



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 321 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 20, 21, 22, 23, 28, 29(D), 47 OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLES 27,28, 29(D) 47 OF
THE CONSTITUTION OF KENYA, 2010;**

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF 2012

IN THE MATTER OF THE MOI UNIVERSITY CHARTER, LEGAL NOTICE NO. 202 OF 2013

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

VIOLET OMBAKA OTIENO.....1ST PETITIONER

OBEGI MALAK OCHWERI..... 2ND PETITIONER

NDIRANGU TABITHA.....3RD PETITIONER

VERAH SHAWIZA MANYONYI.....4TH PETITIONER

MAUREEN KWAMBOKA.....5TH PETITIONER

YVONNE AKHAGO BULUMA.....6TH PETITIONER

OMONDI LINDA AKINYI7TH PETITIONER

JOHN KAMAU MUTHONI8TH PETITIONER

SARAH KARANJA WANJIKU.....9TH PETITIONER

JAKOYO PAULLETE AKINYI.....10TH PETITIONER

RUTH WAMBOI MWANGI.....11TH PETITIONER

KARANJA SUSAN WAITHIRA.....12TH PETITIONER

PATIENCE MBITHI KAMUTU.....13TH PETITIONER

VERSUS

MOI UNIVERSITYRESPONDENT

RULING

The Application

1. This Court delivered a judgment on 21st August 2019 in favour of the Petitioners herein, who are students at the Moi University. The Petitioners had sued the said University (hereinafter “the Respondent”), for failing to include them in the final list of students who were to graduate in the Respondent University’s Graduation ceremony scheduled for 22nd August 2019. This Court in its judgment found the Respondent’s action to be discriminatory, in violation of the Petitioners’ right to fair administrative action and legitimate expectations.
2. The Court in addition awarded each Petitioner nominal damages of Kshs 50,000/= for infringement of their rights, and ordered the Respondent to avail each of the Petitioners herein the reasons for their non-inclusion in the final graduation list within 30 days of the judgement; to undertake all the necessary internal procedures required to include the Petitioners in the next graduation list and graduation ceremony within 90 days of the judgement; and to file a written report to this Court on the progress made in compliance within 90 days of the date of the judgment.
3. The Respondent subsequently moved this Court by a Notice of Motion dated 16th September 2019 seeking orders of stay of execution of the Judgment delivered on 21st August 2019, the resultant decree, as well as all other consequential orders issued therein, pending the filing, hearing and determination of its intended appeal. The application is premised on the grounds on the face of the Notice of Motion , the supporting affidavit sworn on 16th September 2019 by Petrolina Chepkwony, the Respondent’s Legal Officer, and a further affidavit sworn on 5th November 2019 by Dr. Bernard Kibet Malakwen the Director of the Respondent’s Nairobi campus. The Respondent also filed a written Report dated 19th November 2019 titled *Compliance with Orders V and VI in the Judgment of 21st August 2019*.
4. According to the Respondent, it filed a Notice of Appeal on 27th August 2019 against the said Judgment delivered on 21st August 2019. It is also their contention that they have formally requested for typed proceedings, a certified copy of the said Judgment, and served the parties in this matter with copies of the Notice of Appeal and the request letter. The Applicant contends that whereas the Court directed in its orders that certain things be fulfilled within thirty and ninety days respectively from the date of the Judgment, the said Judgment was not availed to it immediately. The Respondent averred that its advocates attempted to access the Judgment from the Court’s Registry on 28th August 2019, and were informed that the Judgment was not signed and needed to be corrected, and the Judge would resume on 2nd September 2019. That they only managed to obtain the same on 3rd September 2019, and served a copy of the same on the Petitioners on 4th September 2019. The Applicant contends that in the circumstances, it could not process the application for stay of execution without reading and digesting the Judgment, which it obtained 12 days after its delivery, yet the Judgment had timelines.
5. It is further contended that the Court’s order compelling the Applicant to undertake all the necessary internal procedures required to include the Petitioners in the next graduation list and ceremony within 90 days divests the Applicant of its statutory mandate through its Senate, of deciding which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other awards of the University. Thus, the University is placed in a dilemma because on the one hand the Court requires of it only one course of action, and on the other, the Universities Act requires it to only graduate those persons who have attained such standard of proficiency hence fit to graduate.
6. The Respondent also pointed out that the Court requires it to furnish each of the Petitioners with reasons for their non-inclusion in the graduation list within 30 days of the judgment, which by design presupposes that those reasons have not been tested by the Court. This implies that those reasons could either allow all or some of the Petitioners to be eligible for graduation, or not. Yet, on the other hand that the Court compels the Applicant to include the Petitioners in the graduation list within 90 days as stated herein before, which presents a difficulty. In this regard, that the statutory imperatives and Court’s directives are diametrically opposed. The Respondent however denied being in contempt of Court, and stated that it has complied with the Court order which directed it to avail to each of the Petitioners reasons for their non-inclusion in the 38th Graduation Ceremony, by giving reasons for their non-inclusion therein vide letters sent to each of them.
7. The Respondent averred that the balance of fairness rests in staying the orders of the Court pending the filing, hearing and determination of the intended appeal. That this would facilitate the Petitioners to comply with any terms of their inclusion on the next graduation list, which may include retaking the exam for papers whose marks were not verified, certified or those failed. According to the Applicant, this would be better than graduating pursuant to the Court’s order, and then being stripped of the same if the appeal succeeds, as such Petitioners would not have been certified by the Senate.
8. Additionally, the Respondent contended that the sum of Kshs. 50,000/= general damages awarded to each Petitioner translates to Kshs. 650,000/= which would aggregate to substantial loss if the Appeal were to succeed, whereas for the Petitioners the monies would be recovered with interest. Further, that the Respondent is prepared to have the monies secured in an interest earning account in the names of the Petitioners’ advocates. The Respondent contends that it is important that the intended appeal be adjudicated by the Court of Appeal without being rendered nugatory, hence stay should be granted. The Respondent avers that it will ensure that all the Petitioners who meet the statutory thresholds would be properly processed in accordance with the University’s statutes, and their names submitted to the Senate to be placed on the graduation list if it establishes they have met the requirements.
9. Lastly, the Respondent also contended that there are students admitted to various of its degree programmes who have not fulfilled the requirements for award of such degrees, and who will take out proceedings against it for inclusion in the next graduation list, hence it is just that stay be granted pending appeal. According to the Respondent, the instant application has been made without undue delay, and further, that the extracted decree served upon it is illegal, null and void for failing to meet the mandatory statutory requirements, and contains errors. The Respondent averred that it is ready to abide by such terms as the Court seems just and appropriate in granting the stay of execution.

