Universities Funding Board v Kenya Medical Practitioners & Pharmacists Dentists Union & another (Civil Application E417 of 2021) [2022] KECA 909 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 909 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E417 OF 2021

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

UNIVERSITIES FUNDING BOARD .... APPLICANT

AND

KENYA MEDICAL PRACTITIONERS & PHARMACISTS DENTISTS UNION .... 1ST RESPONDENT

UNIVERSITY OF NAIROBI .... 2ND RESPONDENT

(An application under rule 5 (2) (b) of the Court of Appeal Rules for stay of execution of the judgment of the High Court (Mrima, J.) delivered on 21st October, 2021 in Hc Const. Petition 265 of 2021)

RULING

[1] What is before us is a notice of motion dated November 17, 2021brought by the applicant, Universities Funding Board (the Board). The Board is a semi-autonomous Government Agency established under the *Universities Act* with a mandate of apportioning funds to public Universities and issuance of conditional grants to private Universities. It has developed Maximum Differentiated Unit Cost (MDUC) criteria in consultation with the chairpersons of public universities for programs offered, and this forms the basis for funding universities.

[2] The Board is aggrieved by a judgment delivered by the High Court (Mrima, J.) on October 21, 2021in a constitutional petition that was filed by the 1st respondent, the Kenya Medical Practitioners, Pharmacists and Dentists Union (the Union), who were aggrieved by the upward revision of the academic tuition fees by the 2nd respondent, the University of Nairobi (the University), as a result of the implementation of the MDUC criteria.

[3] In the impugned judgment, the learned Judge found that the MDUC criteria adopted by the Board is a violation of articles 10(2) (a) and 201(a) of *the Constitution*, for want of adequate public participation. Consequently, the learned Judge, inter alia, declared the MDUC criteria as prepared by the Board and adopted and implemented by the University through the Handbook of Fees Payment (Policy, Schedules, Guidelines & Procedures), constitutionally infirm, and its implementation by the University through the MDUC criteria unconstitutional, null and void ab initio, and quashed the MDUC criteria.

[4] The Board is seeking orders of stay of execution of the impugned judgment and orders made by the High Court on October 21, 2021. As per an affidavit sworn by Geoffrey Monari (Monari), the Chief Executive Officer of the Board, the MDUC is simply a computation of costs for running individual academic programs used by the government as a basis of financing undergraduate students in universities, and that the Board has applied the MDUC to allocate funds to universities on the basis of government sponsored students as placed in different undergraduate programs by the Kenya Universities and Colleges placement services, and that the Board has not and does not purport to influence or determine the amount of fees charged by universities.

[5] Monari urges that the MDUC by degree programs should be sustained as a basis for funding sponsored students in public universities since they are applicable to all public universities. He maintains that the board has an arguable appeal, and that it is in the interest of justice, public interest, rule of law and constitutionalism that the impugned judgment and orders be stayed pending the determination of the appeal.

[6] Mr. Thande Kuria, learned Principal State Counsel, who represented the Board during the hearing, filed written submissions, which he also orally highlighted. In brief, Mr. Thande urged that the Board has an arguable appeal. He identified 5 grounds upon which the judgment of the High Court is faulted, including that the learned Judge having erred: in holding that the MDUC formula as a basis for funding undergraduate degree program was unconstitutional on the basis that there was no public participation; and in failing to appreciate that the issues before the Court were primarily on the constitutionality and legality of the powers of the University to increase the amounts of fees charged on graduate students using the MDUC criteria as opposed to the legality of the formula applied by the Board under its statutory mandate.

[7] In addition, Mr. Thande submits that unless an order of stay is granted, the Board will be divested of its powers to use MDCU formula as a basis of funding undergraduate university degree programs; that the nullification of the MDUC means that the Board now has no basis upon which public funds can be utilized to fund undergraduate degree programs in all public universities; and that the damage caused by this will be irreversible if no stay is issued, as damages would not reasonably compensate the affected parties.

[8] The Union, in its submissions, opposed the motion contending that the Board had failed to demonstrate that it had an arguable appeal, or that its appeal would be rendered nugatory if the orders sought are not granted. The Union argued that the peculiar circumstances of the case shows that, should the Board be successful and the orders sought are issued, students from the University would be forced to pay increased fees, which may be impossible for some students, and that there would be no remedy for these students as they would have lost the opportunity to join the University.

[9] The University filed submissions in support of the application, but proceeded to submit on issues touching on the main appeal as opposed to the present application.

[10] We have considered the motion, the responses thereto, as well as the rival submissions filed by the parties. The motion being one under Rule 5 (2) (b) of the Court of Appeal Rules, we reiterate the principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) of the *Court of Appeal Rules*, as stated by this Court in *Republic vs Kenya Anti-Corruption Commission and others* [2009] KLR 31 (which was relied on by both Board and the Union):

> "The law as regards the principle that guide the Court of Appeal in an application brought pursuant to rule 5(2)(b) of the Court of Appeal Rules were settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needed to satisfy the Court first, that the appeal or intended appeal was not frivolous, that is to say that it was an arguable appeal. Secondly, the Court must also be persuaded that were it to dismiss the application for stay, and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb."

See also *Multimedia University & another vs. Professor Gitile N. Naituli* (2014) eKLR; and *Kenya Airways Limited vs Patrick Waweru Mwangi & Anor* [2016] eKLR.

11. Applying the above stated principles, the issues that we must determine is whether the intended appeal is arguable; and whether the appeal if successful, would be rendered nugatory if the orders sought are not granted. The Board has put forward several grounds that it intends to canvass in its appeal. Suffice to state that the learned Judge nullified the MDUC on the basis of lack of public participation and the question whether nullification of the MDUC on that ground was proper in view of the provision in the University's Act providing for who should be consulted. This is an arguable issue. As was stated in *Yellow Horse Inns Limited & another v A.A. Kawir Transporters Ltd & 4 others* [2014] eKLR, one arguable ground is sufficient and we need not say more on the issue of arguability.

12. On the nugatory aspect, in determining this issue, the question is whether what is sought to be stayed, if allowed to happen is reversible or whether damages will reasonably compensate the aggrieved party. In considering this issue, we take note of what was stated by the Court in Reliance *Bank Ltd v Norlake Investments Ltd* [2002] E.A. 227, that:

> "To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined."

13. The results from nullification of the MDUC formula was that the same could not be applied in releasing funds to both under graduate and post graduate programs. The Board and the University insisted that this lack of funding would have an effect as to how much tuition fees would be paid by students, with students being required to pay more. The Union maintained that the loss suffered by the students who would be unable to enroll due to the high fees charged, would be irreversible. It is our opinion that any affected students would have an opportunity to enroll for the program in the year following in the event that the appeal succeeded. Such actions taken would be reversible even though the students may lose some time. Such loss as such, the appeal would not be rendered nugatory.

14. We find that the nugatory aspect, being the second principle, has not been satisfied. This Court clearly elucidated the said principles in the case of *Republic v Kenya Anti-Corruption Commission & 2 others,* (2009) KLR 31 as follows:

> "… In order that the applicant may succeed, he must demonstrate BOTH limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb."

15. Consequently, we find that this application lacks merit, and we therefore dismiss the same with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR