



**Onyango v Nandi & 3 others (Civil Application E028 of 2025)
[2025] KECA 1190 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1190 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E028 OF 2025
W KARANJA, F TUIYOT'T & P NYAMWEYA, JJA
JULY 4, 2025**

BETWEEN

PROF MARY O ABUKUTSA ONYANGO APPLICANT

AND

PROF MANYASA J.O. NANDI 1ST RESPONDENT

**EZEKIEL MACHOGU CABINET SECRETARY, MINISTRY OF
EDUCATION 2ND RESPONDENT**

**DR BEATRICE MUGANDA INYANGALA PRINCIPAL SECRETARY
STATE DEPARTMENT FOR HIGHER EDUCATION AND
RESEARCH 3RD RESPONDENT**

**DR BERNADETTE MUNGAI CHAIRPERSON, KAFU UNIVERSITY
COUNCIL 4TH RESPONDENT**

*(An application for stay of execution pending appeal from the Ruling of
the Employment and Labour Relations Court at Nairobi (Justice Nduma
Nderi J.), dated 19th December 2024 in ELRC PET No. E014 of 2024)*

RULING

1. Prof. Mary Abukutsa Onyango, the applicant herein, seeks to stay the execution of a judgment delivered in ELRC Pet. No. E014 of 2024 on 19th December 2024 by the Employment and Labour Relations Court (ELRC) at Nairobi (Nduma Nderi J.), in which the learned Judge allowed a petition filed by Prof. Manyasi Nandi, the 1st respondent herein. The Cabinet Secretary, Ministry of Education, the Principal Secretary, State Department for Higher Education and Research and Chairperson, Kafu University Council (the 2nd, 3rd and 4th respondents herein) were the 1st, 2nd and 3rd respondents in the said petition, while Prof. Mary Abukutsa Onyango was the 4th respondent.



2. The learned Judge of the ELRC made the following orders in favour of the petitioner:
 - a. A declaration that the recommendation by the 1st Respondent for appointment of the 4th Respondent as Vice Chair Kaimosi Friends University is unlawful, null and void.
 - b. A declaration that the selection and recommendation by the 3rd Respondent and Council, Kaimosi Friends University for appointment of the Petitioner as the Vice Chancellor, Kaimosi Friends University be sustained as it conforms with the provisions of Articles 10 and 232 of *Constitution of Kenya*, 2010 and the *Universities Act*, 2012.
 - c. A declaration that the selection and recommendation by the 1st Respondent, for appointment of Prof. Mary O. Abukutsa Onyango as the Vice Chancellor, Kaimosi Friends University contravenes the provisions of Articles 10 and 232 of *Constitution of Kenya*, 2010 and the *Universities Act*, 2012.
 - d. An order of mandamus directed to the 3rd Respondent and Council of Kaimosi Friends University being the appointing authority to comply with the provisions of Article 232 on appointments on merit and proceed to appoint the Petitioner.
 - e. An order of prohibition restraining the 3rd Respondent and the Council of Kaimosi Friends University from proceeding with any meeting set to deliberate the appointment of Prof. Mary O. Abukutsa Onyango as the Vice Chancellor, Kaimosi Friends University.
 - f. An order of mandamus directed to the 3rd Respondent and Council of Kaimosi Friends University being the appointing authority to comply with the provisions of Article 232 on appointment on merit and proceed to appoint the Petitioner.
 - g. Declaration that the Petitioner has legitimate expectation of being appointed to the position of Vice Chancellor for a term of five (5) years which would be renewable subject to performance.
 - h. Costs of the Petition.
3. These are the orders whose execution the applicant seeks to stay by way of an application dated 14th November 2024 lodged in this Court pursuant to rule 5(2)(b) of the *Court of Appeal Rules*. The application is supported by an affidavit sworn on even date by the applicant, and submissions dated 4th March 2025 filed by the applicant's advocates. The main grounds urged are that intended appeal raises triable issues, since the learned trial Judge disregarded the role of the Cabinet Secretary in the process of appointment of a Vice Chancellor for a public university as provided by section 39(1) of the *Universities Act*, 2012 which gives the authority to appoint a Vice Chancellor of a public university to the Cabinet Secretary.
4. Additionally, there was no mention of the applicant's cross petition in the impugned judgment, which means it was not considered. There is therefore imminent risk that if the orders sought are not granted, the appointing authorities shall proceed to execute the judgment and the intended appeal would be rendered nugatory, a mere academic exercise to the applicant's detriment, as the 1st respondent may then be appointed and serve the term of office.
5. The 1st respondent opposed the application by way of a replying affidavit he swore on 14th February 2025 and submissions dated 4th March 2025 filed by his advocates. The 1st respondent's case is that section 39 of the *Universities Act* provides for the appointment of the Vice-Chancellor by the Cabinet Secretary, upon the recommendation by the University Council and after a recruitment process is conducted and concluded by the Public Service Commission. Further, that he was the candidate



- recommended by the University Council having attained the highest score during the recruitment process conducted by the Public Service Commission.
6. However, that the Cabinet Secretary, the 2nd respondent herein, acted ultra vires and usurped powers by rejecting the University Council's recommendation and proceeding to recommend the applicant to the position of Vice-Chancellor, despite the fact that she was not a shortlisted candidate for the said position although she participated in the interview process. In addition, that the 2nd, 3rd and 4th respondents were unable to prove the allegations that he was a loan defaulter or a practitioner of nepotism in employment. Lastly, the applicant has not demonstrated the risk, damage or loss that she will suffer should the respondents execute the judgment, whereas the 1st respondent stands to be greatly prejudiced as he will be denied the fruits of the judgment.
 7. We heard the application on 5th March 2025 on this Court's virtual platform, and learned counsel Mr. Amutavi holding brief for learned counsel Mr. Okatch appeared for the applicant while learned counsel Mr. Martin Oloo appeared for the 1st respondent. There was no appearance for the 2nd to 4th respondents despite their advocates having been duly served with the hearing notice, nor did they file any responses to the application. Mr. Amutavi and Mr. Oloo reiterated their client's respective cases in their submissions.
 8. We have carefully considered the application, together with the averments and submissions made by the parties. The principles applicable in the exercise of this Court's discretion under Rule 5 (2) (b) of the *Court of Appeal Rules* to grant a stay of execution, injunction or stay of proceedings are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR.
 9. Both limbs must be demonstrated before a party can obtain a relief under Rule 5(2)(b) (see *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31; *Reliance Bank Ltd v Norlake investments Ltd* (2002) I EA 227 and *Githunguri v Jimba Credit Corporation No (2)* (1988) KLR 838). In addition, this Court exercises original jurisdiction under Rule 5 (2)(b) as held in *Ruben & 9 others v Nderitu & another* (1989) KLR 459 and *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* (2000) eKLR.
 10. Bearing in mind that the requirement of arguability of an intended appeal is met if it raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union*, Civil Application No. Nai. 72 of 2011 UR), we note that both the applicant and 1st respondent have raised the issue of the role of, and nature of participation of the relevant Cabinet Secretary in the process of appointment of a vice chancellor of a public university under the provisions of the *Universities Act*, 2012. We are satisfied that this is an arguable point.
 11. As regards the second limb that is required to be demonstrated, an appeal or intended appeal will be rendered nugatory where the resulting effect of not granting a stay of execution, injunction or stay of proceedings is likely to be irreversible or, if it is not reversible, where damages will not reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* (*supra*)). Hence the various decisions of this Court that the purpose of a remedy under rule 5(2) (b) is to preserve the subject matter of the appeal. In the present application, it is notable that neither the applicant nor 1st respondent are yet to take office, and upon inquiry as regards the status, we were informed that there is an acting Vice-Chancellor who has been appointed to undertake the duties of the office.



12. We are accordingly of the view that it is in the public interest that there is no lacuna in the office of Vice Chancellor of Kaimosi Friends University and that the issues raised in the intended appeal are determined with dispatch. We accordingly order as follows:

1. The status quo currently obtaining as regards the office of the Vice Chancellor of Kaimosi Friends University shall be maintained pending the hearing and determination of the applicant's intended appeal, and neither the applicant nor 1st respondent shall be appointed as Vice Chancellor of Kaimosi Friends University during that period.
2. The applicant shall ensure the Record and Memorandum of Appeal is filed and served the within (30) thirty days of the delivery of this ruling, failing which the status quo order hereinabove shall automatically lapse.
3. The Deputy Registrar of the Court of Appeal, shall, upon the filing of the applicant's Record and Memorandum of Appeal, list the appeal for case management and expedite the hearing of the appeal on a priority basis.
4. The costs of the application dated 14th November 2024 shall abide the outcome of the appeal.

13. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025

W. KARANJA

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I Certify that this is s true copy of the Original

signed

DEPUTY REGISTRAR