The Response

10. The application was opposed by the Petitioners by way of a Replying Affidavit and Further Affidavit sworn on 17th October 2019 and 12th November 2019 respectively by Ruth Wamboi Mwangi, the 11th Petitioner. According to the Petitioners, the Respondent has failed to

meet the legal threshold for grant of an order for stay of execution pending appeal, and has not demonstrated that there exists any ground to challenge the judgment and orders/decrees of the Court. Further, that the Respondent has not established an arguable appeal because it is unable to fix any blame on the Petitioners, and instead blames its own officers and departments for the exclusion of students in the said graduation list.

11. It is further averred that the Respondent has not demonstrated that it would suffer substantial loss if a stay order is not granted as prayed. That on the contrary, it is the Petitioners who stand to suffer substantial loss which cannot be compensated because their lives will be put on hold indefinitely if the order for stay is granted. Further, that the Respondent has not established that the intended appeal would, if successful, be rendered nugatory unless an order of stay is granted. That, in the event the appeal succeeds, the Respondent would simply recall the thirteen degrees and recover the damages and costs from each of the students. It is also averred that the Respondent has not demonstrated that the Petitioners are unable to repay the Kshs. 50,000/= awarded together with costs should the appeal succeed. In this regard, it is averred that each of the Petitioners incurred an average of over Kshs. 500,000/= for their studies and also paid the costs of this suit and legal fees. The Petitioners are also against the proposal by the Respondent to have security for the decretal sum in a secured interest earning account in the names of the Petitioners' advocates.

12. The Petitioners contended that the Court has not divested the Respondent of any power, but is merely requiring it to abide by its statutory mandate and ensure that students graduate in December 2019. That in this regard, the Court granted the Respondent thirty days to provide conditions, requirements, terms, pre-qualifications, statutory thresholds or standards of proficiency set by it to enable students graduate in August 2019, and which the Petitioners did not meet. Further, that the Respondent is misapprehending the Court's orders, as the reasons ought to have been availed to the Petitioners once the decision to exclude them was made, and that the Court, by ordering that those reasons be provided, is correcting that procedural anomaly.

