



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 500 OF 2019

BETWEEN

KENYA NATIONAL EXAMINATIONS COUNCIL.....APPLICANT

AND

REPUBLIC.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

CHAIRMAN FORM FOUR PARENTS' ASSOCIATION 2018

IKHLAS INTERGRATED HIGH SCHOOL (SUING ON BEHALF OF

IKHLAS INTERGRATED HIGH SCHOOL.....4TH RESPONDENT

AND

ABDIRAZAK OMAR IBRAHIM & 124 OTHERS (suing ON BEHALF OF

IKHLAS INTERGRATED HIGH SCHOOL..... 5TH RESPONDENT

(Being an application for stay of further proceedings in Nairobi High Court Judicial Review Misc. Application No. 36 of 2019 pending the hearing and determination of an appeal from the ruling and order of the Hon. Lady Justice Pauline Nyamweya dated 28th June, 2019 and delivered on the 1st July, 2019)

RULING OF THE COURT

1. The applicant, Kenya National Examinations Council, in its application dated 15th July 2020 seeks an order, under Rule 5(2)(b) of the Court of Appeal Rules, for stay of proceedings in Nairobi High Court Judicial Review Misc. Application No. 36 of 2019 pending the hearing and determination of an appeal from the ruling and order of the High Court (*P. Nyamweya, J.*) dated 28th June 2019 and delivered on the 1st July 2019.

2. The background in brief is that the 5th respondent sought and was granted leave by the High Court to commence judicial review proceedings against the applicant and the 1st to 4th respondents. Thereafter, the 5th respondent presented a motion dated 20th February 2019 seeking orders of certiorari, prohibition and mandamus in relation to the applicant's decision to cancel the 2018 examination results of the candidates of Ikhlas Integrated High School.

3. Being of the view that the matter should, in the first instance have been handled by the National Examination Appeals Tribunal established under Section 40B of the Kenya National Examinations Council Act, the applicant filed a notice of preliminary objection dated 4th March 2019 to the Judicial Review application urging that the 5th respondent should have exhausted the alternative remedies provided under that Act.

4. After considering arguments for and against that preliminary objection, the learned Judge delivered the impugned ruling holding that in the circumstances of the case, the National Examination Appeals Tribunal cannot be an effective remedy as the issues raised do not fall within its jurisdiction. The applicant indicated in its present application that following that ruling, the hearing of the judicial review application was then scheduled for 29th September 2020 (now past) and it is not clear whether it took place in which case this application may have been overtaken by events.

5. We have considered the application, the affidavit in support sworn by Andrew Francis Otieno and the written submissions in support by the firm of Obura Mbeche & Company Advocates. As correctly submitted by learned counsel for the applicant, in an application of this nature, it is incumbent upon the applicant to satisfy the Court that the intended appeal is arguable and that if the order for stay is declined and the appeal ultimately succeeds, it will have been a futile endeavour. In that regard, counsel made reference to the decision of this Court in **Multimedia University & another vs. Gitile N. Naituli [2014] eKLR.**

6. The applicant has in its memorandum of appeal raised six grounds of appeal, amongst which are complaints that the learned Judge erred in finding that jurisdiction of the High Court was properly invoked despite the fact that alternative remedies had not been exhausted and also in concluding that the National Examination Appeals Tribunal did not have jurisdiction to determine the issues in contention. We are persuaded that the appeal is indeed arguable.

7. On the nugatory aspect, counsel submitted that an issue of jurisdiction should be addressed before a trial on merits occurs as jurisdiction is everything as stated in the case of **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR.** However, quite apart from the fact that the application appears to have been overtaken by events (and we have no concluded view on that) the applicant has not demonstrated to us that the appeal will be rendered nugatory if we decline the present application. We are mindful that the appeal arises from an interlocutory decision by the High Court that the specific circumstances of the case took it outside the jurisdiction of the Tribunal and any party aggrieved by the substantive decision of the High Court, once the judicial review application is substantively determined, would be at liberty to challenge it on appeal.

8. All in all, we are not inclined to exercise the Court's discretion under Rule 5(2)(b) of the Rules of the Court in favour of the applicant. The application dated 15th July 2020 fails and is hereby dismissed. Costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 19th day of March, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR