



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. 596 OF 2019**

**BETWEEN**

**TECHNICAL UNIVERSITY OF KENYA.....APPLICANT**

**AND**

**CHARLES KAINDO KURIA & 20 OTHERS.....RESPONDENTS**

*(Being an application for stay of execution of the judgment and decree of the High Court at Nairobi (Hon. J.A. Makau, J) dated 2<sup>nd</sup> May, 2019*

**IN**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. 607**

**OF 2014)**

\*\*\*\*\*

**RULING OF THE COURT**

Before us is a Notice of Motion dated 20<sup>th</sup> February 2020 brought under **Rules 5(2)(b)** of the Court of Appeal Rules, and all enabling provisions of law, substantively seeking an order of stay of execution of the judgment and decree of **Makau, J.** dated 2<sup>nd</sup> May 2019 pending hearing and determination of the intended appeal.

The background to this application is that the respondents were students in the applicant’s university pursuing a diploma in engineering which commenced in January 2011 and was to end in December 2014 with the graduation of the respondents. However this was not to be as the lecturer who taught the unit “**mathematics**” picked the examination scripts from the respondents but failed to return them after marking. Consequently, the applicant could not verify whether the respondents had excelled in that unit to warrant the university senate to approve their graduation. The applicant reported the lecturer’s misconduct to the police and criminal proceedings were instituted against the lecturer, one **Mr. Bramwel Ndedah**, who was found culpable for the offence of neglect of official duty and breach of trust. The respondents thereafter initiated in the High Court Constitutional petition claiming violation of their constitutional rights. The petition was contested by the applicant but the trial Court (**Makau, J**) handed down its judgment in favour of the respondents and which awarded each respondent **Kshs.148,764.00**.

The applicant wishes to challenge that judgment and decree in this court by way of an appeal. Indeed it has already filed Notice of Appeal. Pursuant to the said notice of appeal the applicant has filled the instant application for stay. In support of the application, the applicant urges and believes it has an arguable appeal as it will be challenging the trial court’s findings on the twin issues of liability and quantum. The applicant further argues that because it does not know the respondents’ sources of income or livelihoods, if compelled to pay, they may not be able to refund the amount, thereby rendering the intended appeal nugatory. The applicant relied on the following cases: **Banking Insurance and Finance Union (K) v. Justus Aloo Ogeka & 9 others** [2015] eKLR, **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others** [2013] eKLR and **National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd & Another** [2001] eKLR. in support of its submissions. In rebuttal it is the respondents’ submission that the intended appeal will not be arguable granted that there was no dispute or denial by the applicant that the

respondents did not graduate on time, the same being *prima facie* evidence that their rights were violated. Thus trial court's finding on the applicant’s culpability cannot be faulted. That they deserved the damages awarded which in any event were not excessive. In the premises the intended appeal was neither arguable nor could it be rendered nugatory. In this respect the respondents relied on following cases;

**Civil Application No. Nai 3 of 2004 – Bob Morgan Systems Limited & Another v. Jones [2004] eKLR and Kenya Shell Limited v. Benjamin Karuga Kibiru & Another [1986]eKLR.**

We have considered the record in the light of the above rival positions, and submissions and the law. This being an application for stay of execution, the applicant has to satisfy the twin requirements of **Rule 5(2)(b)** of the Court of Appeal Rules as restated in **Githunguri v. Jimba Credit Corporation Ltd (1988) KLR 838**. The requirements are that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.

In satisfaction of the first requirement, the applicant contends that the trial court awarded damages without proof of any loss by the respondents. The applicant will also be questioning the finding by the trial court of its liability and or culpability. In law 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. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

We are satisfied that the aforesaid intended grounds of appeal are not frivolous. Indeed they are arguable their ultimate success or otherwise notwithstanding.

Turning to the second requirement, the position in law is that this 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. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

The applicant contends that the respondents have no known assets, neither have they demonstrated their sources of income. The applicant is apprehensive that the respondents may not be able to refund the decretal sum should it's intended appeal succeed. These assertions are not idle nor have they been rebutted by the respondents.

In the premises we are satisfied that if stay is not granted as sought the intended appeal will be rendered nugatory

The applicant having satisfied the twin requirements under **Rule 5(2)(b)** of the Court Rules, the application is allowed. There shall be stay of execution of the judgment and decree of the High Court dated 2<sup>nd</sup> May 2019 pending the hearing and determination of the intended appeal. Costs shall be in the intended appeal.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of April, 2021.**

**ASIKE – MAKHANDIA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**