13. It was further averred that since the Respondent has willfully disobeyed the Court's orders, the instant application should be dismissed. According to the Petitioners, the purported evidence of compliance is a letter copy posted to all Petitioners stating: "*the examination results submitted by the Dean to the Senate did not have your complete marks of 42 Units per academic year for the four years you attended...*" However, the said letter is faulted by the Petitioners for non-compliance with the Court order, for reasons that it does not provide each Petitioner with the specific conditions, requirements, terms, pre-qualifications, statutory thresholds, or standards of proficiency set by the Respondent which the Petitioners did not meet. Hence that the Petitioners are unable to act on or answer to that letter. Further, that different circumstances and units apply for each of the Petitioners, and that the Respondent is therefore in contempt of the Court order requiring them to put internal measures in place to ensure the Petitioners are included in the next graduation.

14. It is also averred that the Respondent has to date neither confirmed nor denied the Petitioners' assertions that the only marks missing by 22nd July 2019 when the Senate was sitting was for Editing and Publishing Skills unit. It is averred that one Mr. Orina allegedly withheld the marks because he had allegedly not been paid by the Respondent, and it has not been denied that the Petitioners engaged it on the issue.

15. Lastly, it was deponed that granting stay would occasion breach of the Petitioners' constitutional rights and legitimate expectation to graduate and move on with their lives. Further, that it would be akin to allowing the Respondent to introduce requirements at the end of the Petitioners' studies while at the same time keeping the said requirements unknown to them, which is a travesty of justice.

The Determination

16. When the instant application came up for hearing on 2nd December 2019, Ms. Kariuki-Owesi, the advocate holding brief for Mr. Wekesa for the Respondent, requested for another hearing date to highlight the submissions filed. The application for adjournment was opposed by the Petitioner, and upon inquiry, the Court was informed that the Respondent's next graduation ceremony, that is a subject matter of the instant application is due to be held on 19th December 2019. This Court thereupon directed that due to the urgency of the application, the ruling on the application would be delivered on the basis of the pleadings and written submissions filed by the parties.

17. Wekesa & Simiyu Advocates for the Respondent in this respect filed submissions dated 25th September 2019, while Salisbury Law Advocates for the Petitioners filed submissions dated 17th October 2019. I have read and carefully considered the pleadings and submissions filed. The issue before the Court for determination is whether the Respondent has met the legal threshold for grant of stay of execution of the judgment of this Court dated 21st August 2019.

18. The Respondent submitted that the Court ought to be guided in this respect by the provisions of Article 23(3) of the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and that there is no room for application of Order 42 of the Civil Procedure Rules on the issue of substantial loss. Reliance was placed on the decision by Lenaola J. (as he then was) in **Pharmaceutical Manufacturing (K) CO. Ltd & 3 Others vs Commissioner General of the Kenya Revenue Authority & 2 Others (2015) eKLR**. Further, that the traditional civil procedure law conditions for grant of stay pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 do not apply in constitutional petitions.

19. According to the Respondent, the test to be met under the Constitution and rules made thereunder was provided by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, being that conservatory orders should be granted based on the inherent merit of the appeal bearing in mind public interest, constitutional values, and the proportional magnitude between the parties.

20. The Respondent contends that its application for grant of stay of execution has met this test as it has filed a Notice of Appeal, the court's directions that it includes the Petitioners in the next graduation list has thrown it into extreme hardship, inconvenience and a quandary of meetings, and that its statutory imperatives and the Court's directives are diametrically opposed. The Respondent also reiterated the other grounds raised in its application.

21. The decisions in **Republic vs Vice Chancellor Kisii University ex- Parte Muthamia Samuel Mwiti (2019) eKLR**, and **Moi University vs Oindi Zaiipeline & Another (2018) eKLR** that it is the Respondent's Senate which has the statutory power to confer degrees

and other certificates, and that whether a university can award a degree to a student who was no longer registered with it and whom it did not examine is a matter of general public were cited in support of the Respondent's submissions. The holding in **John Owino Obunde (Suing for and on behalf of 82 others) vs Technical University of Mombasa & Another [2016] eKLR**, was also cited for the submission that it is in the public interest that there be stay of execution in order to safeguard the validity of the would be degree certificates of the Petitioners and the reputation of the Respondent.

