



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A]

CIVIL APPLICATION NO. E377 OF 2020

BETWEEN

KENYA NATIONAL EXAMINATIONS COUNCIL....APPLICANT

AND

REPUBLIC.....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

AND

IDRISS GARAT NOOR & 18 OTHERS.....3RD RESPONDENT

(Being an application for stay of any further proceedings in Nairobi High Court Judicial Review Misc. App No. 13 of 2019 pending the hearing and determination of an appeal from the Ruling and Order of Nyamweya, J dated 12 July 2019. **In (Nairobi High Court Judicial Review Misc Appl No. 13 of 2019)**)

RULING OF THE COURT

Before us is a motion dated **30th November 2020**, filed by **Kenya National Examinations Council** (the applicant), under Rule 5 (2) (b) of the Court of Appeal Rules 2010 and all other enabling provisions of the law in which the applicant seeks the following orders:

“1. Spent.

2. THAT the Honourable Court be pleased to grant a stay of proceedings in Nairobi High Court Judicial Review Misc. Application No. 13 of 2019 pending the hearing and determination of this application.

3. THAT the Honourable Court be pleased to grant a stay of proceedings in Nairobi High Court Judicial Review Misc Application No. 13 of 2019 pending the hearing and determination of an appeal from the Ruling and Order of Lady Justice Pauline Nyamweya dated 12th July 2019.

4. THAT costs of this application be provided for.

5. THAT the court be pleased to grant any further orders if any, in the interests of justice”

The motion is supported on the grounds on the face of it and the affidavit sworn by **Befley Bisem** the Corporation Secretary of the applicant who deponed *inter alia* that Judicial Review Misc. Appl No. 13 of 2019 had been instituted by a notice of motion dated **21st January 2019**, seeking *inter alia* orders of Certiorari in relation to the applicant’s decision to cancel examination results for various subjects in various schools particularized therein and that the applicant had raised a preliminary objection dated **8th February 2019**, challenging jurisdiction of the High Court on account of Section 9 of the Fair Administrative Action Act No. 4 of 2015, as the ex-parte applicants had not utilized the mechanisms set out in the Kenya National Examinations Council Act, which preliminary objection was dismissed by **Nyamweya, J** on **12 July 2019**; that the applicant was aggrieved by the decision and had lodged an appeal against the same. The applicant further contended that it had an arguable appeal which raised issues of substantial national importance as far as national examination management is concerned, as it seeks to answer whether the National Examinations Appeal Tribunal was the correct forum for resolution of examinations dispute and that further the applicant had made an application for stay of proceedings in the High Court which was subsequently dismissed. The applicant contended further that if the application was not allowed, the appeal would be rendered nugatory and a mere academic exercise.

The application was opposed vide Grounds of Opposition by the 1st respondent dated **24th February 2012**, who contended *inter alia* that the applicant had failed to satisfy the principles for the grant of the relief sought under Rule 5 (2) (b) of this Court’s Rules with regard to arguability of the appeal having failed to file a memorandum of appeal.

We have carefully considered the motion and the supporting affidavit, the rival submissions by the parties, the grounds of opposition thereof, the authorities cited and the law.

The applicant’s motion is brought under **Rule (5) (2) (b)** of this Court’s Rules. **Rule 5(2) (b)** of this Court’s Rules which guides the court in applications of these nature provides:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

a. ...

b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR** as follows:

“

i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. 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.

xi. 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.

xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xiii. 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.”

A cursory perusal of the pleadings herein certainly reveals that indeed the applicant has an arguable appeal since fundamental issues relating to the jurisdiction of the court have been raised. In our view the intended appeal is not frivolous. Of course we are mindful that we will not make further comments lest we embarrass the bench that will handle the matter.

With regard to whether the appeal will be rendered nugatory if stay of proceedings is not granted, it is indeed not in dispute that the matter was slated for mention on **7th December 2020**, for directions on hearing and determination of the matter. The matter will therefore be heard and determined unless stay of proceedings is granted, and this may result in waste of valuable judicial time if the appeal is successful. In view of the above, we have come to the conclusion that the applicant has established the twin principles for consideration in an application under Rule 5(2) (b) and deem it fit to grant an order of stay of further proceedings in Nairobi

High Court Judicial Review Misc. Appl No. 13 of 2019, pending the hearing and determination of the intended appeal.

The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR