



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW

MISC. APPL. NO. 388 OF 2012

**IN THE MATTER OF AN APPLICATION BY MR. RWITO JOSEPH MUNGANIA FOR
JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI**

AND

**IN THE MATTER OF IMPOUNDING OF DEGREE CERTIFICATE NO. 201211500842 BY THE
DEPUTY REGISTRAR AND HEAD GRADUATION AND CERTIFICATES KENYATTA
UNIVERSITY**

BETWEEN

REPUBLICAPPLICANT

VERSUS

VICE CHANCELLOR, KENYATTA UNIVERSITY.....RESPONDENT

EX-PARTE APPLICANT.....MR. RWITO JOSEPH MUNGANIA

RULING

1. On 4th June, 2014, this Court delivered a judgement in this matter in which the Court granted an order of mandamus compelling the Respondent to release the ex-parte applicant's degree certificate No. 20211500842 unlawfully impounded and/or retained by the university.
2. Aggrieved by the said decision, the Respondent in the substantive Motion (hereinafter referred to as the University) intends to appeal to the Court of Appeal. In the meantime it has filed a Notice of Motion dated 7th July, 2014, in which it seeks the following orders:

1. The Application be certified urgent and service be dispensed with in the first instance.

2. A conservatory be issued staying the execution of the Judgment of Honourable Justice G. V. Odunga delivered on June 4, 2014 in this matter pending the hearing and determination of this application *inter partes*;

3. A conservatory order be issued staying the execution of the Judgment of Honourable

Justice G.V. Odunga delivered on June 4 2014 pending the hearing and determination of the intended Appeal in the Court of Appeal;

4. Costs of this Application be provided for.

3. For the purposes of this ruling the relevant prayers are prayers 3 and 4 above.
4. The application was supported by an affidavit sworn by **Daniel Muindi**, the University's Registrar (Administration) on 7th July, 2014.
5. According to the deponent, the University has sought for leave and requested for typed proceedings to enable it lodge an appeal to the Court of Appeal. In the meantime, it is apprehensive that if the *Ex-parte* Applicant/Respondent is allowed to execute the orders of this court, it stands the risk of damaging the University's academic integrity and process and rendering the intended appeal and this application moot.
6. Apart from that it was deposed that the University stands to suffer irreparably for the reason that if it is compelled to issue the degree certificate, a shadow would be cast over the quality and prestige of degrees issued to other innocent graduates of the University.
7. In response to the application the ex parte applicant filed a replying affidavit sworn on 11th July, 2014.
8. According to him, the University's application is filed maliciously with an aim of frustrating him and subsequently denying him the fruits of the judgment delivered by this Honourable Court on 4th June 2014. In his view, the intended appeal has slim chances of success because the paramount issue which is not in dispute is that his degree certificate was impounded and/or confiscated without the Respondent giving him an opportunity or chance to be heard, a fact which the Respondent is obviously not going to chance an appeal.
9. He further contended that in view of the foregoing the University's intended appeal will not be rendered nugatory in the event that a stay of execution is not granted since the Respondent can still recall and/or impound the degree certificate from him in the unlikely event that the intended appeal is successful a fact which according to him was acknowledged by the University in ground (f) of the application.
10. It was therefore the ex parte applicant's view that in the event that a stay is declined and the Respondent's appeal succeeds, then he is the one to suffer prejudice and not the Respondent since the said degree certificate will definitely be impounded at his disadvantage.
11. It was further asserted that though the University is seeking orders from this Honourable Court, it has declined to issue the ex parte applicant with the degree certificate in contention as ordered despite a demand to do so hence the University is in contempt and should not seek orders from the same court unless it purges the contempt.
12. I have considered the application, the affidavits in support of the application as well as in opposition thereto.
13. The powers of this Court to grant conservatory orders in the nature of stay of execution pending appeal are circumscribed in Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

(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.

14. Unlike the Court of Appeal which is empowered to consider the chances of the intended appeal succeeding, this Court in considering whether or not to grant a stay of execution pending appeal to the Court of Appeal is not required to consider such a condition.
15. In this case it is clear that the order which this Court made is capable of being executed. Therefore unlike in cases where the Court simply declined to grant the orders sought in judicial review application, this Court in the circumstances of this case is empowered to grant the orders sought in

this application. See **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572.**

16. One of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. The University has based its application on two grounds. The first ground which appears in the affidavit is that if the *Ex-parte* Applicant/Respondent is allowed to execute the orders of this court, the University stands the risk of its academic integrity and process being damaged and that a shadow would be cast over the quality and prestige of degrees issued to other innocent graduates of the University hence rendering the intended appeal and this application moot. The second ground appears in the grounds disclosed in the body of the application that if the appeal is successful, the process of reversing the decision of the High Court will involve the revocation of the degree certificate which will prejudice and affect any arrangements made with third parties on the strength of that degree.
17. The second issue can be readily dealt with. What the University is contending under that ground is purely a matter speculation and conjecture since there is no evidence that the *ex parte* applicant has secured or will secure a job before the intended appeal is heard and determined based on the strength of the said degree certificate.
18. With respect to the first ground, 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 arrive at a just decision. It ought to be appreciated that the successful party ought not to be kept away from enjoying the fruits of his judgement 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.
19. Here the substantial loss alluded to by the University is that it stands to suffer in terms of academic integrity if the application is not allowed. However, the Court also takes notice of the fact that getting jobs in this country is no mean task and as more graduates leave the Universities the more difficult it is for graduates to secure jobs. Accordingly, a delay of one year for example in accessing the job market may make a great difference in not only ones ability to get employment but may also dictate one's career progression. Therefore as was held 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 judgement 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”.

20. As clearly appreciated by the parties, if the intended appeal is successful, the University would be entitled to recall the *ex parte* applicant's degree certificate and cancel the same. It has not been alleged that that course of action would not be possible. In my view I am not satisfied that the fears of the University's reputation being damaged are rather far fetched since there is no tangible evidence that that is bound to happen especially taking into account the fact that the University had in fact issued the said degree certificate.
21. In premises the Notice of Motion dated 7th July, 2014 fails and is dismissed with costs.

Dated at Nairobi this day 8th October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amati for the ex parte applicant

Mr Guto Mogere for the Respondent University