



Maasai Mara University Council & another v Walingo & 3 others (Civil Application E031 of 2024) [2024] KECA 336 (KLR) (2 April 2024) (Ruling)

Neutral citation: [2024] KECA 336 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E031 OF 2024
F TUIYOTT, FA OCHIENG & WK KORIR, JJA
APRIL 2, 2024**

BETWEEN

MAASAI MARA UNIVERSITY COUNCIL 1ST APPLICANT

MAASAI MARA UNIVERSITY 2ND APPLICANT

AND

MARY KHAKONI WALINGO 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(An application for interim stay of execution pending the ruling in the application for stay in Nakuru CA Civil Application No. E086 of 2023)

RULING

1. The applicants, Maasai Mara University Council and Maasai Mara University, were before this bench (Tuiyott, Ochieng & Korir JJA) on 26th February 2024 in Nakuru CA Civil Application No. E086 of 2023. They were seeking to stay execution by the 1st respondent, Prof. Mary Khakoni Walingo, of the ruling and order delivered on 28th September 2023 by H. Wasilwa J in Nakuru Employment and Labour Relations Court (E&LRC) Petition No. E007 of 2022. At the conclusion of that matter, the Court reserved its ruling for 26th April 2024. However, on 20th March 2024, the applicants moved this Court through the instant motion (Nakuru Civil Application No. E031 of 2024) brought under sections 3, 3A and 3B of the Appellate Jurisdiction Act and rules 5(2)(b) and 43 of the Court of Appeal Rules, 2022. Through the application, they seek an order of interim stay of execution pending the determination of the application for stay of execution in Nakuru Civil Application No. E086 of 2023. They also seek an order of stay and/or discharge of garnishee proceedings instituted by the 1st



respondent against the 2nd applicant in Nakuru Employment and Labour Relations Court (E&LRC) Petition No. E007 of 2023 pending the hearing of Nakuru CA Civil Appeal No. E168 of 2023. They further pray that the costs of the application be in cause.

2. The application is premised on the grounds on its face as well as the affidavit of Dr. Kennedy Ole Kerei sworn on the date of the application. In a nutshell, the applicants' case is that on 14th March 2024 the 1st respondent attached the monies in all the 2nd applicant's bank accounts thus bringing its operations to a halt. According to the applicants, as a result of the 1st respondent's action, the applicants face an imminent threat of student riot as the 2nd applicant cannot access its bank accounts in order to facilitate the day-to-day operations and provision of services. It is the applicants' deposition that unless the orders sought are granted, the situation will persist, and the appeal, and the pending application for stay, will be rendered nugatory. The applicants also aver that the decretal sum of KSh. 81, 019, 348 is colossal and remains disputed between the parties. They assert that they have an arguable appeal in that the decretal sum being a claim for special damages ought to have been proved but that was not the case.
3. The application is opposed the 1st respondent through her affidavit sworn on 25th March 2024. It is her case that the application is sub judice and is seeking to deceitfully appeal the directions issued in Nakuru Civil Application No. E086 of 2023. She avers that the applicants are forum shopping as the Court, despite being aware of the facts of the case, had not deemed it necessary to issue a temporary stay. She states that the applicants are not deserving of an order staying the garnishee proceedings as a similar application had been dismissed by the trial court. The 1st respondent reiterates the factual background of the dispute and avers that the appeal will not be rendered nugatory if the application is denied. Further, that she is a person of means and in a position to refund the decretal sum should the applicants' appeal succeed.
4. This application came up for hearing on 26th March 2024 through the virtual platform. Learned counsel Mr. Kahiga appeared for the applicants, learned counsel Mr. Omwanza Ombati and Mr. Manwa Hosea appeared for the 1st respondent while learned counsel Ms Nyambura appeared for the 2nd and 4th respondents. There was no appearance for the 3rd respondent, the Public Service Commission.
5. Learned counsel Mr. Kahiga had filed written submissions dated 25th March 2024 which he sought to rely on accompanied by a brief oral highlight of the same at the plenary. Counsel submitted that the applicants' pending appeal being Nakuru CA No. E168 of 2023 raises numerous arguable issues and has high chances of success. Counsel urged that since garnishee proceedings put in motion by the 1st respondent have resulted in the attachment of the applicants' bank accounts, the applicants' pending appeal will be rendered nugatory if the decretal amount is deducted from the applicants' bank accounts. Counsel submitted that the interests of justice and fairness leaned towards issuing the temporary stay as prayed. According to counsel, the Court is under a duty to preserve the substratum of the appeal hence the need to lift the garnishee order in place. Counsel stressed that the applicants have been diligent and moved the Court with speed hence deserving of the orders sought.
6. Learned counsel Ms Nyambura for the 2nd respondent (the Cabinet Secretary, Ministry of Education) and the 4th Respondent (the Attorney General) supported the application and orally submitted that the funds in the 2nd applicant's bank accounts are already budgeted for and it would be a disservice to the university were the garnishee proceedings allowed to crystallize as this would cripple the operations of the university. She therefore urged the Court to grant a temporary stay and vacate the garnishee order in place.
7. In opposition to the application, learned counsel Mr. Ombati for the 1st respondent relied on the written submissions dated 25th March 2023 accompanied by oral highlights which were backed



