



Peter L. Lemoosa & 14 others (All Suing in their Capacities and as Delegates and Officials of UASU Kenyatta University Chapter) v Registrar of Trade Union & 8 others (Civil Application E498 of 2021) [2022] KECA 690 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 690 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E498 OF 2021
HM OKWENGU, S OLE KANTAI & A MBOGHOLI-MSAGHA, JJA
JULY 22, 2022**

BETWEEN

**PETER L. LEMOOSA & 14 OTHERS APPLICANT
ALL SUING IN THEIR CAPACITIES AND AS DELEGATES AND OFFICIALS
OF UASU KENYATTA UNIVERSITY CHAPTER**

AND

**REGISTRAR OF TRADE UNION 1ST RESPONDENT
UNIVERSITY ACADEMIC STAFF UNION (UASU) EXECUTIVE, KENYATTA
UNIVERSITY CHAPTER 2ND RESPONDENT
UNIVERSITY ACADEMIC STAFF UNION (UASU) SECRETARY, KENYATTA
UNIVERSITY CHAPTER 3RD RESPONDENT
UNIVERSITY ACADEMIC STAFF UNION (UASU) CHAIRMAN KENYATTA
UNIVERSITY CHAPTER ELECTION BOARD 4TH RESPONDENT
KENYATTA UNIVERSITY 5TH RESPONDENT
FRANKLINE KABURU KINOTI 6TH RESPONDENT
CRISPUS KOINANGE WAWIRE 7TH RESPONDENT
ATHONY WANYONYI WASENA 8TH RESPONDENT
MOSES ONYANGO OPIYO 9TH RESPONDENT**

(An application for stay of execution of the judgment of the Employment & Labour Relations Court of Kenya at Nairobi (Rika, J) dated 20th August, 2021 in ELRC at Nairobi Petition No E093 of 2021) Consolidated with ELRC at Nairobi Petition No E043 of 2021)



RULING

1. This application arises from a judgment in two petitions which were consolidated. Petition No. E093 of 2021 was filed by 14 petitioners who are the applicants before us. They had filed the petition in their capacity as officials and delegates of University Academic Staff Union (UASU) Kenyatta University Chapter (KU Chapter). They sought orders to participate in the Union National Delegates Conference for UASU that was due to be held on 23rd June 2021, as representatives of the KU Chapter.
2. Petition No. E043 of 2021 in which Anthony Wanyonyi Wasena and Moses Onyango Opiyo (the 8th and 9th respondents herein) were 3rd and 4th petitioners, sought to bar the applicants from participating in the UASU National Delegates Conference on the grounds that their elections as union officials on 25th March 2021 was irregular, and should therefore be nullified.
3. The two petitions were consolidated and heard by the ELRC (Rika) and a judgment delivered on 20th August 2021. In the judgment, the learned Judge declined to grant the orders sought in Petition No. E093 of 2021 holding that the applicants mandate as officials of KU Chapter had expired, but allowed Petition No. E043 of 2021 directing the applicants to update the KU Chapter's voters' register and upon inspection of the register by members, hold fresh elections within 60 days of that judgment. Therefore, the elections ought to have been held by 20th October 2021.
4. The applicants who were aggrieved by the judgment of 20th August 2021, filed a notice of appeal and followed it with a notice of motion dated 7th September 2021 in which the applicants moved the Court under Rule 5(2)(b) of the *Court of Appeal Rules* for stay of execution of the orders and judgment delivered on 20th August 2021, pending the hearing and determination of the appeal. Effectively, the applicants are seeking to have the elections ordered by the learned Judge suspended during the pendency of the appeal.
5. Dr. George Lukoye Makokha (Dr. Makokha) who claims to be the current KU Chapter Secretary swore an affidavit in support of the applicants' motion. The applicants also filed written submissions in which they urged the Court to grant the orders sought.
6. The applicants maintain that they have an arguable appeal, as no instances of irregularities were produced in evidence or demonstrated as having materially affected the outcome of the elections. They state that the appeal shall be rendered nugatory if the orders sought are not granted. This is because they will be denied their democratic right to serve the people who elected them and the right to participate in and be elected as national union officials and as a result will suffer irreparable damage.
7. The applicants complain that the elections were annulled on grounds that the 8th and 9th respondent (3rd and 4th petitioners in Petition No. E043 of 2021) were excluded from the voters' register and thus denied a chance to vote, but that the annulling of the election has denied the entire membership of the UASU-KU Chapter their democratic rights to elect their office bearers, and proportionality outweigh the rights of the two respondents alleged to have been denied a chance to participate in the elections. Furthermore, that the judgment creates a lacuna as UASU-KU Chapter will have no officials until the fresh elections, and this has brought the day-to-day operations of the KU Chapter to a standstill. Finally, the applicants urge that the balance of convenience in terms of cost of running another elections is in favour of granting the order of stay.
8. The Registrar of Trade Union (1st respondent), opted not to participate in this matter, while the UASU-KU Chapter Executive and Secretary (2nd and 3rd respondents), did not file any response to



the motion or participate in the hearing of the motion. The Chairman KU Chapter Election Board (4th respondent) filed written submissions, while Kenyatta University (5th respondent) objected to the motion through a replying affidavit sworn by its Vice Chancellor Prof. Paul K Wainaina (Prof Wainaina). The motion was also opposed by a replying affidavit sworn by Dr. Frankline Kaburu Kinoti (Dr. Kinoti) (6th respondent), who swore the affidavit on his own behalf and on behalf of the 7th, 8th and 9th respondents.

