



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. E417 OF 2020 AND E002 OF 2021

BETWEEN

KENYA SCHOOL OF LAW.....APPLICANT

AND

OTENE RICHARD AKOMO & 41 OTHERS.....RESPONDENTS

(Being an application for stay of execution against the ruling and orders of the High Court (Mativo, J.) delivered on 28th August 2020 in Judicial Review Application No. 8 of 2020 (Consolidated with Judicial Review Application Nos. 7 of 2020, 13 of 2020, 20 of 2020 and 21 of 2020)

RULING OF THE COURT

By a Notice of motion dated 5th January 2021, brought pursuant to **Articles 10, 27 and 47** of the **Constitution** and **rules 5 (2) (b)** of the **Court of Appeal rules**, the applicant, the Kenya School of Law has sought for orders of stay of execution against the judgment and decree dated 28th August 2020 (*Mativo, J.*), pending the hearing and determination of an intended appeal. The application was supported by a sworn affidavit of **Fredrick Muhia**, the applicant's Academic Services Manager, of the same date, and was brought on the grounds that in its judgment, the trial court ordered the applicant to admit the respondents to the Advocates Training Program and to prepare them to take their Bar examinations and to thereafter be called to the Bar as advocates despite their lacking in the necessary qualifications.

It was further stated that the applicant is in imminent danger of being compelled to admit the respondents who are unqualified persons to the legal education program which will be harmful to the legal profession and the public at large; that further, there is case law concerning similar facts where it has been found that the respondents' qualifications were unsuitable to warrant admission to the Advocates Training Program; that for instance, the 1st respondent, Otene Richard Akomo had attained a mean grade of [...] and a grade of [...] in English and [...] in Kiswahili, while the 2nd respondent Gertrude Moraa Orina did not provide any KCSE qualifications or their equivalent; that the trial court's decision was further impugned for the reason that in determining whether or not students should be admitted to the program, it relied on subsidiary legislation instead of the substantive law and also sought to apply the provisions of the Kenya School of Law Act to the respondents' case whereas it had yet to be enacted.

The applicant stated that it was apprehensive that were it to be compelled to admit unqualified students, such admission would render the appeal nugatory by giving rise to in a mere academic exercise, in the event that it were to succeed.

The 3rd respondent, Esther Wanjiru Kimani filed a replying affidavit sworn on 20th January 2021, and written submissions. In her affidavit, she deponed that the applicant had not filed a Notice of appeal, and therefore this application was not properly before the court; that the intended appeal was not arguable as the trial court had found that her qualifications satisfied the requirements necessary for admission to the advocates training program. It was deponed that, following the ruling of the court delivered on 28th August 2020, the applicant had in response issued the respondents with Provisional Admission letters, from which it could be inferred that the respondent were already admitted to the training program, with the effect that the application had since been overtaken by events; that the applicant had not met the threshold requirements for granting of the orders sought as it had not been demonstrated that it would suffer any loss were it to admit unqualified students. The 3rd respondent went on to conclude that she was at risk of "...loosing out on the intake to ATP 2021/2022...", which according to a newspaper advertisement is due to commence on 3rd May 2021.

The 36th to 42nd respondents filed written submissions where it was argued that the applicant's intended appeal was not arguable as the

applicant did not specify the provision of law that disqualified the respondents from admission to the training program. They were emphatic that no law barred legal education progression from Diploma to LLB and on to the Advocates Training Program. On the nugatory aspect it was submitted that admission of the respondents to the training program was not irreversible; that in the event the respondents were admitted and went on to be admitted as Advocates, and the appeal were to succeed, they could always be struck off the Roll of Advocates; that on the other hand the delay in their admission amounted to loss of time and opportunities.

In so far as applications filed under *rule 5 (2) (b)* of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR*, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, 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 success could be rendered nugatory.”

At the outset, we observe that the applicant has filed a Notice of appeal dated 2nd September 2020, and as such this motion is properly before us.

With respect to whether the appeal is arguable, we are satisfied the extant provisions of the law and existing case law give rise to a question of whether the respondents were qualified to be admitted to the applicant's Advocates Training Program. We consider the lack of clarity arising from the decision on questions surrounding student admissions to the applicant's program are suitable matter to be ventilated before this Court.

On the nugatory aspect, the applicant's concern is the admission of the respondents who are unqualified persons to the Advocates Training Program, which it states is contrary to the requirements of the law. It considers that such action would jeopardise the standing of the legal profession and the public.

The 3rd respondent on the other hand argued that the applicant has already issued them with Provisional Admission letters, and therefore the application is overtaken by events. She further stated that she is still awaiting to apply for admission which is to take place on 3rd May 2021 (a date in the future), while the other respondents argue that admissions should proceed, but in the event they are admitted to the Roll of Advocates, they can always be struck off were the appeal to succeed.

These assertions make it clear that the respondents have not been admitted to the Advocates Training Program, and therefore, it has not been overtaken by events. Our view is that it would be more prudent to forestall any admission at this juncture so that the matter can be heard and determined with finality, without the respondents having to suffer the undesirable ramifications of unwinding the consequences following their admission, were the appeal to succeed.

Accordingly, the two limbs having been satisfied, the Notice of motion dated 5th January 2021 succeeds, and is hereby allowed. Costs in the intended appeal. We further order that the applicant expedite the filing of the appeal so that it can be heard and determined on a priority basis.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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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