



REPUBLIC OF KENYA



KENYA LAW
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Federation of Kenya Employers v Law Society of Kenya (Civil Application E141 of 2021) [2021] KECA 198 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KECA 198 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E141 OF 2021
MA WARSAME, F SICHALE & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

FEDERATION OF KENYA EMPLOYERS APPLICANT

AND

LAW SOCIETY OF KENYA RESPONDENT

(Being an application for stay of any further proceedings pending the hearing and determination of an appeal from the Ruling and Orders of Makau J dated 17th March 2021.) In (Nairobi High Court Petition No. 505 of 2019)

RULING

1. Before us is a motion dated 6th May 2021, brought under the provisions of Rule 5 (2) (b) of the Court of Appeal Rules in which The Federation of Kenya Employers (the applicant herein) seeks the following orders:
 1. Spent.
 2. THAT the Honourable Court be pleased to grant a stay of proceedings in Nairobi High Court Petition 505 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 Petition 505 of 2019 pending the hearing and determination of an appeal from the ruling and order of Justice J.A Makau dated and delivered on 17th **March 2021**.
 4. THAT the costs of this application be provided for.”



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Jacqueline Mugo the Executive Director of the applicant who deposed *inter alia* that the respondent had filed a petition dated 16th December 2019, at the High Court seeking a declaration *inter alia* that the advertisement by the applicant as to its offering of legal services over and above what is set out under Section 22 of the [Employment and Labour Relations Court Act](#) No. 20 of 2021, constitutes an infringement of the respondent's members rights and practice of an exclusive profession under Article 19 of the [Constitution of Kenya 2010](#), Article 35 of the Constitution of Kenya, Article 40 of the Constitution of Kenya 2010 and a threat to consumer rights under Article 46 of the Constitution of Kenya 2010.
3. That, subsequent thereafter, the applicant raised a preliminary objection dated 20th February 2021, arguing *inter alia* that pursuant to Article 165 (5) (b) read together with Article 162 (2) (a) of the Constitution that the High Court lacks jurisdiction to entertain the petition which preliminary objection was dismissed by Makau, J. vide a ruling dated 17th March 2021 and that being aggrieved by the aforesaid decision, the applicant had appealed against the same and lodged a Notice of Appeal and that further the applicant had an arguable appeal and that unless a stay of proceedings in Nairobi Petition No. 505 of 2019 was granted, the same would be rendered nugatory and an academic exercise for the reason *inter alia* that the applicant's right to have the dispute resolved through the proper application of the law as guaranteed by Article 50 (1) of the Constitution of Kenya 2010, stands to be infringed should the proceedings proceed to conclusion.
4. The application was opposed vide a replying affidavit sworn by Mercy Kalondu Wambua the Chief Executive Officer of the respondent on 17th May 2021 who deposed *inter alia* that stay of proceedings was a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation and impinges on right to access of justice, right to be heard without delay and overall right to fair trial hence the orders sought by the applicant should not be granted as it goes against the spirit and principles of fair trial and justice.
5. We have carefully considered the motion, the grounds thereof and the supporting affidavit, the replying affidavit, the rival submissions by the parties, he cited authorities and the law.
6. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) of the [Court of Appeal Rules](#) to grant an order of stay of execution or injunction 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](#) [2013] eKLR.
7. In the instant case, the applicant is essentially seeking a grant of stay of proceedings in Nairobi High Court Petition No. 505 of 2019, pending the hearing and determination of an appeal from the ruling and orders of Makau, J. dated 17th March 2021, in which he dismissed the applicant's preliminary objection dated 20th February 2020, in which the applicant had *inter alia* contended that the High Court lacked the jurisdiction to entertain the petition.
8. A cursory perusal of the record herein shows that the High Court vide its ruling dated 17th March 2021, merely dismissed the applicant's preliminary objection dated 20th February 2020 with costs. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is



nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:

"what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered."

9. Similarly, in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia, J. (as he then was) stated thus:

"The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

10. We need not say more. The upshot of the foregoing is that the applicant's motion dated 6th May, 2021 fails. Accordingly, it is hereby dismissed in its entirety with costs.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

M.A WARSAME

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