by learned counsel Mr. Manwa. Counsel reiterated and relied on the 1st respondent's averment in the replying affidavit to the application for stay in Nakuru Civil Application No. E086 of 2023. Counsel submitted that the pending appeal does not raise any arguable issues and is frivolous. Counsel also submitted that the instant application is incompetent as it is against garnishee proceedings which resulted from the decision of the 3rd respondent, which decision has never been appealed by the applicants. Counsel further urged that the application should be declined considering that the applicants were all along aware of the impending garnishee proceedings but never sought an interim order of stay during the hearing of their application for stay of execution. According to counsel, the circumstances that prevailed at the hearing of Nakuru Civil Application No. E086 of 2023 still subsist hence an order of temporary stay is not justifiable.

8. Turning to the question as to whether the pending appeal will be rendered nugatory if no orders are issued, counsel submitted that the applicants are well funded and have also not shown that they will have any difficulty in recovering the decretal sum from the 1st respondent. Counsel relied on [*Equip Agencies Limited v J&M Bank Limited*](#) [2019] eKLR in support of this argument.

Still arguing that the applicants' pending appeal will not be rendered nugatory, counsel asserted that the 1st respondent is a person of means as disclosed in the affidavit of means sworn in opposition to the application for stay. Counsel finally asserted that this application is sub judice as it seeks orders similar to those sought in the pending application for stay. We were therefore urged to dismiss the application.

9. We have carefully considered the pleadings and submissions of the parties as well as the applicable law. From the pleadings and submissions, it is apparent that this application is intertwined with the application for stay which is pending delivery of the ruling of this Court on 26th April 2024.
10. Before proceeding further, we need to consider the 1st respondent's preliminary opposition to the application on the ground that it offends the doctrine of sub judice. In our view, the manner in which the present application is framed saves it from the bounds of sub judice. The prayers sought are meant to secure temporary relief pending the outcome of the application for stay of execution which is pending ruling. Much as the advocates for the parties have proceeded as if this is a rule 5(2)(b) application, the truth of the matter is that this is an application for interim protection and maintenance of the status quo pending the delivery of the ruling on the rule 5(2)(b) application. In those circumstances, we are not concerned as to whether the applicants have an arguable appeal which is likely to be rendered nugatory should the instant application be declined.
11. Second, at the time the application in E086 of 2023 was filed and argued, execution of the impugned ruling and order had not commenced. At that time the apprehension of the applicants was that if stay was not granted then they would be forced to comply with the ruling and order with the result that their appeal would be rendered nugatory. The difference between the two applications is that the current one seeks to arrest an active execution which commenced after the application in E086 of 2023 had been argued.
12. An interim relief such as the one sought by the applicants is a temporary order directing a party to perform or refrain from performing a specific act in order to preserve the status quo. At page 1633 of the 10th Edition of Black's Law Dictionary, the term "status quo" is defined as the "situation that currently exists." It is trite that this Court can issue an order of status quo-see [*Total Kenya Limited v Kenya Revenue Authority*](#) [2013] eKLR and [*Samiyan Kaur Devinder Singh v Speedway Investments Ltd & Another*](#) [2014] eKLR. Indeed, in [*Total Kenya Limited v Kenya Revenue Authority*](#) (*supra*) the



Court explained that other orders aimed at preserving the status quo are available under rule 5(2)(b). In that regard, the Court stated that:

“Rule 5 (2) (b) emphasizes the centrality of loss to the parties on both sides of the appeal. That is what the court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory. So that, although under Rule (2)(b) only three orders are recognized, that does not preclude the Court, in specific circumstances, from making any other conservatory orders under its inherent jurisdiction.”

13. The manner in which the parties have proceeded to argue this application poses a risk of premature determination of the pending application for stay of execution. We will therefore proceed to determine this application based on the principles that have been established for grant of temporary or interim injunction. In Civil Application No. 03 of 2018, *Kaumba Wiltshire v Ismail Dabule*, the Supreme Court of Uganda cited with approval the holding in *Zubeda Mohamed & Another v Laila Wallia & Another*, Civil Reference No. 07 of 2016 that an applicant must demonstrate that there is a competent notice of appeal; a substantive application; and a serious threat of execution in order to justify the grant of interim relief.

14. As it were, the purpose of an interim relief is to protect the dignity of the court. In issuing such an order, the court is assuring the parties that the court should first be allowed to weigh in on the dispute before any conclusive step is taken by either of the parties. In that regard, the Indian Supreme Court opined in *Deoraj v State of Maharashtra & others* AIR 2004 SC 1975 that:

“The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice.”

15. In *Zenit Mataplast P. Ltd v State of Maharashtra & others*, 2009 AIR SCW 6454, the Supreme Court of India, though dealing with the question of interim reliefs in constitutional litigation, held that:

“Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is, to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.”

16. In opposing the application, counsel submitted that the 1st respondent is a person of means and if the appeal is allowed, she will be in a position to refund the decretal sum. Counsel also argued that the applicants are not deserving of the orders of temporary stay as execution was foreseeable on the date the application for stay pending appeal was being prosecuted. Finally, counsel urged that the 1st respondent will be prejudiced if the orders of temporary stay are issued as she will be denied an opportunity to enjoy the fruits of her judgment.

17. In the case before us, it is not disputed that the applicants’ application for stay pending appeal is awaiting the ruling of this Court. Allowing the 1st respondent to proceed with execution of the decree of the trial court would render the impending ruling otiose. It is immaterial what the outcome of that ruling will be. The Court will have been engaged in a futile exercise and the applicants will be entitled to perceive that their application for stay was a useless engagement as what they sought to stay



took place during the pendency of the Court's decision. There is no harm if the 1st respondent waited for another three weeks or so for the decision of the Court on the applicants' application for stay of execution pending appeal. Garnishee proceedings can always be commenced afresh or continued and any expenses arising from delayed prosecution of the garnishee proceedings can always be compensated by an award of costs. The question whether the 1st respondent is a person of means or not, is not an issue for determination in this application. That is an issue to be addressed in the pending ruling on the application of stay pending appeal.

18. It is our view that the applicants before us have satisfied the three conditions for the grant of interim stay set in *Zubeda Mohamed & Another v Laila Wallia & Another* (*supra*) by demonstrating that they have filed an appeal; that there is a substantive application for stay which has been argued and is pending determination; and, that the 1st respondent is intent on executing the decree, and has indeed initiated execution, through the garnishee proceedings before the delivery of the ruling by the Court. It bears repeating that to allow the 1st respondent to proceed with execution of the decree of the trial court during the pendency of the ruling on the applicants' application for stay of execution pending appeal will be to render that application fait accompli.
19. Regarding the applicants' prayer for the lifting of the garnishee order, we find merit in the same. The 2nd applicant is a public university and allowing all its bank accounts to be seized will be prejudicial to the public interest as the university may not be able to deliver on its core mandate of teaching and learning. As already stated, the 1st respondent will not be prejudiced at all as she can always reactivate the garnishee proceedings were the applicants' application for stay of execution to fail. The appropriate order in the circumstances is to suspend the garnishee proceedings and lift the garnishee nisi order dated 14th March 2024 in Nakuru ELRC Petition No. E007 of 2022 pending the delivery of the ruling in Nakuru CA Civil Application No. E086 of 2023. This will allow the applicants to freely operate their bank accounts as the parties await the determination of this Court on the applicants' motion for stay of execution pending appeal.
20. From what we have stated above, it follows that the notice of motion dated 20th March 2024 has merit. We therefore allow it in the following terms:
 - i. That an order of temporary stay of execution is issued pending the delivery of the ruling scheduled for 26th April 2024 in Nakuru Civil Application No. E086 of 2023;
 - ii. That an order is hereby issued suspending the garnishee proceedings and lifting the garnishee nisi order dated 14th March 2024 in Nakuru ELRC Petition No. E007 of 2022 pending the delivery of the ruling in Nakuru Civil Application No. E086 of 2023; and
 - iii. That the costs of this application shall be as per the order on costs in the pending ruling in Nakuru Civil Application No. E086 of 2023.
21. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF APRIL, 2024

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

