Tharaka University & College Students' Association & 2 others v Gikonyo & 18 others (Civil Application E479 & E483 of 2022 & E047 of 2023 (Consolidated)) [2023] KECA 549 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 549 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E479 & E483 OF 2022 & E047 OF 2023 (CONSOLIDATED)

HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA

MAY 12, 2023

BETWEEN

THARAKA UNIVERSITY & COLLEGE STUDENTS' ASSOCIATION ..... APPLICANT

AND

WANJIRU GIKONYO ..... 1ST RESPONDENT

CORNELIUS ODUOR OPUOT ..... 2ND RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA ..... 3RD RESPONDENT

THE SENATE OF THE REPUBLIC OF KENYA ..... 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND BOARD ..... 6TH RESPONDENT

CABINET SECRETARY, TREASURY ..... 7TH RESPONDENT

THE COUNCIL OF GOVERNORS ..... 8TH RESPONDENT

CHARLES AGAR OWINO ..... 9TH RESPONDENT

PETER RUNKIN OUMA ONYANGO ..... 10TH RESPONDENT

ISABEL NYAMBURA WAIYAKI ..... 11TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION E483 OF 2022

BETWEEN

DICKSON KIPCHUMBA BIRIR & 10 OTHERS ..... APPLICANT

AND

WANJIRU GIKONYO & 10 OTHERS ..... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION E047 OF 2023

BETWEEN

NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND COMMITTEE, KIBWEZI WEST CONSTITUENCY ..... APPLICANT

AND

WANJIRU GIKONYO & 7 OTHERS ..... RESPONDENT

(Being applications for stay of proceedings under Rule 5 (2) (b) pending the hearing and determination of an intended appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Ngaah, Aburili, Kimondo, JJ.) dated 1st December, 2022 in Nairobi Constitutional Petition No. 178 of 2016)

RULING

1. This ruling determines three consolidated applications, namely, civil application No 479 of 2022 dated December 19, 2022, Tharaka University Students and College Association v Wanjiru Gikonyo and 10 others, civil application No E483 of 2022 also dated December 19, 2022, Dickson Kipchumba Birir and 6 others (suing as members of Anaibkoi Youth Community Based Organization v Wanjiru Gikonyo and 10 others) and civil application No E047of 2023 dated January 26, 2023, National Government Development Fund Committee, Kibwezi West Constituency v Wanjiru Gikinyo and 7 others.

2. The common thread running between the three applications is that the applicants are all aggrieved by a ruling dated December 1, 2022, in Nairobi constitutional petition No 178 of 2016 in which a bench of three High Court judges declined their respective applications seeking to be enjoined in the said proceedings as interested parties. In dismissing the applications, the learned judges observed that the petition had been pending in court since 2016, and had been fully heard by way of *viva voce* evidence, submissions had been filed and at the time the applications were filed, the petition was coming up for highlighting of submissions. It was the court's view that the applications were brought late in the day. The learned justices also noted that the *National Government Constituency Development Fund Act*, 2015 ("the NGCDF Act") has been in the statute books for years and t the said applications were filed very late in the proceedings which the court described as at "the 11th hour." However, despite highlighting the above points, the bench reserved the full reasons to be delivered in the final judgment.

3. The other point of convergence is that the applicants in Nos E479 of 2022 and E483 of 2022 filed their respective notices of appeal signifying their desire to appeal to this court while the applicants in E047 of 2023 not only filed their notice of appeal, but they have also lodged their appeal, being COACA/ E047 of 2023.

4. On February 21, 2023, this court consolidated the three applications and designated No E479 of 2022 as the lead file. Perhaps we can usefully underscore that consolidation of suits is done for the purposes of achieving the overriding objective of expeditious, proportionate and affordable disposal of disputes. Consolidation saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The logic behind consolidation of matters is to avoid conflicting judgments/rulings, save time and money by clubbing together matters involving common questions of fact and law. (See the High Court decision in *Korean United Church of Kenya & 3 others v Seng Ho Sang* (2014) eKLR).

5. The other common feature in the three applications is the substantive prayer sought in each application beseeching this court to stay the proceedings in High Court constitutional petition No 178 of 2016, pending the hearing and determination of their appeals to this court against the said ruling. The core grounds cited in each application as we glean through them from the applications and the respective supporting affidavits are: (a) the intended appeals are arguable; (b) the applications were not filed late in the day as stated by the trial court because the matter is still pending before the superior court; (c) the learned justices of the High Court exercised their discretion capriciously and whimsically by refusing to allow the applications; and (d) the intended appeals raise matters of public interest because the petitioners at the superior court have challenged the legality and constitutionality of the *NGCDF Act*.

6. It is the applicants' case that if the stay sought is refused, they will be condemned unheard, yet they have an identifiable stake in the matter before the superior court which, makes them necessary parties to the said proceedings. Additionally, they state that no prejudice will be suffered by the respondents if stay is granted because highlighting of the submissions before the learned bench did not proceed after a member of the bench recused himself from the proceedings, making it necessary for the bench to be reconstituted. It is the applicants' position that it is only fair, just and equitable and in the public interest that the said proceedings are stayed pending hearing and determination of their appeal(s).

7. In opposition, the 1st and 2nd respondents' case is that it would be unfair and extreme to stay proceedings generally in a seven- year-old matter. Further, where reasons for the interlocutory ruling are reserved to be given in the main judgment, a stay order will mean that the reasons will never be provided because the main judgment will never be delivered. Therefore, both the application and intended appeal are premature and speculative because in the absence of the full reasons, there is no arguable point on appeal.

8. In opposition to the applications, the 4th respondent (the Senate) proffered the following grounds: (i) the applications do not satisfy the legal threshold to merit the orders sought; (ii) the applications and the appeal(s) lack legal basis because the reasons for the ruling sought to be appealed against are yet to be provided; (iii) the applications lack merit, are frivolous, vexatious and an abuse of the court process since they are meant to delay the determination of the petition before the superior court, which has been pending determination since 2016; (v) the impugned laws were passed by the National Assembly which is a substantive respondent in the proceedings before the High Court, and (vi) the applicants do not have an identifiable stake in the proceedings.

9. In opposition to the applications, the 8th respondent (the Council of Governors), stated that the application lacks merit, is frivolous, vexatious and an abuse of the court process, as it seeks to delay the suit before the superior court in contravention of the dictate in article 159 (2) (b) of the *Constitution*.

10. The 3rd respondent (the National Assembly), the 6th respondent (the National Government Constituency Development Fund Board), the 5th and 7th respondents, (the Hon Attorney General and the Cabinet Secretary, Treasury respectively), did not reply to the applications nor file written

submission. However, counsel representing them supported the applications. Lastly, the 9th, 10th and 11th respondents did not file any responses to the application nor did they participate in the proceedings.

11. In his submissions, Mr Muragara, learned counsel for the applicant in civil application E479 of 2022 reiterated the contents of the affidavit in support of the application, and submitted that the applicant has an arguable appeal (as evidenced by the draft memorandum of appeal), which raises constitutional issues of grave public importance. Underscoring the public interest element, counsel submitted that the *NGCDF Act* is an important financing channel for eradicating poverty and implementation of the bill of rights as envisaged by the overall vision of Kenya as a developing state. Counsel argued that because the *NGCDF Act* helps the applicant achieve its goals, it is imperative that the applicant is enjoined in the proceedings.

12. Ms Nganyi, learned counsel for the applicant in civil application 483 of 2022 reiterated the contents of the applicant's affidavit and submitted that the intended appeal is arguable because it raises substantial issues particularly, the right to be heard.

13. Mr Ouma, learned counsel for the applicant in civil application E047 of 2023 (the 6th respondent, that is National Government Constituency Development Fund Board) submitted that if the stay is refused, and the petition in the High Court is allowed, the applicant may be declared unconstitutional, so it stands to suffer. Counsel further submitted that it is not true that the applicants intend to use the stay to delay the expeditious hearing and disposal of the petition at the High Court, because currently, the matter is temporarily stayed as a result of recusal of a member of the bench. Answering the argument that the appeal is pre-mature because the reasons for the ruling are yet to be provided, counsel drew the court's attention to the impugned ruling dated December 1, 2022, and the ensuing order at pages 18 to 21 of the record of appeal.

14. Mr Kuria learned counsel for the 5th and 7th respondent (the Hon Attorney General and the Cabinet Secretary, Treasury respectively), did not file any response to the applications but he orally informed the court that he supported the applications.

15. Mr Kuiyoni, learned counsel for the 3rd respondent, (the National Assembly) submitted that the appeal (s) are arguable since they raise constitutional issues of grave public importance, specifically the right to be heard. The appeals are not frivolous since the presence of the applicants will assist the superior court to determine the issues in dispute.

16. Mr Kipkirui learned counsel for the 6th respondent (the National Government Constituency Development Fund Board) in support of the application submitted that the applicants have an arguable appeal because the High Court did not consider the substance of the issues raised by the applicants in their applications but instead it misinterpreted the law.

17. On the question whether the appeals would be rendered nugatory if the proceedings are not stayed, counsel submitted that the matter will be heard without their input and a decision that affects them will be handed down perhaps against their interest, and they will be left with a pending appeal before the Court of Appeal. Moreover, he argued that considering the weighty issues at the High Court, it will be an uphill task to seek retrial in the event the appeal succeeds, thus rendering their appeal nugatory, and simply trifling.

18. In rebuttal, Mr Ochiel appearing together with Mr Lempaa for the respondents, reiterated the contents of the 1st and 2nd respondents replying affidavit and submitted that an appeal filed where a court did not provide reasons for the decision is premature and speculative. Counsel cited the Supreme Court in *Abote v Kawaka & 4 others* (petition 16 (E019) of 2022) (2022) KESC 36 (KLR) (25 July 2022)

(Ruling) where it found "no basis" upon which a matter could "be jurisprudentially determined in the absence of reasons". Counsel also cited the dictum in *Wanjigi v Chebukati & 2 others* (2022) KESC 40 (KLR) where the Supreme Court asserted that:

> " an appeal must, of necessity, be against the outcome of a case... A speculative appeal, like the one here, is not arguable."

19. Counsel further argued that although no reasons have been given yet, the appellants' delay in filing the application in the High Court is a relevant factor defeating the equitable relief of joinder because in an application based on discretion, delay is the applicant's waterloo. To buttress their submissions, they relied on the Supreme Court decision in *Cyrus Shakhalaga Khwa Jirongo v Soy Developers Ltd & 9 others* (2020) eKLR para 39 and 40.

20. Mr Mukele learned counsel for the 4th respondent in opposition to the applications cited *Francis Karioki Muruatetu & Another v Republic & 5 others* petition 15 as consolidated with 16 of 2013 (2016) eKLR in which the Supreme Court held that to be enjoined in a suit as an interested party is not as of right but is discretionary and dependent on whether a party meets the threshold established in law. Therefore, the failure by the applicants to meet the threshold for joinder before the trial court cannot form a basis for an arguable appeal. Further, it should be noted that the High Court reserved its full reasons for the main judgment and consequently there is no basis for the appeal and therefore the appeal is not arguable.