22. Lastly, the Respondent submitted that there is no prejudice that would befall the Petitioners if the stay is granted, given the Respondent's willingness and readiness to put on the graduation list of December 2019 all of the Petitioners who will meet the stipulated conditions for graduation as per the its statutes.

23. The Petitioners on their part submitted that the Respondent has not demonstrated how Article 23 and 159 of the Constitution can apply exclusive of Order 42 Rule 6 of the Civil Procedure Rules. Further, that the Court of Appeal in various decisions has held in its interpretation of Order 42 Rule 6 that an applicant seeking stay pending execution even in Constitutional Petitions must have an arguable case, must demonstrate substantial loss if stay is denied, and must demonstrate that the appeal would be rendered nugatory if stay is denied.

24. The Petitioners in this regard cited the Court of Appeal decisions in **Halai & Another vs Thornton & Turpin (1963) Ltd [1990] eKLR**, **Shah Munge & Partners Ltd vs National Social Security Fund Board of Trustees & 3 others [2018] eKLR**, **Fred Matiang'i, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna & 4 Others [2018] eKLR**, **Kenya Hotel Properties Limited vs Willesden Investments Limited [2007] eKLR**, **Hassan Guyo Wakalo vs Straman East Africa Ltd [2013] eKLR**, **Kenya Shell Ltd vs Kibiru & Another [1986] KLR 410**, and **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another [2006] eKLR** on the interpretation of the various requirements of Order 42 Rule 6. .

25. According to the Petitioners, the Respondent misapprehended the decision in **Pharmaceutical Manufacturing (K) Co. Ltd & 3 Others vs Commissioner General of the Kenya Revenue Authority & 2 Others (supra)** as the Learned Judge did not state that Order 42 Rule 6 is not applicable to Constitutional Petitions, and was reiterating the latitude accorded to the Court by Articles 23 and 159 to grant orders in the interests of justice. The decision was therefore distinguished as being irrelevant, as were the decisions in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)** and **Moi University vs Oindi Zaiippeline & Another (supra)**, which the Petitioners distinguished on the basis that they were not dealing with stay of execution pending appeal.

26. It was submitted that the Respondent has not raised a single *bona fide* arguable ground as it did not controvert the fact that the Petitioners were excluded from the graduation list of August 2019 without being given a notice of the same, reasons for the same and a chance to respond to those reasons contrary to Article 47 of the Constitution. Further, that the Respondent has not explained to each petitioner as the Court ordered, which 'terms', 'conditions' 'requirements' 'statutory thresholds' 'standards of proficiency' the Petitioners were required to meet or satisfy and which they have not.

27. In addition, that the Petitioners sat all the examinations and continuous assessments tests as prescribed in their respective courses, passed the said examinations and continuous assessments tests, handed in their projects on time, got the pass mark for the projects and paid all the due fees and charges. Furthermore, that this will remain the position which cannot be changed by a stay order, and there is therefore nothing to be rendered nugatory even if a stay order is not granted, and in the very unlikely event that the appeal succeeds, the Respondent will not have any difficulty recalling any degree they deem was unmerited.

28. It was also submitted that the Petitioners have proved to be of means and would be able to repay the damages awarded and costs due in this suit as well as in the appeal, and that the Respondent has not expressed any reasonable fear that Petitioners who spent over Kshs. 500,000/= on average for their courses have no resources to repay the Kshs 50,000/= awarded to each of them should the appeal succeed. Further, that the Respondent has not demonstrated how paying about three million shillings (Kshs 3,000,000/-) would be an unbearable hardship. On the other hand, that staying the money decree would be indeterminately denying the Petitioners the fruits of their judgment as no one can tell when the Court of Appeal will make its determination.

29. Lastly, the Petitioners opposed the proposal to have the security for the decretal sum in a secured interest earning account in the names of the advocates for the parties herein, as it would be yoking the Petitioners' advocate with an undue responsibility of protecting the Petitioners' decretal amounts and costs of suit in a joint account with the Respondent's advocate.

30. The first question that this Court needs to settle is that of the applicable law to applications for stay of execution pending appeal in Constitutional Petitions. It is notable in this respect that the issue that was being ruled on by the learned Judge in **Pharmaceutical Manufacturing (K) Co. Ltd & 3 Others vs Commissioner General of the Kenya Revenue Authority & 2 Others (supra)** was the arguments raised by some of the parties that Courts are forbidden from granting injunctions against the Government and its agencies, including some of the respondents in that case. It is in this context that the Judge found that the Courts have power to issue a conservatory order or injunction pending appeal under Article 23 (3) of the Constitution. The issue of the applicability of Order 42 Rule 6 of the Civil Procedure Rules was not raised nor canvassed, neither was it a subject of the ruling in that case.

31. Specifically on the applicability of Order 42 Rule 6 of the Civil Procedure Rules to Constitutional Petitions, it is notable that the long title and section 1 of the Civil Procedure Act applies the Act to the procedure in all civil courts, and all proceedings in the High Court. In addition, a suit is defined in section 2 of the Act to mean all civil proceedings commenced in any manner prescribed. Civil Proceedings are defined in **Black's Law Dictionary, Tenth Edition** at page 300 as "*a judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies*" as juxtaposed with criminal proceedings in which the "*Court adjudicates whether a person has committed a crime, or having fixed guilt, decides on the offender's punishment*"(at page 456).

32. In this context, the rights in the Bill of Rights that were the subject of the present petition are specifically applied by Article 19 and 20 of the Constitution to all individuals and persons, and are therefore essentially private in nature. In addition, the Constitution specifically states that other rights and fundamental freedoms not in the Bill of Rights and recognised or conferred by law shall not be excluded, and are subject only to the limitations contemplated in the Constitution. There is no such limitation in the Constitution, the Constitution of Kenya (Protection

of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, or any law expressly limiting the provisions of Order 42 Rule 6 of the Civil Procedure Rules in the enforcement of the Bill of Rights. Lastly, it is notable in this respect that the provisions of Article 23 (3) of the Constitution buttress the powers of this Court to grant appropriate relief in any proceedings brought to enforce the Bill of Rights, and are not a limitation of the application of Order 42 Rule 6 of the Civil Procedure Rules.

33. It is thus my finding that arising from the above reasons, applications for stay of execution pending appeal in Constitutional Petitions are also governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6 provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.”

34. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 Rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

35. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

36. In the present application, this Court notes that judgment was delivered herein on 21st August 2019, and the instant application was filed on 17th September 2019. The Respondent states that it received the judgment on 3rd September 2019, and given the circumstances, this Court finds that there was no inordinate delay in filing the application fourteen days later.

37. On the fulfillment of the second condition, the Respondent needs to show the specific loss or prejudice it will suffer if it complies with the orders of this Court. The Respondent has in this respect stated the judgment of this Court will be in conflict with its statutory imperatives, and that this Court’s order that it provides the reasons to the Petitioners for non-inclusion in the Graduation List of the 38th Graduation ceremony held on 22nd August 2019 is contradictory to the other orders. It is notable that there were specific findings were made by this Court on the said arguments in the judgment delivered on 21st August 2019 as follows:

“34. Coming to the substantive issues raised by the Petition, it is necessary to state at the outset that the applicability of the laws and procedures governing the Respondent’s graduation and in particular the Universities Act, the Respondent’s Charter and its statutes are not disputed. The main areas of dispute are whether there was non-compliance with the Constitution in the manner the said laws and procedures were applied, and if so, who should take responsibility for any non-compliance, and the effect thereof on the Petitioners.

35. In this respect, in addition to the Universities Act and the Respondent’s Charter, Statutes and Rules, there are now various norms and laws which regulate the manner in which the Respondent is required to perform its powers and functions, particularly those introduced by the Constitution of 2010. The Respondent’s Charter, Statutes and Rules must now be read and interpreted in a manner that is consistent with the Constitution. A number of values, principles, rights and duties in the Constitution directly impact on the Respondent, including the values and principles in Article 10 of the Constitution and the Bill of Rights.”

38. Specifically on the role of the Respondent’s Senate, this Court held as follows:

“53. In the present petition, the arguments made by the Respondent that the Senate only sits at defined times and could not therefore address the Petitioners’ concerns when raised clearly falls short of this Constitutional and legal requirements on fair administrative action. In addition, the Respondent’s Senate clearly made adverse decisions affecting the Petitioners by not including them in the list of graduands for its Graduation ceremony scheduled for 22nd August 2019, and has not brought any evidence to show that before or after approval of the graduation list, it did give adequate opportunity to the Petitioners to make representations. While this Court cannot purport to direct the Respondent on how to perform its duties in this regard, it can only emphasize that the performance of such duties and procedures must now be reoriented to be consonant with, and in compliance with the new constitutional dispensation. Where necessary, this may include legal amendments to align the

Respondent's statutes and rules to align them with the Constitutional requirements.”

39. This Court has therefore already pronounced itself on the issues raised by the Respondent, and the question of whether or not this Court granted legal and consistent remedies, and whether 1st Respondent has an arguable appeal in this regard 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 a matter which it has determined, and indeed has no jurisdiction to do so, except on an application for review.

40. In any event, the Respondent has stated that it has complied with the orders given by this Court that it should give reasons to the Petitioners for their non-inclusion in the graduation list of 22nd August 2019, and the order requiring it to make a report on compliance. For purposes of this application, this averment is relevant to illustrate that no substantial loss will thereby be suffered by the Respondent if stay is not granted with respect to these orders. Whether there was actual compliance, the extent thereof, and if the Respondent is in contempt of court as regards the said orders as alleged by the Petitioners is not an issue that can be determined in the present application, but in separate proceedings that the Petitioners are at liberty to commence in this regard.

41. The outstanding orders therefore that are germane in this application as regards substantial loss being occasioned thereby are the orders to include the Petitioners in the Respondent's next graduation list and graduation ceremony, and payment to each of the Petitioners of Kshs 50,000/- as damages. On the order given by this Court to include the Petitioners in the next graduation, the Respondent in Annexure I of its Report dated 19th November 2019 and filed in Court on 22nd November 2019 stated as follows:

“...that the thirteen Petitioners herein have met the academic requirements and their respective missing marks for various units have been resolved. The Department of Communication Studies in the School of Information Sciences is now satisfied and has cleared the thirteen Petitioners for graduation subject to the Senate approval”

42. The Respondent also submitted that it is willing and ready to put all of the Petitioners who will meet the stipulated conditions for graduation as per the its statutes on the graduation list of December 2019. According to its report as shown in the foregoing, it is all the Petitioners herein who in this respect qualify to graduate.

43. It is therefore not fathomable to this Court what substantial loss the Respondent is likely to suffer by inclusion of the Petitioners in the next graduation list and graduation scheduled for 19th December 2019 as ordered by this Court in its judgment, in light of its own admissions that compliance is possible. The Petitioners are on the other hand likely to suffer substantial loss, having clearly qualified for graduation, and are clearly still being hindered by the Respondent's own internal processes which are not of their own making from graduating.

44. On the orders that the Respondent pays the Petitioners nominal damages of 50,000/- each ,which amounts to a total sum of Kshs 650,000/=, there was no evidence produced by the Respondent of the inability of the Petitioners to refund the said sums of money in the event its appeal succeeds. I however note that the Respondent did affirm that that it is willing to furnish security by depositing the decretal sum in an interest earning account. This proposal was opposed by the Petitioners on the basis of its indeterminate nature, which is a valid concern, given that the Respondent did not provide any evidence of the progress of its appeal in the Court of Appeal.

45. Therefore, staying the order of payment of damages to the Petitioners indefinitely would disproportionately prejudice the Petitioners, 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 Respondent has an arguable appeal in this regard.

46. Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Respondent's Notice of Motion dated 16th September 2019 only succeeds to the extent of the following orders and terms:

i. Stay of execution of the Judgment delivered on 21st August 2019 is allowed only with respect to the order granting each of the 1st to 13th Petitioners herein an award of Kshs 50,000/= as nominal damages for infringement of their rights under Articles 27, 28, 29(d) and 47 of the Constitution, and even then only on the following conditions:

a. Such stay of execution shall be for a period of 90 days only, to facilitate the Respondent's application for stay pending appeal in the Court of Appeal.

b. The Respondent shall deposit the sum of Kshs 650,000/= in Court as security for the said award of damages within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

ii. The prayer for stay of execution of the other orders in the judgment delivered herein on 21st August 2019 is expressly declined.

iii. The Respondent shall meet the costs of the Notice of Motion dated 16th September 2019.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2019.

P. NYAMWEYA

JUDGE