9. Prof Wainaina maintained in his affidavit that the appeal is not arguable as no particulars have been set out in the motion, and the memorandum of appeal is based on a misapprehension of the findings of the trial court; that under section 34 of the *Labour Relations Act*, the term of office of the officials of the KU Chapter had expired and the Registrar of Trade Unions had issued notices to the KU Chapter to conduct their elections between 4th January 2021 and 30th June 2021; that the applicants were no longer the lawful office bearers; that it was in public interest that the elections be held; that the exclusion of some staff from the UASU-KU Chapter register of voters created tension; and that the appeal would not be rendered nugatory as all union members would participate in the new elections and the officials elected would resume office.
10. Dr. Kinoti in his affidavit disputes Dr. Makokha's claim that he is the current Secretary of the KU Chapter contending that the KU Chapter does not currently have any officials as the former officials ceased to hold office on 23rd March 2021 when their 5-year term ended. He maintains that the intended appeal will not be rendered nugatory if the stay orders are not granted for reasons that the process of updating the voter register is underway. He explains that the election was not annulled on account of two people but that a total of 147 KU Chapter union members, including the 8th and 9th respondents, were left out of the KU Chapter voters register and this was good ground for nullification of the elections of 25th March 2021.
11. During the hearing of the applicants' motion which was conducted virtually, learned counsel Mr. Koceyo was present for the applicants, learned counsel Ms. Mwangi for the 1st respondent, learned counsel Ms. Masaki & Mr. Omari for the 6th, 7th, 8th and 9th respondents. There was no appearance for the 2nd and 3rd respondents. Apart from Ms. Mwangi who indicated that the 1st respondent did not wish to participate in the motion, each of the counsel present orally highlighted their submissions.
12. We have carefully considered the motion before us, the contending affidavits, the applicants' submissions and authorities cited, as well as the submissions filed by the respondent. The motion before us is brought under Rule 5(2) (b) of the *Court of Appeal Rules*.
13. In *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union* [2012] eKLR this Court stated:

“The power of the Court under rule 5(2)(b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision. It is also trite that the applicant need not show several issues. As stated earlier at least one issue suffices for purposes of an application under rule 5 (2) (b). Second, the applicant must in addition, show that, unless he is granted either a stay or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory.”



14. The issue that we must therefore address is whether the applicants have satisfied the twin principles of arguability and the nugatory aspect so as to entitle them to the orders sought. On arguability as stated by the Court, an arguable appeal is one that is not frivolous but raises a *bona fide* issue deserving determination by the Court and a single *bona fide* issue would suffice. We are persuaded that the issue of the regularity and annulment of the elections held on 25th March 2021 is one which is pertinent and is sufficient to engage the Court's mind on appeal. We accordingly find that the appeal is arguable.
15. On the nugatory aspect, as was stated by this Court in *Reliance Bank (in liquidation) v. Norlake Investments Ltd*, (2002) 1 EA 227, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
16. The challenged orders which the applicants seek to stay, were as follows:
 - a. Petition No. 093 /2021 is declined with costs to the respondents therein;
 - b. It is declared that the 1st and 2nd respondents in Petition 043/ 2021, violated the 3rd and 4th petitioner's fundamental rights and freedoms under the Constitution of Kenya and the Labour Relations Act by excluding them from the voter's register;
 - c. No registration shall be effected by the 4th respondent, with regard to results from the elections of 25th March 2021;
 - d. The election results of 25th March 2021 are nullified;
 - e. The 1st and 2nd respondents shall update the Chapter's voters register as advised earlier by the 4th respondent;
 - f. Upon updating the voter's register; upon inspection of that register by members; and with concurrence of the 3rd and 4th respondents, the Kenyatta University UASU Chapter, shall hold fresh elections within 60 days of this Judgment;
 - g. No orders on costs in Petition No. 043 /2021.
17. We note that some of the orders are of a negative nature or declaratory nature and therefore incapable of being stayed. These include orders (a), (b) and (g)). However, the focus of the applicants appears to be orders (c), (d) and (f) that relate to the nullification of the elections of 25th May 2021 and the direction to update the voters register and hold fresh elections. These orders are capable of being suspended and can therefore be stayed. The question is whether if an order of stay is not issued in regard to these orders the intended appeal would be rendered nugatory. In other words, can the nullification or the update of the register or the new elections be reversed if held and the appeal is successful, and if not reversible, will damages be sufficient in compensation?
18. The Court has not been informed of the fate of the UASU National Delegates Conference that was scheduled to be held on 23rd June 2021, so we can assume that since there was no order stopping the conference the same took place. An order of stay would therefore not help the applicants in regard to the annual delegates conference for 2021. With regard to the holding of the fresh elections, the same can be easily nullified and or reversed by the Court if the applicants are successful on appeal, and therefore the appeal will not be rendered nugatory.
19. In our view, if the stay is not granted and elections take place, the applicants will suffer little prejudice or damage if any, for reasons that a free and fair election would only give them the opportunity to bounce back with a resounding victory if they were indeed elected by the majority of the union members as



they claim. Moreover, if the order of stay is granted in regard to the updating of the register and fresh elections, the matter may take long to resolve and, in the meantime, as the leadership of KU Chapter is in issue, the operations of its office shall continue to be negatively affected. We are not persuaded that the nugatory aspect has been demonstrated.

20. As the applicants are required to demonstrate both arguability and the nugatory aspect, but have failed to demonstrate the nugatory aspect, the notice of motion dated 7th September 2021 fails. It is accordingly dismissed with costs to the respondents who participated in the motion.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