21. On whether the appeal would be rendered nugatory, Mr Mukele urged that one of the parties to the proceedings before the trial court is the National Assembly, which under article 95(1) of the constitution represents the people of the constituencies and special interests in the National Assembly. Counsel further submitted that the National Government Constituency Fund Board is also a party to the suit. Consequently, in making its decision, the trial court was cognizant of the fact that the National Assembly and National Government Constituency Fund Board as parties to the suit could adequately canvass the issues intended to be raised by the proposed interested parties. Consequently, for the foregoing reasons, he submitted that the non-joinder of the applicants would not render the appeal nugatory.

22. Mr Simiyu, learned counsel for the 8th respondent (the Council of Governors) submitted that the intended appeal is not arguable, it is frivolous, and an abuse of the court process because the presence of the applicants in a petition challenging the constitutionality of an Act of Parliament will not be of much value in terms of enabling the superior court to appreciate the constitutional matters in dispute. Further, he argued that the benefits of the *NGCDF Act* raised by the applicants has already been addressed by the National Assembly, the Senate, the National Government Constituency Development Fund Board who are parties to the petition.

23. Responding to the 1st and 2nd respondents' argument that the appeals are premature, Mr Kuiyoni submitted that the finding by the Supreme Court in *Abote v Kawaka & 4 others* (supra) is distinguishable from the instant case because in the said case the Court of Appeal had not given reasons for its judgment. However, in this case the superior court is yet to deliver its judgment and this is just an interlocutory appeal.

24. We have carefully considered the consolidated applications, the affidavits in support to the applications, the responses, the grounds of opposition, the submissions made by counsel, and the authorities cited. The principles upon which application under rule 5(2)(b) may be granted have been reiterated in several decisions. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR). In summary, the jurisdiction is discretionary. Even though the discretion is wide, it must be exercised judicially

depending on the circumstances of a particular case. In exercising the discretion, the court must be satisfied that two elements are established. One, an applicant must demonstrate he has an arguable appeal. Two, he must demonstrate that unless the stay is granted, the appeal will be rendered nugatory.

25. Before addressing the question whether or not the applicants have satisfied the above prerequisites, we find it appropriate to first address the 1st and 2nd respondents' argument that the extant application is premature and speculative for want of reasons for the impugned ruling. This argument is anchored on the assertion that the trial court reserved the reasons for its decision to be provided in the final judgment. We have cautiously considered the impugned ruling dated December 1, 2022. Three important facts are worth mentioning. First, a reading of the ruling clearly shows that the trial court gave reasons for its decision, albeit briefly. We highlighted the said reasons earlier in this ruling. Because of the centrality of the presence or absence of the reasons in addressing the 1st and 2nd respondents' argument, we will recap the reasons offered by the learned justices while the application in the next paragraph.

26. The learned justices premised their findings on the following conclusions: (a) the petition had been pending in court since 2016; (b) the petition had been fully heard by way of viva voce evidence; (c) the submissions had been filed at the time the applications were filed; (d) the petition was coming up for highlighting of submissions; (e) the applications were brought late in the day; (f) the *NGCDF Act* has been in the statute books for years; and, (g) the applications were brought at the 11th hour. Clearly, the foregoing were the grounds upon which the applications were dismissed. In our view, the instant applications are distinguishable from the Supreme Court dictum in *Abote v Kawaka & 4 others* (supra) cited by the 1st and 2nd respondents, because in the said case, there was absence of reasons in the judgment delivered by the Court of Appeal unlike in the instant ruling where the court provided reasons for its decision.

27. Second, a decision is only an authority for what it decides. This is correctly captured in the following passage by the Supreme Court of India in *State of Orissa v Sudhansu Sekhar Misra Manu*/SC/0047/1967:-

> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found a case is only an authority for what it actually decides "

28. The ratio of any decision must be understood against the background of the facts of the particular case. (See Supreme Court of India in *Ambica Quarry Works v State of Gujarat and Ors* MANU/SC/0049/1986). A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. (See Supreme Court of India in *Bhavnagar University v Supreme Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59). Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. (See the High Court of Delhi in W.P (C)No 6254/2006, *Prashant Vats v University of Delhi & Anr*). In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

29. Third, and equally important is the fact that before the court were applications for joinder which by their very nature required urgent and prompt determination. This is because the essence of the applications was to determine whether or not the applicants would participate in the ongoing proceedings.

