present application, the 1st 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 Applicants has shown the prejudice they are likely to suffer in terms of loss of opportunities to the students affected by the 1st Respondent's decision, 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.

23. The orders that commend themselves to me therefore are that the 1st Respondent's Notice of Motion dated 22nd July 2019 is found not to be merited and is hereby dismissed. The 1st Respondent shall meet the costs of the said Notice of Motion.

24. Orders accordingly.

DATED AND SIGNED THIS 7TH DAY OF NOVEMBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 11TH DAY OF NOVEMBER 2019.

J.M. MATIVO

JUDGE