Therefore, a prompt decision with reasons is what would in all fairness have served the interests of justice. We wonder what value reasons would serve if they are provided in the final judgment in an application of this nature. The reasons just like the ruling will be otiose regardless of the outcome. Even if the applications were to succeed, there will be no proceedings for the applicants to participate in. In any event, the court provided reasons why it dismissed the applications. It is not clear what the "full reasons" would entail over and above the reasons provided. What is clear is that by telling the applicants to wait for the reasons in the final judgment, the court only threw the applicants into an unnecessary confusion by putting their right to appeal into jeopardy. This was not a proper case for a court of law and justice to reserve reasons. On the contrary, the justice of the case demanded a prompt determination of the applications and reasons for the decision. Accordingly, we reject the argument that the applicant's application and the appeal is pre- mature.

30. We now turn to the merits of the consolidated applications. On the first prerequisite, that is whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR where this court described an arguable appeal in the following terms:

> " vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. viii). In considering an application brought under rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

31. We are alive to the fact that at this stage we cannot delve into the merits of the appeal. That duty lies with the bench hearing the appeal. We have within the confines of our mandate in an application of this nature evaluated the proposed grounds of appeal conscious that we are not required to make definitive findings while determining an application under rule 5 (2) (b). It will suffice for us to mention that the petitioners before the trial court are challenging the constitutional validity of a statute. It will also suffice to mention that the National Assembly, the Senate and the Honorable Attorney General all of whom represent the public are parties to the said proceedings. We also note that the orders in question are essentially discretionary.

Whether or not the court exercised its discretion properly is matter for the bench hearing the appeal. It will suffice to mention that the proceedings in question have been pending in court since 2016. The applicants moved the court late last year. Further, the petition had been heard by way of oral evidence and what was remaining was highlighting written submissions. The above being the position, we are not satisfied that the applicants have demonstrated that they have an arguable appeal.

32. Turning to the second prerequisite, that is, whether the appeal, if successful, would be rendered nugatory, in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (supra) this court stated that:

> " ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

33. The term "nugatory" was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: "it does not only mean worthless, futile or invalid. It also means trifling." The court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

34. The issue before us is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay of further proceedings is not granted. It is evident that if an order of stay of further proceedings is not granted, the case in the superior court will proceed to highlighting of submissions and determination. *Halsbury's Law of England*, 4th Edition Vol 37 page 330 and 332 provides some principles to bring to bear while considering whether or not a court should stay proceedings. It states as follows: -

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> "This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
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> "It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

35. We reiterate that we are not hearing the main appeal. It is not for us at this stage to determine whether the applicant have a stake in the petition before the superior court or whether their case can be advanced by some of the respondent already on record. Suffice to note that the applicants have filed notices of appeal against the decision by the superior court denying the applications for joinder as interested parties. Be that as it may, the peculiar circumstances of this case cannot be ignored. The dispute before the superior court is old as it dates back to 2016 and the applicants have only sought to be joined as interested parties after more than six (6) years have lapsed and after evidence has been taken and what is pending is basically highlighting of submissions. As a consequence, the petition before the superior court ought to be finalized timeously and without further delay.

36. In conclusion, we are persuaded that the circumstances of the application before us do not call for stay of further proceedings in the High Court. We find that the applicants have not met the twin principles necessary to warrant the exercise of our discretion in their favor. It is our finding that the grant of orders of stay of further proceedings can only serve to stand in the way of the final determination of the petition before High Court on merits. Consequently, we dismiss the consolidated applications Nos 479 of 2022 dated December 19, 2022, E483 of 2022 also dated December 19, 2022, and E047of 2023 dated January 26, 2023. Each party shall bear his/its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR